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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1883

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

ATTORNEY-GENERAL.

Benjamin Harris Brewster.

SOLICITOR-GENERAL.

Samuel Field Phillips.

REPORTER.

J. C. Bancroft Davis.

CLERK.

James H. McKenney.

MARSHAL.

John G. Nicolay.

MEMORANDUM.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

Ordered that Section 3, of Rule 32, be amended so as to read as follows:

3. All such cases will be advanced on motion. The motion may be made *ex parte*. If granted, the party on whose motion the case shall have been advanced may have the case submitted on printed briefs, on serving, with a copy of his brief, on the adverse party, a notice of intention to submit, such as is required by Rule 6, to be given upon motions to dismiss writs of error and appeals.

5th MAY, 1884.

ERRATA.

Page 194, line 10: for "sending" read "receiving."

" 216, line 3 of syllabus: for "hereinafter" read "hereinbefore."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1883.

OTOE COUNTY *v.* BALDWIN.

BALDWIN *v.* OTOE COUNTY.

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

Submitted January 4th, 1884.—Decided March 17th, 1884.

Jurisdiction—Legislative Authority—Municipal Bonds—Municipal Corporations—Nebraska—Practice—Statutes.

Bonds to the amount of $40,000 were issued by the county of Otoe, in the State (then Territory) of Nebraska, to the Council Bluffs and St. Joseph Railroad Company, as a donation to that company to aid in the construction of a railroad in Fremont County, Iowa, to secure to said Otoe County an eastern railroad connection. Notwithstanding any defects or irregularities in the voting upon or issuing said bonds, they were validated by § 8 of the act of the legislature of the State of Nebraska, passed February 15th, 1869 (Laws of 1869, p. 92), 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 purpose," taken in connection with another act of said legislature of the same date (Laws of 1869, p. 200).

The decision of this court in *Railroad Company* v. *County of Otoe*, 16 Wall. 667, cited and applied.

The legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote, and to cure, by a retrospective act, irregularities in the exercise of the power conferred.

Statement of Facts.

The first of said acts of February 15th, 1869, was not in violation of section 19 of article 2 of the Constitution of Nebraska, of 1867, which provided that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

Where an action of law is tried by a Circuit Court, without a jury, and the facts on which, on a writ of error, the plaintiff in error seeks to raise a question of law, are not admitted in the pleadings, or specially found by the court, and there is a general finding for the defendant in error on the cause of action which involves such question of law, and there is no exception by the plaintiff in error to any ruling of the court in regard to such question, this court can make no adjudication in regard to it.

On the 1st of April, 1882, John T. Baldwin brought a suit at law, in the Circuit Court of the United States for the District of Nebraska, against the county of Otoe, in the State of Nebraska, to recover the amount due on sundry coupons cut from bonds issued by that county, the coupons being payable, some January 1st, and others July 1st, in each year, from and including 1870 to and including 1881, and January 1st, 1882. On the 11th of August, 1882, Baldwin brought another suit at law, in the same court, against the same defendant, to recover the amount due on sundry other coupons, cut from bonds issued by that county, the coupons being payable, some January 1st, and others July 1st, in each year, from and including 1878 to and including 1882. The bonds were issued by the county, while Nebraska was a Territory, to the Council Bluffs and St. Joseph Railroad Company, the principal being payable January 1st, 1887, with interest from January 1st, 1867, at the rate of 10 per cent. per annum, payable on July 1st and January 1st, in each year. The amount of the principal of the bonds was $40,000, they bore date November 12th, 1866, and were signed by the chairman of the board of county commissioners, and the treasurer, and attested by the county clerk, and bore the seal of the county, and were payable to the company or its assigns, and each bond was assigned by it, by an assignment under its seal, to the bearer, indorsed on the bond, and dated November 18th, 1869. Each bond contained the following statement:

"This bond is one of a series of one hundred and sixty, of the like tenor and date, one hundred of which are for one hundred

dollars, and sixty of which are each for five hundred dollars, in the aggregate amounting to the sum of forty thousand dollars, executed and issued, or to be issued from time to time, as the wants of said county shall require, to pay to the Council Bluffs and St. Joseph Railroad Company, as an appropriation made by said county to said railroad company, to aid in the construction of the railroad of said company, to be located in Fremont County, Iowa, through a point most convenient to Nebraska City. This debt is authorized by a vote of the legal voters of said county of Otoe, taken at an election held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance with the several acts of the legislature of the Territory of Nebraska, in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid."

Nebraska City is in the county of Otoe, on the west bank of the Missouri River. Fremont County, in Iowa, adjoins Otoe County on the east, being separated from it only by the Missouri River. Council Bluffs is in Iowa, on the east bank of the Missouri River, above Fremont County, and 40 to 50 miles above Nebraska City. St. Joseph is in Missouri, on the east bank of the Missouri River, below the other places named.

On the 6th of January, 1860, the legislative assembly of the Territory of Nebraska passed an act (Laws of 1859–60, 6th Session, p. 112) entitled "An Act to authorize Otoe County to subscribe and take stock in any railroad located or to be located in Fremont County in the State of Iowa." This act contained the following provisions:

"That the Board of County Commissioners for Otoe County may at any time, by an order of said board, cause an election to be held for the purpose of ascertaining the will of the people of Otoe County, as to the propriety of said county subscribing stock for any amount not exceeding seventy-five thousand dollars, to any railroad company for the purpose of constructing any railroad now, or hereafter, to be located in Fremont County and State of Iowa. § 2. If a majority of the legal voters of said county shall vote in favor of such proposition, then the board of county

commissioners of Otoe County shall issue the bonds of said county for whatever amount of stock it may have been decided upon by such vote, to any such railroad company, which bonds shall not bear any greater interest than ten per cent. per annum."

On the 11th of January, 1861, the legislative assembly of the Territory passed an act (Laws of 1860–61, 7th Session, p. 146) entitled "An Act to define the powers and duties of county commissioners and county clerk." This act created in each county a board of county commissioners, consisting of three persons. It also provided as follows:

"§ 24. 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. § 25. 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 21st section of this act, such special tax shall be paid in money and in no other manner. § 26. The mode of submitting the questions to the people, contemplated by the last two sections, shall be the following: The whole question including the sum desired to be raised, or the amount of 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 for four weeks in some newspaper published in the county. If there be no such newspaper 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 shall 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. § 27. 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 act; 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. § 28. The rate of tax levied in pursuance of the last four sections of this act, shall, in no case, exceed more than 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, as provided, 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 act, becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue laws of this Territory. § 29. The said commissioners being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large upon the book containing the record of their proceedings; and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the board of county commissioners. § 30. Money raised by the county commissioners in pursuance of the last six sections of this act, is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed is discharged."

The records of the commissioners of Otoe County, and the records of that county, showed the following facts: The county clerk called a meeting of the commissioners of Otoe County, to be held February 24th, 1866, "to take into consideration the question of submitting to the people of said county the issuance of the bonds of said county, not exceeding $200,000

in amount, to be used in securing to said county an eastern railroad connection." The meeting was held on that day, two commissioners being present, and it was ordered that an election be held on the 17th of March, 1866, in and throughout the county of Otoe, "for the purpose of ascertaining whether the commissioners of Otoe County shall issue bonds, not to exceed $200,000, for the purpose of securing an eastern railroad connection for Nebraska City, N. T." The election was held on the day named, and the vote was 1,362 for, and 201 against, "the issuing of $200,000 for the purpose of securing an eastern railroad connection for Nebraska City." On the 9th of November, 1866, the commissioners, three being present, made the following order:

"Ordered, that ($40,000) forty thousand dollars be donated to the Council Bluffs and St. Joseph Railroad Company, provided that said railroad company locate their road within one and a half miles of the Ferry Landing at Nebraska City, N. T., and secure to Nebraska City and to Otoe County an eastern railroad connection on or before the 1st day of September, 1876, by the way of St. Joseph, Mo. The above order was made in conformity of a vote of legal voters of Otoe County, taken at an election duly held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance of the several acts of the legislature of the Territory of Nebraska, in such cases made and provided."

The bonds were issued and were received by the railroad company, $7,000 on the 24th of November, 1866, $20,000 on the 23d of February, 1867, and $13,000 on the 13th of November, 1867. Nebraska became a State on the 1st of March, 1867. 14 Stat. 820.

On the 15th of February, 1869, the legislature of the State passed an act, Laws of 1869, p. 92, 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 purpose." The first seven sections of this act authorized counties, cities, and precincts in the

State to issue bonds to aid in the construction of railroads and other works of internal improvement, and prescribed regulations in respect to the same, embracing the taking of a prior vote of the legal voters of the county, city, or precinct, and the laying of taxes to pay the principal and interest of the bonds. Section 8 was as follows:

"§ 8. All bonds heretofore voted and issued by any county or city in this State to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote, or in the execution of such bonds, and notwithstanding the same may not have been voted upon, executed, or issued in conformity with law, and such bonds shall have the same legal validity and binding force as if they had been legally authorized, voted upon, and executed; *Provided*, That nothing in this section, nor in this act, shall be so construed as to legalize or in any way sanction any vote of the people of Nemaha County heretofore had, for the purpose of aiding in the construction of any railroad, nor anything done by the county commissioners of said county authorizing said vote, or anything done by them in consequence of such vote."

On the same day the legislature of the State passed another act, Laws of 1869, p. 260, entitled "An Act to authorize the county commissioners of Otoe County to issue the bonds of said county to the amount of $150,000 to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City." This act provided as follows:

"Whereas the qualified voters of the county of Otoe and State of Nebraska have heretofore, at an election held for that purpose, authorized the county commissioners of said county to issue the bonds of said county, in payment of stock, to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad connection, to the amount of two hundred thousand dollars, and whereas but forty thousand dollars have been issued: Section 1. *Therefore, be it enacted by the Legislature of the State*

of Nebraska, That said commissioners be, and they are hereby, authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri River Railroad Company, or any other railroad company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, on such terms and conditions as may be imposed by said county commissioners. Sec. 2. Said bonds, when so issued, are hereby declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled 'An Act to enable counties, cities, and precincts to borrow money 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 purpose,' approved February, A.D. 1869."

After an answer and a reply in each suit the two suits were consolidated. The petitions by which the suits were commenced alleged, in respect to each of the bonds from which the coupons sued on were cut, that it was issued and delivered to the company, and assigned by it in blank, and was sold and delivered by it for value, and has in due course of business come to the plaintiff, "who has become and is the true and lawful owner and holder thereof, together with the coupons thereto annexed, and without any knowledge of any facts, if any there be, affecting its validity;" that, by the second act of February 15th, 1869, above cited (which the petitions call an act of the legislature of the Territory), the Territory recognized the due issue of the bonds; and that said county paid all of the coupons attached to said bonds when the same were issued, except those which matured on and after January 1st, 1870.

The answers denied all the allegations of the petitions except those expressly admitted. They denied that the county issued or delivered the bonds. They admitted that the board of county commissioners issued and delivered the bonds and coupons to the company, but aver that they did so without legal authority; that neither the question of issuing the bonds nor the proposition to lay or levy a tax for the payment of the bonds or coupons was ever submitted to or voted or passed upon by the voters or people of the county; that the bonds

were a donation by the commissioners to the company, for which the county received no consideration; that the company was an Iowa corporation, having its road wholly in that State; that it obtained the bonds upon an agreement with the commissioners, with which it did not comply, as to where it would build its road and establish a depot; that the plaintiff had notice of all said facts when he received the bonds and coupons, and paid no consideration for them; that the Territory of Nebraska did not, by said second act of February 15th, 1869, recognize the due issue of the bonds; and that said act was unconstitutional and void, and was not retrospective or retroactive, and did not pretend to authorize or legalize any bond or bonds made or issued before that act was passed. The answer in the second suit alleged as an additional defence, that the question of issuing the bonds, and the sum to be raised, and the amount of tax, and its rate, was not published before March 17th, 1866, or at any time, in any newspaper published in the county, nor posted up in any election precinct, nor was any question of issuing any bonds to said company ever so published or posted up, and no copy of any question to be submitted and voted on by the people of the county at said election was posted up at any place of voting in the county during the 17th of March, 1866. The replies denied the matters set up in the answers.

A trial by jury having been duly waived in the consolidated action, it was tried before the circuit judge and the district judge. There was no special finding of facts. The judgment, entered May 19th, 1883, stated that "the court finds for the defendant upon all the causes of action pleaded by the plaintiff, upon coupons which were more than five years past due when these actions were brought, and, upon all other causes of action pleaded by the plaintiff in the said two several actions, the court finds for the plaintiff, and assesses his damages at" $19,537.65. The judgment was for the plaintiff for that amount, with costs. In the first suit, the answer set up as a defence to the causes of action on the coupons which were more than five years past due when the suit was brought, the Nebraska statute of limitations.

Statement of Facts.

There was, in the record, a bill of exceptions, which stated that it contains all the evidence offered or given by either party in the trial of the case, but it contained no exception to anything by either party, nor did the record contain any exception to any ruling of the court. The bonds and coupons and the records of the county commissioners were made a part of the bill of exceptions. The rest of the bill consisted of oral testimony.

There was, however, in the record, a certificate signed by the circuit judge and the district judge, and filed the same day the judgment was entered, stating that, in the course of the trial, the following questions arose for determination, that is to say:

"First. Whether the commissioners of the defendant had the power to issue bonds under either of the statutes, copies of which are hereto attached, marked 'A' and 'B,' without first giving four weeks' notice of the election, as provided by section 26 of act marked 'B,' so that the same would be good and valid in the hands of a *bona fide* holder? Second. If the power to issue bonds existed under either of said statutes, was it a defence available to the county against a *bona fide* holder of the bonds in suit, that the election, in pursuance of which they were issued, was for the purpose of determining whether the county should issue its bonds to the amount of $200,000, for the purpose of securing an eastern connection for Nebraska City, when only $40,000 was issued under said vote? Third. The order for the election not providing for the submission of a provision to levy a tax, as required by section 27 of the act marked 'B,' should it be presumed that the proposition to issue the bonds submitted and voted on at an election was not accompanied by a provision to lay the tax as required in said act, and, if such presumption is to be indulged, was the presumed fact a defence available to the county against a *bona fide* holder of the bonds? Fourth. Was it a defence available to the county against a *bona fide* holder, that the bonds in suit, after being issued in pursuance of a vote held under one or both of said acts, were donated to the railroad company, provided it were located within one and one-half miles of Nebraska City? Fifth. If originally illegal and void, were the bonds validated by the

acts, copies of which are hereto attached, marked 'C' and 'D?'" The act marked "A" is the Territorial act of January 6th, 1860; the act marked "B" is the Territorial act of January 11th, 1861; and the acts marked "C" and "D" are the two State acts of February 15th, 1869. The certificate further states that, "the circuit judge being of the opinion that, all of said questions notwithstanding, judgment should be for the plaintiff, and the district judge being of the contrary opinion, it is ordered that judgment be entered for the plaintiff, and the said questions be certified to the Supreme Court for its consideration and answer, . . . at the request of counsel."

Each party sued out a writ of error to review the judgment.

Mr. J. M. Woolworth for Baldwin.

Mr. O. P. Mason, *Mr. I. N. Shambaugh*, and *Mr. J. C. Watson* for Otoe County.

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

The condition of the record is such, in the absence of an exception by either party to any ruling of the court in the progress of the trial, and of a special finding of the court upon facts, that there is nothing open for our consideration outside of the questions embraced in the certificate of the judges. We accept the certificate as sufficient to warrant an answer to the fifth question, although it does not state, in the terms of § 652 or § 693 of the Revised Statutes, that the judges disagreed upon the points stated in the five questions, or that their opinions were opposed upon such questions, but only that they disagreed as to whether the judgment should be for the plaintiff or the defendant, notwithstanding all of said questions. Having arrived at the conclusion that the fifth question must be answered in the affirmative, and such result disposing of the writ of error taken by the defendant, we do not deem it necessary to answer the other four questions. The fifth question assumes that the bonds were originally illegal and void, and we so assume, without so deciding, in answering that question.

The question is not an open one, on this record, as to whether the plaintiff is a *bona fide* owner of the bonds and coupons for value, without knowledge or notice of any facts affecting their validity, as alleged in the petitions and replies and denied in the answers. That issue is found for the plaintiff by the general finding in his favor as to all the causes of action except those on coupons which fell due before July 1st, 1877. This general finding has the same effect as the verdict of a jury, and we cannot review it.

It is contended for the defendant that the failure to give the four weeks' notice of the election, as provided by § 26 of the act marked "B," and the failure to include in the vote the question of taxation, as provided by § 27, constituted such a want of power to issue the bonds that the legislature could not validate their issue.

The Territorial act of January 11th, 1861, the proceedings for the election and its result, and the State act marked "D," were before this court in *Railroad Company* v. *County of Otoe*, 16 Wall. 667, at December Term, 1872. After that act was passed, and in September, 1869, the commissioners of Otoe County issued to the Burlington and Missouri River Railroad Company, named in that act, as a donation, the $150,000 of bonds mentioned in it, there having been no vote of the people, other than the one above mentioned, authorizing the issue of the bonds. The bonds and their coupons were transferred for value, and before the maturity of any of the coupons, by that company, to the Chicago, Burlington and Quincy Railroad Company, and it sued the county, on some of the coupons, in the Circuit Court of the United States for the District of Nebraska. Upon the trial of that suit, two questions were certified to this court: 1. Whether the act marked "D," authorizing the county to issue bonds in aid of a railroad outside of the State, conflicted with the Constitution of the State. 2. Whether the county commissioners, under that act, could lawfully issue the bonds without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same, being or having been submitted to a vote of the people of the county, as provided by the Territorial act of January 11th, 1861. This court held,

1. That the act of February 15th, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the State, did not conflict with the Constitution of the State. 2. That it was a valid exercise of legislative authority, to authorize a county to incur indebtedness and impose taxation in aid of railroad companies. 3. That the legislature could constitutionally authorize a donation of the county bonds to the railroad company. 4. That it could authorize aid to a railroad beyond the limits of the county and outside of the State. 5. That, under said act of February 15th, 1869, the county commissioners could lawfully issue the $150,000 of bonds, without a vote of the people, as provided by the Territorial act of January 11th, 1861, on the proposition to issue them and on the question of taxation to pay them. This court said, by Mr. Justice Strong: "If the legislature had power to authorize the county officers to extend aid on behalf of the county or State to a rail road company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended as well as the terms and conditions of the extension, and it needed no assistance from the popular vote of the municipality. Such a vote could not have enlarged legislative power. But the act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that their assent had been obtained. That prior to 1869 the sanction of approval by a local popular vote had been required for municipal aid to railroad companies or improvement companies, is quite immaterial. The requisition was but the act of an annual legislature, which any subsequent legislature could abrogate or annul."

It cannot be doubted that the two acts of February 15th, 1869, taken together, intended to legalize the $40,000 of bonds issued to the Council Bluffs and St. Joseph Railroad Company. These bonds fall within the description of section 8 of the act marked "C," as bonds theretofore "voted and issued" by the county of Otoe to aid in the construction of a railroad. The vote was a vote of the county to issue $200,000 of bonds "for the purpose of securing an eastern railroad connection for

Nebraska City;" and the $40,000 of bonds were issued as a donation to said company, to aid it in building a railroad so near to Nebraska City as to secure to that city and to the county of Otoe an eastern railroad connection by the way of St. Joseph. The defects and irregularities alleged in respect to the bonds were defects and irregularities in submitting to a vote of the people of the county the question of issuing the bonds, in regard to the publishing of notice, and in regard to including in the vote the question of taxation. It was alleged that the bonds were not voted upon or issued in conformity with law. The statute enacted that, notwithstanding such defects or irregularities, the bonds should be legal and valid, and should have the same legal validity and binding force as if they had been legally authorized, voted upon and executed. The act of the same date, marked "D," refers to and identifies sufficiently the election held, and the authority given by the vote to the county commissioners to issue the bonds of the county to the amount of $200,000, "to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad connection." It recites the authority as one to issue the bonds "in payment of stock." But the question is one merely of identity, and it is not pretended there was any election in Otoe County to the purport set forth, including the words "in payment of stock," while there was just such an election leaving out those words. The identity is further shown by the words in the act, "and whereas but forty thousand dollars have been issued," and by the authority given to issue $150,000 "of the bonds aforesaid," that is, of the $200,000 of bonds so voted, as a donation to any railroad company that would "secure to Nebraska City a direct eastern railroad connection." It is not pretended that any $40,000 of bonds were issued except those named in the bonds sued on in this suit. Taking the two acts together, the legislature recognized the fact that the voters of Otoe County had voted to issue $200,000 of bonds to secure an eastern railroad connection for Nebraska City in that county; that $40,000 had been issued; and that the defects and irregularities before named were alleged to have occurred in respect to the voting upon and issuing the $40,000 of the bonds; and it enacted that

those bonds should be legal and valid, and that $150,000 more of the $200,000 should be issued for the same purpose.

The decision by this court in regard to the $150,000 of bonds leaves but little more to say in regard to the $40,000. As the legislature had power to authorize the issue of bonds without any precedent action of the voters of the county, it could validate the issue of bonds by curing and legalizing defects in respect to the voting. The bonds were assigned by the railroad company, and came to the plaintiff after the acts of 1869 were passed, and he became a *bona fide* holder of them on the faith of those acts. The doctrine is well settled in this court, that the legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote, and to cure, by a retrospective act, irregularities in the exercise of the power conferred. *Thompson* v. *Lee County*, 3 Wall. 327; *Campbell* v. *City of Kenosha*, 5 Id. 194.

Much stress is laid by the defendant on the decision of the Supreme Court of Nebraska in *Hamlin* v. *Meadville*, 6 Neb. 227, in 1877. That was a suit brought in February, 1871, by an owner of property in Otoe County, to enjoin the county treasurer from collecting a tax levied on his property to pay the interest on these $40,000 of bonds and to have the bonds declared void. A judgment to that effect was rendered and was affirmed by the Supreme Court. The question adjudged in the case was the power conferred on the county commissioners, by the acts of 1860 and 1861, to issue the bonds. It was held that the only authority, if any, given by the vote of the people, was to subscribe for stock in a railroad company. The act marked "C" was not considered. It was held that it was not the purpose of the act marked "D" to legalize the $40,000 of bonds, but only to authorize the issue of the $150,000 of bonds; and that the only subject or object expressed in its title was the issuing of bonds.

The adjudication in *Hamlin* v. *Meadville* is not set up as a judgment binding on the plaintiff. Nor can it be. He was no party to it, nor was any holder of the bonds.

It is objected that the act marked "C" is void because section 19 of article 2 of the Constitution of Nebraska of 1867, provided that "no bill shall contain more than one subject, which shall be clearly expressed in its title," and because the act does not comply with those provisions. It is plain, we think, that the bill does not contain more than one subject. That subject is municipal bonds issued or to be issued to aid in making works of internal improvement. There is but one purpose, object, or subject, and that is the aiding of such works by bonds and the status of such bonds. The subject of the act, to authorize future bonds and legalize existing bonds, for such purpose, is clearly expressed in its title.

But it is objected that the title of the act is limited to bonds issued or to be issued to aid works in Nebraska, while the body of the act extends to works anywhere; and that so the subject of the act is not expressed in its title. The first section of the act relates to the future issues of bonds by "any county or city in the State," the seventh section relates to like issues by "any precinct in any organized county of this State," and the eighth section relates to "bonds heretofore voted and issued by any county or city in this State." The railroads and works of internal improvement referred to in the body of the act are not limited to those situated in the State. It would, we think, be a strained construction, to hold that the title of the act is to be so interpreted as to be limited to works situated in the State, when such limitation does not exist in the body of the act, and when the words "in this State," in the title, may fairly be regarded as applicable to the prior words "counties, cities, and precincts," to which words they are applied in the body of the act. This principle of construction is sanctioned by the views expressed in *Montclair* v. *Ramsdell*, 107 U. S. 147, and in *City of Jonesboro'* v. *Cairo & St. Louis Railroad Company*, 110 U. S. 192. See also Cooley's Constitutional Limitations, 141, *et seq.* We have not been referred to any decision of the Supreme Court of Nebraska which we regard as in conflict with these views.

The question sought to be raised by the writ of error of the plaintiff is, that the statute of limitations had not run against

the coupons which were more than five years past due when the first suit was commenced, because, under section 17 of the Code of Civil Procedure of Nebraska, the disability of a married woman, from whom the plaintiff purchased the bonds, intervened for a sufficient time, between their date and such purchase by him, to prevent what would otherwise be the bar of the statute. Without considering that question, it is sufficient to say, that the facts on which it could be raised are not admitted in the pleadings or specially found by the court, and that the general finding for the defendant on the causes of action on coupons which were more than five years past due when the actions were brought, and the absence of any exception by the plaintiff to any ruling of the court in regard to the question, preclude any adjudication here upon it.

The fifth question certified is answered in the affirmative, and the judgment of the Circuit Court is affirmed.

LAMMON & Others *v.* FEUSIER & Others.

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

Submitted January 10th, 1884.—Decided March 17th, 1884.

Bond—Officer of the Court—Surety.

The taking, by a marshal of the United States, upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.

The original action was brought in the Circuit Court of the United States for the District of Nevada, by Henry Feusier, a citizen of California, against George I. Lammon and three other persons, citizens of Nevada, upon a bond given by Lammon, the marshal of the United States for that district, as principal, and by the other defendants as his sureties, and conditioned that Lammon, "by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal."

Opinion of the Court.

It was alleged in the declaration and found by the court (trial by jury having been duly waived) that Lammon, while marshal, and while the bond was in force, having in his hands a writ of attachment on mesne process against the property of one E. D. Feusier, levied it upon the goods of the plaintiff, a stranger to the writ. On the question of law, whether the taking of the plaintiff's property upon a writ of attachment against another person constituted a breach of official duty on Lammon's part for which his sureties were liable, the Circuit Judge and the District Judge were opposed in opinion, and so certified. The plaintiff having died pending the suit, final judgment was rendered for his executors, in accordance with the opinion of the Circuit Judge, and the defendants sued out this writ of error.

Mr. C. J. Hillyer for plaintiff in error.

Mr. M. N. Stone for defendant in error.

Mr. Justice Gray delivered the opinion of the court. After reciting the foregoing facts, he continued:

The bond sued on was given under § 783 of the Revised Statutes, which requires every marshal, before entering on the duties of his office, to give bond with sureties for the faithful performance of those duties by himself and his deputies; and this action was brought under § 784, which authorizes any person, injured by a breach of the condition of the bond, to sue thereon in his own name and for his sole use.

The question presented by the record is, whether the taking by the marshal upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.

The marshal, in serving a writ of attachment on mesne process, which directs him to take the property of a particular person, acts officially. His official duty is to take the property of that person, and of that person only; and to take only such property of his as is subject to be attached, and not property exempt by law from attachment. A neglect to take the attachable property of that person, and a taking, upon the writ,

of the property of another person, or of property exempt from attachment, are equally breaches of his official duty. The taking of the attachable property of the person named in the writ is rightful; the taking of the property of another person is wrongful; but each, being done by the marshal in executing the writ in his hands, is an attempt to perform his official duty, and is an official act.

A person other than the defendant named in the writ, whose property is wrongfully taken, may indeed sue the marshal, like any other wrongdoer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshal, nor the writ of attachment, affords him any defence to such an action. *Day* v. *Gallup*, 2 Wall. 97; *Buck* v. *Colbath*, 3 Wall. 334.

But the remedy of a person, whose property is wrongfully taken by the marshal in officially executing his writ, is not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the government, for the indemnity of all persons injured by the official misconduct of himself or his deputies; and his bond may be put in suit by and for the benefit of any such person.

When a marshal, upon a writ of attachment on mesne process, takes property of a person not named in the writ, the property is in his official custody, and under the control of the court whose officer he is, and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way, except in the court from which the writ issued. *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276. The principle upon which those decisions are founded is, as declared by Mr. Justice Miller in *Buck* v. *Colbath*, above cited, "that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over

the court whose process has first taken possession, or some superior jurisdiction in the premises." 3 Wall. 341. Because the law had been so settled by this court, the plaintiff in this case failed to maintain replevin in the courts of the State of Nevada against the marshal, for the very taking which is the ground of the present action. *Feusier* v. *Lammon*, 6 Nevada, 209.

For these reasons the court is of opinion that the taking of goods, upon a writ of attachment, into the custody of the marshal, as the officer of the court that issues the writ, is, whether the goods are the property of the defendant in the writ or of any other person, an official act, and therefore, if wrongful, a breach of the bond given by the marshal for the faithful performance of the duties of his office.

Upon the analogous question, whether the sureties upon the official bond of a sheriff, a coroner, or a constable are responsible for his taking upon a writ, directing him to take the property of one person, the property of another, there has been some difference of opinion in the courts of the several States.

The view that the sureties are not liable in such a case has been maintained by decisions of the Supreme Courts of New York, New Jersey, North Carolina, and Wisconsin, and perhaps receives some support from decisions in Alabama, Mississippi and Indiana. *Ex parte Reed*, 4 Hill, 572; *People* v. *Schuyler*, 5 Barb. 166; *State* v. *Conover*, 4 Dutcher, 224; *State* v. *Long*, 8 Iredell, 415; *State* v. *Brown*, 11 Iredell, 141; *Gerber* v. *Ackley*, 32 Wisconsin, 233, and 37 Wisconsin, 43; *Governor* v. *Hancock*, 2 Alabama, 728; *McElhaney* v. *Gilleland*, 30 Alabama, 183; *Brown* v. *Mosely*, 11 Sm. & Marsh. 354; *Jenkins* v. *Lemonds*, 29 Indiana, 294; *Carey* v. *State*, 34 Indiana, 105.

But in *People* v. *Schuyler*, 4 N. Y. 173, the judgment in 5 Barb. 166 was reversed, and the case *Ex parte Reed*, 4 Hill, 572, overruled by a majority of the New York Court of Appeals, with the concurrence of Chief Justice Bronson, who had taken part in deciding *Reed's Case*. The final decision in *People* v. *Schuyler* has been since treated by the Court of Appeals as settling the law upon this point. *Mayor, &c., of New*

York v. *Sibberns*, 3 Abbott App. 266, and 7 Daly, 436; *Cumming* v. *Brown*, 43 N. Y. 514; *People* v. *Lucas*, 93 N. Y. 585. And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest courts of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas and California, and in the Supreme Court of the District of Columbia. *Carmack* v. *Commonwealth*, 5 Binn. 184; *Brunott* v. *McKee*, 6 Watts & Serg. 513; *Archer* v. *Noble*, 3 Greenl. 418; *Harris* v. *Hanson*, 2 Fairf. 241; *Greenfield* v. *Wilson*, 13 Gray, 384; *Tracy* v. *Goodwin*, 5 Allen, 409; *State* v. *Jennings*, 4 Ohio St. 418; *Sangster* v. *Commonwealth*, 17 Grattan, 124; *Commonwealth* v. *Stockton*, 5 T. B. Monroe, 192; *Jewell* v. *Mills*, 3 Bush, 62; *State* v. *Moore*, 19 Missouri, 366; *State* v. *Fitzpatrick*, 64 Missouri, 185; *Charles* v. *Haskins*, 11 Iowa, 329; *Turner* v. *Killian*, 12 Nebraska, 580; *Holliman* v. *Carroll*, 27 Texas, 23; *Van Pelt* v. *Littler*, 14 Cal. 194; *United States* v. *Hine*, 3 MacArthur, 27.

In *State* v. *Jennings*, above cited, Chief Justice Thurman said: "The authorities seem to us quite conclusive, that a seizure of the goods of A. under color of process against B. is official misconduct in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer, under color of a *fi. fa.* seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different if, under color of the same process, he take the goods of a third person? If the exemption of the goods from the execution in the one case makes their seizure official misconduct, why should it not have the like effect in the other? True, it may sometimes be more difficult to ascertain the ownership of the goods, than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the com-

munity with no other indemnity against official misconduct than the responsibility of the officer might furnish." 4 Ohio St. 423.

So in *Lowell* v. *Parker*, 10 Met. 309, 313, a constable, authorized by statute to serve only writs of attachment in which the damages were laid at no more than $70, took property upon a writ in which the damages were laid at a greater sum. In an action upon his official bond, it was argued for the sureties that they were no more answerable than if he had acted without any writ. But Chief Justice Shaw, in delivering the opinion of the Supreme Judicial Court of Massachusetts, overruling the objection, and giving judgment for the plaintiff, said: "He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods; that is, the goods of Bean, for whose use and benefit this action is brought, and who, therefore, may be called the plaintiff. He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

Upon the weight of authority, therefore, as well as upon principle, the judgment of the Circuit Court in the case at bar is right, and must be

Affirmed.

SWIFT COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued March 5th, 6th, 1884.—Decided March 17th, 1884.

Internal Revenue—Voluntary Payment.

Under the act of July 14th, 1870, c. 255, § 4, 16 Stat. 257, the proprietor of friction matches who furnished his own dies, was entitled to a commission of ten per cent. payable in money upon the amount of adhesive stamps over $500 which he at any one time purchased for his own use from the Bureau of Internal Revenue. *Swift Company* v. *United States*, 105 U. S. 691, considered and affirmed.

A payment made to a public officer in discharge of a fee or tax illegally exacted

is not such a voluntary payment as will preclude the party from recovering it back.

A course of business and a periodical settlement between the commissioner of internal revenue and a regular periodical purchaser of revenue stamps entitled by statute to commission on his purchases payable in money, which shows that the commissioner asserted and the purchaser accepted that the business should be conducted upon the basis of payments of the commissions in stamps at their par value instead of in money, does not preclude the purchaser from asserting his statutory right, if he had no choice, and if the only alternative was to submit to an illegal exaction or discontinue his business.

When the commissioner of internal revenue adopted a rule of dealing with purchasers of stamps which deprived them of a statutory right to be paid their commissions in money, and obliged them to take them in stamps, and made known to those interested that the rule was adopted and would not be changed, the rule dispensed with the necessity of proving, in each instance of complying with it, that the compliance was forced.

In a course of dealing between a regular purchaser through a series of years of stamps and the commissioner of internal revenue, where a separate written order was given for each purchase, and the commissioner answered each by sending the stamps asked for, "in satisfaction of the order," and where remittances were made from time to time by the purchaser on a general credit, which the commissioner so applied; and where accounts were made and balanced monthly between the parties; and where in each transaction the commissioner withheld from the purchaser a part of the commission due him by law; the right of action accrued in each transaction as the commission was withheld, and the Statute of Limitations in each case began to run at that time.

This case was heard at October Term, 1881, on a demurrer to the petition. The judgment of the Court of Claims sustaining the demurrer was overruled, and the case remanded for a hearing on the merits, 105 U. S. 691. The Court of Claims found that the claimants from 1870 to 1878, were manufacturers of matches, furnished their own dies, and gave bonds for payment of stamps furnished within sixty days after delivery under the statute. Each order was for stamps of a stated value. The commissioner from the commencement held that the amount allowed by statute was to be computed as commissions upon the amount of money paid. All business between the parties was transacted and all accounts stated and adjusted by the accounting officers on that basis. The manner in which the parties did business under that ruling is stated below, in the opinion of the court. The Court of Claims held that the facts

showed an acquiescence by the claimant in the construction of the statute by the commissioner, and such repeated settlements and voluntary acceptances of stamps in payment of their commissions in lieu of money, as to preclude them from recovering, and gave judgment in favor of the United States. From this judgment the corporation appealed. On the hearing in this court the argument was on the following points: 1st. Whether the former construction of the statute was correct; 2d. Whether the long acquiescence of the company in the construction given to the statute by the commissioner, and its frequent and regular settlement of its accounts on that basis and acceptance of stamps in lieu of money precluded it from disputing the legality of the transactions; and 3d. What was the effect of the failure to protest against the settlements which it made under the rulings of the commissioner.

Mr. J. W. Douglass and *Mr. Samuel Shellabarger* for appellant.

Mr. Solicitor-General for appellee.

Mr. Justice Matthews delivered the opinion of the court.

On a former appeal in this case a judgment of the Court of Claims dismissing the claimant's petition on demurrer was reversed. *Swift Company* v. *The United States*, 105 U. S. 691.

It was then held that the right construction of the internal revenue acts, act of July 1st, 1862, c. 119, § 102, 12 Stat. 477; act of March 3d, 1863, c. 74, 12 Stat. 714; act of June 30th, 1864, c. 173, 13 Stat. 294, 302; act of July 14, 1870, c. 255, § 4, 16 Stat. 257, required the payment of the commission allowed to dealers in proprietary articles purchasing stamps made from their own dies and for their own use, to be made in money, calculated at the rate of ten per cent. upon the whole amount of stamps furnished, and not in stamps at their face value calculated upon the amount of money paid. In response to a suggestion in argument by the solicitor-general we now repeat the conclusion then announced. We had no doubt upon the point at the time; we have none now. The distinction was then pointed out between the rule applicable to the sale of

other adhesive stamps and those sold to proprietors of articles named in Schedule C, made from their own dies. In the former, the commissioner of internal revenue had a discretion to fix the rate of commission so as not to exceed five per cent., and in exercising that discretion could make the commission payable in stamps as an element in the rate itself. As to the latter, no such discretion was given. The statute fixed the rate of the commission absolutely. The practice of the bureau confused the two cases and ignored the distinction between them. We do not perceive how the substitution of the word "commission" in the act of 1863 for the word "discount" in the proviso to § 102 of the act of 1862 affects the question; for the latter obviously refers to a sum to be deducted from the money paid for the stamps, and not from the stamps sold, while the former equally denotes a sum to be paid to the purchaser on a purchase of stamps at par, both being calculated as a percentage upon the amount of the purchase money, and the necessary implication as to both being that they are to be paid in money. However the words in some applications may differ in verbal meaning, they represent in the transactions contemplated by these statutes an identical thing.

The present appeal is from a decree rendered in favor of the United States, upon a finding of facts upon issue joined; and presents two questions: first, whether the course of dealing between the parties now precludes the appellant from insisting upon his statutory right to require payment of his commissions in money, instead of stamps; and second, whether, if not, part of his claim did not accrue more than six years before suit brought, so as to be barred by the statute of limitations.

On the former appeal we decided that the course of dealing set forth in the petition, which was admitted by the demurrer, did not bar the claimant's right to recover; holding that it did not appear on the face of the petition that the appellant voluntarily accepted payment of his commissions in stamps at par, instead of money, nor that he was willing to waive his right to be paid in that way; and that "it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts from which an agreement to do so," that is

an agreement to waive his statutory right, "might be inferred, but an actual settlement based upon such an understanding."

The decree brought up by the present appeal proceeds upon the basis that the facts as found by the Court of Claims establish such an agreement and such a settlement.

The course of dealing found to exist and to justify this conclusion may be briefly but sufficiently stated to have been as follows: The appellant gave the bonds from time to time necessary under the statute to entitle it to sixty days' credit on its purchases of stamps. The condition of this bond was that the claimant should, on or before the tenth day of each month, make a statement of its account upon a form prescribed by the Internal Revenue Bureau, showing the balance due at the commencement of the month, the amount of stamps received, the amount of money remitted by it during the month, and the balance due from it at the close of the month next preceding; and also that the company should pay all sums of money it might owe the United States for stamps delivered or forwarded to it, according to its request or order, within the time prescribed for payment for the same according to law, that is, for each purchase within sixty days from the delivery of the stamps.

Each purchase was upon a separate written order, specifying the amount desired, for example, $3,000 dollars' worth of match stamps. The commissioner thereupon forwarded stamps of the face value of $3,300, with a letter stating that they were in satisfaction of the order referred to, and inclosing a receipt on a blank form, but filled up, except date and signature, which was an acknowledgment of the receipt of the specified amount of stamps in satisfaction of the order. The receipt was signed by the claimant and returned. The claimant from time to time made remittances of money in authorized certificates of deposit, in sums to suit its convenience, for credit generally, and received in reply an acknowledgment stating that credit had accordingly been given on the books of the internal revenue office on account of adhesive stamps; for instance, by certificate of deposit, $2,500; commission at ten per cent., $250; total, $2,750; and authorizing the claimant to take credit therefor on

the prescribed form for the monthly account current. These accounts were made out by the claimant monthly on blank forms prescribed and furnished by the commissioner, in which the United States were debited with all items of money remitted and with commissions calculated on each remittance at ten per cent., and credited with balance from previous month and stamps received on order in the interval, and with the balance due the United States. This account was by a memorandum at the foot stated to be correct, complete, and true, and signed by the claimant. These returns, with corresponding statements by the commissioner, were settled and adjusted by the accounting officers of the Treasury Department every quarter, and notice of the settlement given to the claimant. The remittances were so made that while not corresponding to any particular order for stamps, they nevertheless covered all stamps the orders for which had been given sixty days or more previously, so that the claimant was always indebted to the United States for all stamps received within the past sixty days, but not for any received more than sixty days previously.

It must be admitted that this course of dealing and periodical settlement between the parties, whether the accounts be regarded as running merely or stated, shows clearly enough that the business was conducted upon the basis, that the claimant was to receive his commissions in stamps at their par value, and not in money, and that this was asserted by the Internal Revenue Bureau, and accepted by the appellant.

But in estimating the legal effect of this conduct on the rights of the parties there are other circumstances to be considered.

It appears that prior to June 30th, 1866, the leading manufacturers of matches, among whom was William H. Swift, who, upon the organization of the claimant corporation in 1870, became one of its large stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against its method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs; although it did not appear that any one in behalf of the claimant corporation ever, after its organization, made any such pro-

test or objection, or any claim on account thereof, until January 8th, 1879. On that date, the appellant caused a letter to be written to the commissioner asserting its claim for the amount, afterwards sued for, as due on account of commissions on stamps purchased. To this, on January 16th, 1879, the commissioner replied, saying that the appellant had received all commissions upon stamps to which it was entitled, "provided the method of computing commissions, which was inaugurated with the first issue of private-die proprietary stamps and has been continued by each of my predecessors, is correct. I have heretofore decided to adhere to the long-established practice of the office in this regard until there shall be some legislation or a judicial decision to change it." And the claim was therefore rejected.

From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money; that it regulated all its forms, modes of business, receipts, accounts, and returns upon that interpretation of the law; that it refused on application, prior to 1866, and subsequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and finally, that conformity to it on their part was made a condition, without which they would not be permitted to purchase stamps at all. This was in effect, to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps, and it could not purchase stamps except upon the terms prescribed by the commissioner of internal revenue. The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no

choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.*

In *Close* v. *Phipps*, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: "The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under what the law calls a species of duress." And in *Parker* v. *Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley* v. *Reynolds*, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt* v. *Ide*, 3 Blatchf. 249; and in *Ogden* v. *Maxwell*, 3 Blatchf. 319, it was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary. And in *Maxwell* v. *Griswold*, 10 How. 242–256, it was said by this court: "Now it can hardly be meant, in this class of cases, that to make a payment involuntary, it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment." To the same effect are the *American Steamship Company* v. *Young*, 89 Penn. St. 186; *Cunningham* v. *Monroe*, 15 Gray, 471; *Carew* v. *Rutherford*, 106 Mass. 1; *Preston* v. *Boston*, 12 Pick. 7. In *Beckwith* v. *Frisbie*, 32 Vt. 559–566, it was said: "To make the payment a voluntary one, the parties

should stand upon an equal footing." If a person illegally claims a fee *colore officii*, the payment is not voluntary so as to preclude the party from recovering it back. *Morgan* v. *Palmer*, 2 B. & C. 729. In *Steele* v. *Williams*, 8 Exch. 625, Martin, B., said: "If a statute prescribes certain fees for certain services, and a party assuming to act under it insists upon having more, the payment cannot be said to be voluntary." "The common principle," says Mr. Pollock, Principles of Contract, 523, "is, that if a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice." Addison on Contracts, *1043; *Alton* v. *Durant*, 2 Strobh. 257.

No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted; and the protests spoken of in the findings of the Court of Claims as having been made prior to 1866 by manufacturers of matches and others requiring such stamps, are of no significance, except as a circumstance to show that the course of dealing prescribed by the commissioner had been deliberately adopted, had been made known to those interested, and would not be changed on further application, and that consequently the business was transacted upon that footing, because it was well known and perfectly understood that it could not be transacted upon any other. A rule of that character, deliberately adopted and made known, and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced. This principle was recognized and acted upon in *United States* v. *Lee*, 106 U. S. 196–200, where it was held that the officers of the law, having established and acted upon a rule that payment would be received only in a particular mode, contrary to law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right.

For these reasons we are of opinion, that the Court of Claims

erred in rendering its judgment dismissing the appellant's petition, and thus disallowing his entire claim. But we are also of opinion that he is not entitled to recover for so much of it as accrued more than six years before the bringing of his suit. There was nothing in the nature of the business, nor in the mode in which it was conducted, nor in the accounts it required, that prevented a suit from being brought, for the amount of commissions withheld, in each instance as it occurred and was ascertained. The recovery must therefore be limited to the amount accruing during the six years next preceding November 21st, 1878, which, according to the findings of the Court of Claims, is $28,616, and for that amount judgment should have been rendered by the court in favor of the appellant.

The judgment of the Court of Claims is reversed and the cause remanded with directions to render judgment in favor of the appellant in accordance with this opinion.

WALSH *v.* MAYER & Others.

MAYER & Others *v.* WALSH.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argued January 31st, February 1st, 1884.—Decided March 17th, 1884.

Conflict of Law—Statute of Limitations—Usury.

A negotiable promissory note made in New Orleans secured by mortgage of real estate in Mississippi, the maker being a citizen of Arkansas, and the promisee being a citizen of Louisiana, and no place of payment being named in the note, is subject to the limitation of actions prescribed by the statute of Mississippi, as the law of the forum, when suit is brought upon it in Mississippi.

In Mississippi a letter from the holder of a promissory note, the right of action on which is barred by the statute of limitations, asking for insurance on buildings on property mortgaged to secure payment of the note, and saying, "The amount you owe me on the $7,500 note is too large to be left in such an unprotected situation : I cannot consent to it"—and a written reply from the maker, saying, "We think you will run no risk in that

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time, as the property would be worth more than the amount due you if the building were to burn down," is an acknowledgment of the debt within the requirements of the Mississippi statute of limitations.

When a promissory note barred by the statute of limitations is signed in their individual names by several persons forming a copartnership, and the acknowledgment in writing to take it out of the operation of the statute is signed in the partnership name, it is a sufficient acknowledgment if the note was an obligation contracted for partnership purposes, and if it can be legitimately inferred from the facts that the firm was the agent of all the makers for the purpose of the acknowledgment.

A statute prescribing a legal rate of interest, and forbidding the taking of a higher rate "under pain of forfeiture of the entire interest so contracted," and that "if any person hereafter shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within twelve months from the time of such payment," confers no authority to apply usurious interest actually paid to the discharge of the principal debt. A suit for recovery within twelve months after payment is the exclusive remedy.

A plaintiff demanding judgment on a note for $7,500, recovered only $702; judgment being against him as to the remainder of the claim on matter of law. He appealed. The defendant took a cross-appeal. On motion to dismiss the cross-appeal for want of jurisdiction: *Held,* That it was incident to the plaintiff's appeal; and that appeal being sustained in part and overruled in part the whole cause was remanded.

On the 2d day of January, 1866, the defendants, J. D. Mayer & Co., purchased from William Barnes, who then resided in the city of New Orleans, and the said defendants then being residents of the State of Arkansas, the hotel property situate in Mississippi City, in this State (Mississippi), known as the Barnes Hotel, and to secure the payment of the last instalment of the purchase money, executed their promissory note for $7,500, payable two years after date, with six per cent. interest thereon until due and ten per cent. thereafter until paid, which note was made payable to themselves, and indorsed and delivered to said Barnes, who held and owned the same until about the last of June, 1874, when he sold and delivered the same for value to the complainant, Walsh.

To secure the payment of this note, and one for the same amount which fell due a year previous, and which has been paid and satisfied, the said defendants executed a mortgage upon the property so purchased and described therein, which was executed and recorded on the 20th February, 1866.

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At the time when said contract was made it was agreed and understood between the parties that the deferred payments were intended by said Barnes as an investment, and that so long as the interest was paid after this note became due, the payment of the principal sum would not be demanded, and in pursuance of said agreement and understanding the said defendants paid up the interest, which was indorsed upon the note as paid, to September, 1873. Some time after the maturity of the note, Barnes, as a condition for further indulgence, demanded of the said defendants that they should execute their notes falling due at a further period for the interest up to their maturity, equal to fifteen per cent. per annum, upon the note for $7,500, and also for the amount of money advanced by Barnes to pay the premiums upon the insurance policies, with fifteen per cent. interest added. These notes were drawn in New Orleans, made payable to order, and indorsed and delivered to Barnes. The last of these notes was dated May 12th, 1874, and made due and payable on the 14th day of September thereafter. These transactions all took place prior to the transfer of the note by Barnes to complainant, but were known to complainant at the time of his purchase.

At the time of the purchase of the note, complainant wrote to the defendants, notifying them that he was the holder and owner of the note, and calling their attention to the continuance of the insurance upon the property; to this letter the said defendants replied on the 6th of July, acknowledging its receipt, but nothing more.

On December 1st, complainant mailed a letter to defendants, informing them that he needed money; that the interest had been paid to the 1st of September before, and again urging funds to provide insurance on the property; defendants replied to this letter on the 8th December, stating that they were willing to pay three months' interest, but had been served with a writ of garnishment in the suit of the First National Bank of New Orleans, in a suit by attachment brought by the bank on said Barnes in the Circuit Court of Harrison County, and therefore declined to make further payment, or for further insur-

ance, stating that they desired to have the insurance changed, and to take it at a future time.

On March 2d, 1876, complainant wrote a letter to defendants, calling their attention to the want of insurance, in which he used the following language: "I think it would not be wise for you, or safe for me, to leave things in that way; *the amount you owe me on the* $7,500 *note is too large to be left in such an unprotected condition, and I cannot consent to it.*"

On the 9th of March, 1876, the defendants made and sent to the complainant the following reply to the foregoing letter:

"Yours at hand, we do not want to insure any until about July, when we expect to insure for about $15,000. *We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down.*

"(Signed) J. D. Mayer & Co."

The suit of the Bank v. defendants was commenced in November, 1874, but owing to the death of Barnes, was continued until the 24th of October, 1876, when the defendants filed their answer to the garnishment, in which they acknowledge the execution of the note, but claim that they have paid excess of interest and usurious interest thereon, which should be deducted from the note, and which when done would only leave a balance of $2,509.76, and which was owing to said William Barnes, but claimed the benefit of the statute of limitations, and which they set up as an entire defence to the said note, and upon which the suit was dismissed as to them.

After this, by an arrangement between them and the bank, they gave their note to the bank for the said sum of $2,509.76, at four years, with 6 per cent. interest, but this was done with the condition that if the complainant recovered on said note for $7,500 the bank was not to collect the note so executed to it.

The bill set up these facts and prayed for an account, and that the defendants might be decreed to pay the sum found due, and enjoined from pleading the statute of limitations and that the mortgage might be enforced.

The answer, among other defences, set up usury and the

statute of limitations, and denied that the correspondence took the notes out of the statute.

The court decreed the enforcement of the lien to the extent of $702.69, the amount remaining due on the note after deducting the usurious interest under the statutes of Louisiana. From this decree the plaintiff appealed, and the defendants took a cross-appeal.

Mr. W. Hallett Phillips for Walsh.

Mr. C. W. Hornor for Mayer and others.

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

Two questions arose on the facts; first, whether the bar of the statute of limitations was prevented by a sufficient acknowledgment or promise by the defendants as makers of the note; and second, whether the usurious interest paid by them could be applied in reduction of the principal debt.

The Circuit Court rightly held that the statute of limitations of Mississippi, being the law of the forum, was the one applicable to the case. Section 2161 of the Revised Code of Mississippi, 1871, provides that actions on promissory notes must be brought within six years after cause of action accrued; and section 2165 declares that in actions founded on contract no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the provisions of the limitation act, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby. We agree with the Circuit Court in the conclusion that the two letters of March 2d and March 9th, 1876, contain such a definite recognition and acknowledgment of the debt due on the note in suit as meets the requirement of the statute. The letter of March 9th, it is true, is signed by J. D. Mayer & Co., in their partnership name, while the note is made by the individual members; but it is a legitimate inference, from the facts found, that the firm was the common agent of

all its members for the purpose, as the business of managing the property was transacted by the firm. It was indeed for the purpose of owning and conducting the hotel that the partnership was formed, and the note, though in form that of the individual partners, was regarded as a partnership obligation.

Upon the question of the application of the illegal interest paid in reduction of the principal, the Circuit Court held that the contract, as to interest, was governed by the law of Louisiana; that by the terms of that law, Rev. Stat. 269, "the amount of conventional interest shall in no case exceed eight per cent. under pain of forfeiture of the entire interest so contracted," and that, "if any person hereafter shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within twelve months from the time of such payment." By the Mississippi Code, 1871, § 2279, the legal rate of interest is fixed, in the absence of contract, at six per cent. per annum; "but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. per annum. And if a greater rate of interest than ten per cent. shall be stipulated for in any case, such excess shall be forfeited on the plea of the party to be charged therewith."

The Circuit Court held that the whole interest paid being avoided by the Louisiana statute, a court of equity would impute its payment to the principal debt, and rendered a decree accordingly, deducting the whole amount of interest paid from the face of the note. In the view we take, it does not become necessary to decide whether the contract ought to be governed by the law of Louisiana or that of Mississippi; for we are of opinion that the decree, in this particular, is erroneous according to either.

It is not claimed that there is any express provision in the Louisiana statute that requires such an application of payments made on account of unlawful interest. It is rested altogether upon the provision that forfeits the whole interest paid, and authorizes the debtor to recover it back within the time limited. But the same provision is contained in sec. 5198 Rev. Stats. of the United States, in reference to national banks; under which

it has been held that usurious interest actually paid cannot be applied to the discharge of the principal. *Driesbach* v. *National Bank*, 104 U. S. 52; *Barnet* v. *National Bank*, 98 U. S. 555. In *Cook* v. *Lillo*, 103 U. S. 792, the Louisiana statute was considered, and, upon the decisions of the Supreme Court of the State, it was decided that the usurious interest cannot be reclaimed, nor be imputed to the principal, unless a suit for its recovery is begun or plea of usury set up to the claim within twelve months after the payment is made. *Cox* v. *McIntyre*, 6 La. Ann. 470; *Weaver* v. *Maillot*, 15 La. Ann. 395.

It is said, however, that the law of Louisiana applies and governs, so far as it allows the forfeited interest to be applied in reduction of the principal, in an action on the note, but that the limitation of time, within which by that law the right must be exercised, being part of the remedy merely, is governed by the law of Mississippi, being the law of the forum, which contains no such limitation.

But the right claimed under the law of Louisiana must be taken as it is given, and is not divisible. The provisions requiring it to be asserted in a particular mode and within a fixed time, are conditions and qualifications attached to the right itself, and do not form part of the law of the remedy. If it is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced in any form. It was accordingly held in *Pittsburg, &c., Railroad Company* v. *Hine's Adm'x*, 25 Ohio St. 629, under an act which required compensation to be made for causing death by wrongful act, neglect, or default, and gave a right of action, provided such action should be commenced within two years after the death of such deceased person, that this proviso was a condition qualifying the right of action, and not a mere limitation on the remedy. *Bonte* v. *Taylor*, 24 Ohio St. 628; *Pritchard* v. *Norton*, 106 U. S. 124.

We are therefore of opinion that the Circuit Court erred in not rendering a decree in favor of the complainants below for the amount of the note, with lawful interest from the date up to which interest had been paid.

We have disposed of the case upon both appeals. The motion to dismiss the cross-appeal of the defendants below, for

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want of jurisdiction, on the ground that the amount in controversy is less than $5,000, is overruled. The cross-appeal, it is true, is from a decree awarding against the defendants below less than that amount, and it could not, therefore, be maintained by itself; but the appeal of the plaintiffs below, to which it is incident, opened the whole controversy here, so far as they were concerned, and that of the defendants must be allowed to have the like effect as to them, so that upon both appeals the case was brought up as it stood for hearing in the court below, the claims of the respective parties involving the question of liability as to the whole amount.

The decree is reversed and the cause remanded with directions to render a decree for the complainants below in conformity with this opinion.

UNITED STATES *v.* ULRICI.

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

Argued March 5th, 1884.—Decided March 17th, 1884.

Internal Revenue.

The sureties on a distiller's bond for payment of taxes are discharged by seizure of the spirits for fraudulent acts of the distiller, and sale of them by the marshal, and payment of the taxes by the marshal out of the proceeds of the sale.

This was an action at law, brought by the United States against Rudolph W. Ulrici, principal, and Gerhard Bensberg and Charles Hoppe, his sureties on a distiller's warehouse bond, which was payable to the United States in the penalty of $47,000, and was dated May 5th, 1875. The condition of the bond was that the principal should pay, or cause to be paid, the amount of taxes due and owing on certain described distilled spirits entered for deposit during the month of April, 1875, in distillery warehouse No. 4, in the city of St. Louis, before the removal of the spirits from the warehouse and within one year from the date of the bond. The breach

alleged was that the defendant Ulrici, principal upon the bond, did not before the removal of the spirits, and within one year from the date of the bond, pay or cause to be paid the taxes due and owing thereon, to the damage of the United States in the sum of $23,189.50.

The answers of the principal and the sureties set up substantially the same defences, only one of which it is necessary to state, which was as follows: After the spirits were deposited in the warehouse they were seized, on account of the fraudulent acts of said Ulrici as a distiller, for which on June 4th, 1875, an information was filed against them in the name of the United States in the Circuit Court for the Eastern District of Missouri, upon which a warrant of arrest issued to the marshal, who by virtue thereof took and held possession of the spirits, which, on January 28th, 1876, were, pursuant to an order of the court, sold by the marshal to various persons for more than enough to pay all the taxes alleged by the United States to exist at the time against them or that were imposed thereon by law; on the same day the marshal received the price of the spirits from the purchasers and therewith by authority of the United States paid to the proper collector of internal revenue the taxes due and owing on the spirits, and the residue of the price he returned into court and delivered the spirits to the respective purchasers thereof.

The Circuit Court overruled a demurrer to this answer, and the plaintiff having taken issue thereon, the parties submitted the cause to the court, both upon the facts and the law.

The bill of exceptions shows that there was evidence tending to prove the truth of the answer. Thereupon "the court declared the law to be that on the pleadings and testimony the plaintiff was not entitled to recover, and found for the defendants and rendered judgment for them." To reverse that judgment this writ of error was sued out.

Mr. Solicitor-General for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE WOODS delivered the opinion of the court. After reciting the facts in the foregoing language he continued:

The assignment of error is that judgment was given for the defendants, whereas it should have been given for the plaintiff. We think the judgment was right.

It is clear, even upon a cursory reading, that the well-considered and minute provisions of the Revised Statutes found in chapter 4, entitled "Distilled Spirits," of Title XXXV., entitled "Internal Revenue," were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits.

All the regulations for the manufacture and storage, the marking, branding, numbering, and stamping with tax stamps, of distilled spirits, and all the penalties, forfeitures, fines, and imprisonments prescribed by the chapter mentioned, have that end only in view. If the tax on distilled spirits were repealed, all the ingenious and complicated provisions of the chapter would become useless and insensible.

Among them is the requirement that when spirits are deposited in a distillery warehouse, the owner should give bond conditioned that he will pay the tax due thereon within one year and before the spirits are removed.

It is clear that the object of exacting this bond is to make sure the payment of the tax. It would seem, therefore, that if the tax is paid within the time limited, either by the distiller or out of the proceeds of the spirits subject to the tax, the object for which the bond was taken is accomplished, and it becomes *functus officio*, and the obligors are discharged.

The contention of the counsel for the government is that the forfeiture of the spirits on which a tax is due for the fraudulent acts of the distiller in seeking to evade its payment is a punishment for the offence, criminal or *quasi* criminal, of the distiller, and that the application of the proceeds of the forfeited spirits to the payment of the tax cannot have the effect of relieving him from the obligation of his bond.

Such, in our opinion, is not the true construction of the law regulating the imposition and collection of the tax on distilled spirits.

Section 3458 of the Revised Statutes, provides that

"Where any whiskey or tobacco or other article of manufacture or produce requiring brands, stamps, or marks of whatever kind to be placed thereon, shall be sold upon distraint, forfeiture, or other process provided by law, the same not having been branded, stamped, or marked as required by law, the officer selling the same shall, upon sale thereof, fix, or cause to be affixed, the brands, stamps, or marks so required, and deduct the expense thereof from the proceeds of such sale."

The bill of exceptions shows, and the Circuit Court found, that this was done in this case within the year following the execution of the bond. As directed by the statute, the marshal procured from the collector of internal revenue the stamps necessary to pay the tax on the spirits sold, and placed them on the packages in which the spirits were contained. The collector was authorized by law to deliver the stamps only to be used for the purpose of paying the taxes. Rev. Stat., §§ 3313, 3314. It is clear, therefore, that the affixing of the stamps to the packages by the marshal was intended by the law to be a payment of the tax, and was a payment. The bond on which the suit is brought, having been exacted for the sole purpose of securing the payment of the taxes, was therefore discharged.

We think the contention of the plaintiff in error cannot be sustained for another reason. The tax on distilled spirits is made by the statute a first lien thereon. Rev. Stat., § 3251. As two of the defendants are sureties, they have the right to insist that, when the spirits are seized and sold by the United States for any reason whatever, the proceeds shall be first applied to the payment of the tax. It was said by this court in the case of *United States* v. *Boecker*, 21 Wall. 652, that a person about to become a surety on the bond required from a distiller before commencing business "may examine and determine how far, in the event of liability on the part of the principal, the property where the business was to be carried on would be available as security for the government and indemnity for the surety." So we think the fact that the tax due the

United States is made by law a first lien on the spirits deposited in the distillery warehouse may fairly be considered by the surety when he estimates the risk he takes by signing the distillery warehouse bond. There is an implied undertaking on the part of the United States, based on the statute making the tax a first lien, that the proceeds of the spirits shall be first applied to the payment of the tax, and this undertaking enters into the distiller's warehouse bond. The government, therefore, having forfeited the spirits for the misconduct of the distiller, cannot consistently with the rights of the sureties apply their proceeds on some other account, and collect the tax of them, for the contract of a surety is to be strictly construed. *Leggett* v. *Humphreys*, 21 How. 66; *Miller* v. *Stewart*, 9 Wheat. 680; *United States* v. *Boyd*, 15 Pet. 187; *United States* v. *Boecker*, 21 Wall. *ubi supra*. We think, therefore, that the proceeds of the sale of the spirits was in fact and in law applied to the payment of the tax due thereon, and that the bond of the defendants in the case given for its payment was discharged.

Judgment affirmed.

The case of the *United States*, plaintiff in error, v. *James M. Sutton* and *James F. R. Clapp*, No. 852, in error to the Circuit Court of the United States for the Western District of North Carolina, was argued at the same time with the foregoing case, and the same questions were presented by the record. As the judgment of the court below in that case was in favor of the defendants, it follows that it must be affirmed.

EX PARTE VIRGINIA.

ORIGINAL.

Argued March 3d, 1884.—Decided March 17th, 1884.

Statutes—Surplus Revenue.

The Secretary of the Treasury is not authorized to use the revenues of the United States, accrued since January 1st, 1839, in order to deposit with the States the fourth instalment of surplus revenue according to the provisions of the act of June 23d, 1836, 5 Stat. 55.

This was a petition on the part of the State of Virginia for a writ of mandamus upon the Secretary of the Treasury to compel him to pay to the State from the present surplus revenues of the treasury the fourth instalment of surplus revenue directed by the act of June 23d, 1836, 5 Stat. 55, to be deposited with the States.

Mr. W. Willoughby and *Mr. F. E. Alexander* for the petitioner.

Mr. Justice Harlan delivered the opinion of the court.

This is an application for a writ of mandamus directed to the Secretary of the Treasury, commanding him to deliver to the proper officer of the Commonwealth of Virginia the sum of $732,809.33—that being, it is claimed, the amount of the fourth instalment of the public money of the United States required by the act of Congress, approved June 23, 1836, to be deposited with that State upon the terms and conditions therein prescribed.

The thirteenth and fourteenth sections of that act—the only parts thereof material to the present inquiry—are as follows:

"Sec. 13. *And be it further enacted*, That the money which shall be in the treasury of the United States on the first day of January, eighteen hundred and thirty-seven, reserving the sum of five millions of dollars, shall be deposited with such of the several States, in proportion to their respective representation in the Senate and House of Representatives of the United States, as shall, by law, authorize their treasurers, or other competent au-

thorities, to receive the same on the terms hereinafter specified; and the Secretary of the Treasury shall deliver the same to such treasurers or other competent authorities, on receiving certificates of deposit therefor, signed by such competent authorities, in such form as may be prescribed by the Secretary aforesaid; which certificates shall express the usual and legal obligations, and pledge the faith of the State for the safe-keeping and repayment thereof, and shall pledge the faith of the States receiving the same to pay the said moneys, and every part thereof, from time to time, whenever the same shall be required by the Secretary of the Treasury, for the purpose of defraying any wants of the public treasury, beyond the amount of the five millions aforesaid: *Provided*, That if any State declines to receive its proportion of the surplus aforesaid, on the terms before named, the same shall be deposited with the other States agreeing to accept the same on deposit, in the proportion aforesaid: *And provided further*, That when said money, or any part thereof, shall be wanted by the said Secretary to meet appropriations by law, the same shall be called for, in ratable proportions, within one year, as nearly as conveniently may be, from the different States with which the same is deposited, and shall not be called for in sums exceeding ten thousand dollars from any one State, in any one month, without previous notice of thirty days for every additional sum of twenty thousand dollars which may at any time be required.

"SEC. 14. *And be it further enacted*, That the said deposits shall be made with said States in the following proportions, and at the following times, to wit: one-quarter part on the first day of January, eighteen hundred and thirty-seven, or as soon thereafter as may be; one-quarter part on the first day of April, one-quarter part on the first day of July, and one-quarter part on the first day of October, all in the same year." 5 Stat. 55.

On the 20th of December, 1836, Virginia, by legislative enactment, signified her acceptance of the terms and conditions of this act, of which due notice was given to the Secretary of the Treasury and to Congress.

On the 1st day of January, 1837, as appears from a letter of the Secretary of the Treasury to the Speaker of the House of Representatives, under date of January 3d, 1837, the balance

in the treasury—in excess of $5,000,000—subject to be deposited with the States, was $37,468,859.97, of which Virginia would have been entitled, under the act of June 23, 1836, to the sum of $2,931,237.34, payable in four instalments. Ex. Doc. 2d Sess. 24th Congress, vol. 2, Doc. No. 62. The first three instalments were deposited with the States, at the respective dates fixed in the act of Congress, but no part of the fourth has ever been delivered. The reason why the last instalment was not deposited on the 1st of October, 1837, is shown by the message of President Van Buren to Congress, at its extra session in September of that year. He said: "There are now in the Treasury $9,367,214, directed by the act of the 23d of June, 1836, to be deposited with the States in October next. This sum, if so deposited, will be subject, under the law, to be recalled, if needed, to defray existing appropriations; and, as it is now evident that the whole, or the principal part of it, will be wanted for that purpose, it appears most proper that the deposits should be withheld." 5 Cong. Globe and Appendix, 8, 1st Sess. 25th Congress.

The Secretary of the Treasury, in his report to Congress, at the same session, after alluding to the then disturbed condition of the finances, and to the fourth instalment payable in October, 1837, suggested that, in view of the condition of the finances, "and the importance of meeting with efficiency and good faith all the obligations of the government to the public creditors, it would be most judicious to apply the whole instalment, as fast as it is wanted and can be collected, to the prompt discharge of these obligations; and that the last deposit with the States, not being a debt, but a mere temporary disposal of a surplus, should be postposed until Congress, in some different state of the finances, when such an available surplus may exist, shall see a manifest propriety and ability in completing the deposits, and shall give directions to that effect." Ex. Doc. and Reports of Committees, 1st Sess. 25th Congress, Doc. No. 2.

By an act of Congress, approved October 2d, 1837, it was provided "that the transfer of the fourth instalment of deposit directed to be made with the States under the thirteenth section of the act of June 23d, 1836, be and the same is hereby

postponed until the 1st day of January, 1839: *Provided*, That the three first instalments under the said act shall remain on deposit with the States until otherwise directed by Congress." 5 Stat. 201.

But, on the 1st day of January, 1839, there was not, as the petition admits, in the treasury, a sufficient amount to meet that instalment after paying existing appropriations for the current expenses of the government. And by the third section of an act approved August 13th, 1841, the entire act of June 23d, 1836, excepting its thirteenth and fourteenth sections, was repealed. 5 Stat. 440.

The petition concedes that at no time since January 1st, 1841, until within the past few years, has there been in the treasury, a surplus of money large enough, after defraying existing charges imposed by Congress, to make the fourth instalment of deposit.

It is, however, alleged that there is now in the treasury of the United States a sufficient sum of money, after defraying all the existing charges imposed by Congress upon the treasury, and not needed or wanted by the Secretary to meet appropriations by law, or to meet the interest accruing upon the public debt or to meet all the expenditures of the government, estimated or ascertained by him for the present fiscal year, to make the deposits of the fourth instalment with all of the States with which said deposits were directed to be made.

The present Secretary of the Treasury, having refused, upon the demand of Virginia, by its duly authorized agent, to use any part of the public moneys for the purpose of meeting that instalment, the present application has been made for a mandamus compelling him to deposit with that State an amount equal to one-fourth of the said sum of $2,931,237.32.

No case is made for a mandamus. If it was the duty of the Secretary of the Treasury, in execution of the act of 1836, to make the fourth instalment of deposit on the day fixed in that act, whatever may have been, on that day, the wants of the public treasury, his failure to do so was legalized by the act of October 2d, 1837, postponing that deposit until January 1st, 1839. Of the latter act the State could not complain, because

that of January 23d, 1836, created no debt or legal obligation upon the part of the government, but only made the States the depositaries, temporarily, of a portion of the public revenue not needed, as was then supposed, for the purposes of the United States.

What was the duty of the Secretary, on January 1st, 1839, to which time, by the act of 1837, the deposit of the fourth instalment was postponed? It is conceded that there was not in the treasury, on January 1st, 1839, a sufficient amount, available and applicable to public purposes, after paying necessary appropriations for the expenses of the government, to meet that instalment. He could not, therefore, do what he might then lawfully have done, had the treasury, on January 1st, 1839, been in the condition contemplated by Congress when the act of 1837 was passed. The last direction given by the legislative department upon the subject of this instalment, is found in the latter act. No authority has been conferred upon the Secretary, by subsequent legislation, to use any surplus revenue accruing after January 1st, 1839, for the purpose of meeting the fourth instalment of deposit. Congress, by the original act, as we have seen, charged the payment of the several instalments upon the revenue above $5,000,000 which might be in the treasury on January 1st, 1837. That charge was transferred to and imposed upon the surplus revenue in the treasury on January 1st, 1839. But no such charge has been imposed upon the revenue accruing subsequently to the latter date.

Congress has permitted the thirteenth and fourteenth sections of the act of 1836, as modified by the act of October 2d, 1837, to stand, for the purpose, as we infer, of showing not only the terms upon which the States received the three first instalments of deposit, but that those instalments are held by the States, subject to be recalled in the discretion of the United States.

But the legislative department of the government seems purposely to have refrained from making the fourth instalment of deposit a charge directly upon any revenues accruing since January 1st, 1839. Since the last direction given by Congress upon the subject, the financial necessities and obligations of the

government have been largely increased, and this circumstance, perhaps, suggests the reason why the legislative department has not fixed any day for the final execution of the act of 1836. Be the reason what it may, we are of opinion that the Secretary of the Treasury has no authority under existing legislation and without further direction from Congress, to use the surplus revenue in the treasury, from whatever source derived, or whenever, since January 1st, 1839, it may have accrued, for the purpose of making the fourth instalment of deposit required by the act of 1836.

The petition for a mandamus must, consequently, be denied.

It is so ordered.

STEVENS *v.* GRIFFITH.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

Submitted February 4th, 1884.—Decided March 17th, 1884.

Rebellion.

A judgment of a Confederate court during the rebellion confiscating a claim due to a loyal citizen residing in a loyal State, and payment of the claim to a Confederate agent in accordance with the judgment, are no bar to a recovery of the claim. *Williams* v. *Bruffy*, 96 U. S. 176, and 102 U. S. 248, cited and its principal points restated and affirmed.

This was an action in a State court in Tennessee to recover a legacy bequeathed the plaintiff by a will proved in Monroe County, Tennessee, in 1859. The defence set up a judgment of a Confederate court, during the rebellion, confiscating the legacy and payment of the judgment. The defence was overruled in the court below where the original trial was had, and sustained in the Supreme Court of Tennessee on appeal. The plaintiff below then sued out this writ of error.

Mr. James M. Durham for plaintiff in error.

No brief filed for defendant in error.

Opinion of the Court.

MR. JUSTICE FIELD delivered the opinion of the court.

In October, 1858, Jesse Rhea died in Tennessee, leaving a will containing various legacies to parties residing in that State, and in Illinois and California. The will was admitted to probate in 1859, and the defendant Griffith, one of the executors named therein, qualified and entered upon the discharge of his duties. In the course of the two years following, the effects and property of the estate were converted into money, its debts settled, and the portions paid to which the legatees in Tennessee were entitled. The executor was desirous of paying the balance to the legatees in Illinois and California; but owing to the civil war, he could not communicate with them nor remit the money. In 1863, whilst this balance was still in his possession, he was notified, under proceedings of a court at Knoxville, Tennessee, established by the Confederate government, to pay the amount to a Confederate agent. On his refusal, suit was brought against him in that court, and judgment recovered for the amount, under a law of the Confederate Congress, passed to sequestrate and confiscate the property of residents of the loyal States. Upon this judgment, he paid over the money. In 1867, legatees in Illinois commenced two suits in equity against him and the sureties on his bond to compel the payment of their share of the estate. These suits were consolidated, and he set up in bar the judgment of the Confederate court, and averred that the State of Tennessee was then in the hands of the rebel authorities, both civil and military; that he was threatened by them with punishment if he did not comply with the judgment; that he believed it would be dangerous to refuse compliance; that the officers had the power to seize his property, and to arrest and imprison him; and that under his fears he paid the money.

The question, whether the payment, under these circumstances, constitutes a bar to the relief prayed is closed by previous adjudications of this court. The effect of confiscation proceedings of the insurrectionary government to protect a party who during the war paid under them to Confederate agents moneys owing to citizens of loyal States, was much considered in *Williams* v. *Bruffy*, 96 U. S. 176. That was an

action for goods sold by the plaintiffs, residents of Pennsylvania, in March, 1861, to a resident of Virginia, and he having died was brought against the administrator of his estate. The defendants set up in bar the organization of the Confederate government; the existence of war between it and the United States; its enactment of a law providing for the sequestration of the effects, credits, and property of residents in the loyal States, termed alien enemies, and making it a misdemeanor for a person having or controlling any such property to refuse to give information of it to the receiver of the Confederate States, and place the same, so far as practicable, in his hands; that this law being in force, the intestate, in January, 1862, paid the amount claimed to such receiver; and also that the debt due was sequestrated by a decree of a Confederate district court in Virginia, upon the petition of the receiver, who afterwards collected it with interest. The courts in Virginia sustained the defence, but this court reversed their decision, and subsequently directed judgment for the plaintiffs. 102 U. S. 248. In the extended consideration given to the questions presented, we held that the Confederate government, formed in the face of the prohibition of the Constitution against any treaty, alliance, or confederation of one State with another, could not be regarded as having any legal existence; that whatever efficacy the enactment pleaded possessed in Virginia arose from the sanction given it by that State. If enforced as a law there it would be considered, as a statute, not of the Confederacy, but of the State, and treated accordingly. Any enactment, to which a State gives the force of law, whether it has gone through the usual stages of legislative proceedings, or been adopted in other modes of expressing the will of the State, is a statute of the State within the meaning of the acts of Congress touching our appellate jurisdiction. As a statute of Virginia, it was repugnant to the Constitution; and the decision of the courts of that State, sustaining its validity, gave us jurisdiction to review their judgment. It not only impaired the obligation of the contract of the deceased with the plaintiffs, but it undertook to relieve him from all liability to them. It also discriminated against them as citizens of a loyal State, and refused to

them the same privileges accorded to citizens of Virginia, contrary to the clause of the Constitution declaring that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

So, in this case, the Confederate enactment, under which the confiscation of the money was had, can be treated only as a statute of Tennessee, by whose sanction it was enforced as a law of that State. As such it was repugnant to the Constitution and laws of the United States. It authorized the seizure and confiscation of the property of loyal citizens upon no other ground than their loyalty, and for the purpose of raising funds to support an armed rebellion against the authority of the United States. No opinion of the Supreme Court of Tennessee is in the record, but its decision sustaining the defence was necessarily in favor of the validity of the enactment. Our jurisdiction, therefore, attaches to review its judgment.

There can be no question of the right of the plaintiff in error to recover her share of the estate which belonged to her deceased mother, one of the legatees under the will, against any defence founded upon the proceedings pleaded. Viewed from the standpoint of the Constitution, the Confederate government was nothing more than the military representative of the insurrection against the authority of the United States. The belligerent rights conceded to it in the interest of humanity, to prevent the cruelties which would have followed mutual reprisals and retaliations, were, from their nature, such only as existed during the war. Their concession led to arrangements between the contending parties to mitigate the calamities of the contest. It placed those engaged in actual hostilities on the footing of persons in legitimate warfare; but it gave no sanction to hostile legislation, and in no respect impaired the rights of loyal citizens of a loyal State. Their right and their title to property which they possessed in the insurrectionary States before the war were not thereby divested or rendered liable to forfeiture. Their visible and tangible property may have been destroyed by violence or seized by insurgents and carried away; and in such cases the occupants or parties in possession may perhaps be relieved from liability, as having

been subjected to a force too powerful to be resisted. "But," as said in *Williams* v. *Bruffy*, "debts not being tangible things subject to physical seizure and removal, the debtors cannot claim release from liability to their creditors by reason of the coerced payment of equivalent sums to an unlawful combination. The debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority." And, as we there observed, 'It would be a strange thing if the nation, after succeeding in suppressing the rebellion and re-establishing its authority over the insurrectionary district, should, by any of its tribunals, recognize as valid the demand of the rebellious organization to confiscate a debt due to a loyal citizen as a penalty for his loyalty. Such a thing would be unprecedented in the history of unsuccessful rebellions, and would rest upon no just principle."

In the consideration of transactions between citizens of the insurrectionary districts, no disposition has been manifested by this court, and none exists, to interfere with the regular administration of the law, or with the ordinary proceedings of society in their varied forms, civil or political, except when they tended to impair the just authority of the general government, or the rights of loyal citizens. Transactions which thus affect the government or the individual can never be upheld in any tribunal which recognizes the Constitution of the United States as the supreme law of the land.

Neither the unlawful proceedings of the Confederate government nor the judgment of its unauthorized tribunal exempts the executor from liability. It may, indeed, as he asserts, be a hardship upon him to compel him to pay the money again which he has once paid to others. This hardship, however, comes not from the regular administration of the law under the Constitution, but from the violence of the insurrectionary movement in which he participated. As Chief Justice Chase said: "Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their hostile acts to the rightful government are violations of law, and originate no rights which can be recognized by the

courts of the nation whose authority and existence have been alike assailed." *Shotbridge* v. *Macon*, Chase's Decisions, 136.

The executor cannot escape the consequences of the insurrection in the community of which he was a member, whatever may have been his individual feelings and wishes as to its action. Besides, also, if questions of hardship are to be considered, the plaintiff might put in her claim there.

The judgment of the Supreme Court must be reversed, and the cause remanded, with directions to affirm the decree of the Chancery Court of Monroe County, so far as concerns the claim of the plaintiff Eliza Stevens, who alone has brought the case here; and it is so ordered.

BURROW-GILES LITHOGRAPHIC COMPANY *v.* SARONY.

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

Submitted December 13th, 1883.—Decided March 17th, 1884.

Copyright.

It is within the constitutional power of Congress to confer upon the author, inventor, designer, or proprietor of a photograph the rights conferred by Rev. Stat. § 4952, so far as the photograph is a representation of original intellectual conceptions.

The object of the requirement in the act of June 18th, 1874, 18 Stat. 78, that notice of a copyright in a photograph shall be given by inscribing upon some visible portion of it the words Copyright, the date, and the name of the proprietor, is to give notice of the copyright to the public; and a notice which gives his surname and the initial letter of his given name is sufficient inscription of the name.

Whether a photograph is a mere mechanical reproduction or an original work of art is a question to be determined by proof of the facts of originality, of intellectual production, and of thought and conception on the part of the author; and when the copyright is disputed, it is important to establish those facts.

This was a suit for an infringement of a copyright in a photograph of one Oscar Wilde. The defence denied the constitutional right of Congress to confer rights of authorship on

the maker of a photograph; and also denied that the surname of the proprietor with the initial letter of his given name prefixed to it ("N. Sarony") inscribed on the photograph was a compliance with the provisions of the act of June 18th, 1874, 18 Stat. 78. The essential facts appear in the opinion of the court. The judgment below was for the plaintiff. The writ of error was sued out by the defendant.

Mr. David Calman for plaintiff in error.

Mr. Augustus T. Gurlitz for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court for the Southern District of New York.

Plaintiff is a lithographer and defendant a photographer, with large business in those lines in the city of New York.

The suit was commenced by an action at law in which Sarony was plaintiff and the lithographic company was defendant, the plaintiff charging the defendant with violating his copyright in regard to a photograph, the title of which is "Oscar Wilde No. 18." A jury being waived, the court made a finding of facts on which a judgment in favor of the plaintiff was rendered for the sum of $600 for the plates and 85,000 copies sold and exposed to sale, and $10 for copies found in his possession, as penalties under section 4965 of the Revised Statutes.

Among the findings of fact made by the court the following presents the principal question raised by the assignment of errors in the case:

"3. That the plaintiff about the month of January, 1882, under an agreement with Oscar Wilde, became and was the author, inventor, designer, and proprietor of the photograph in suit, the title of which is 'Oscar Wilde No. 18,' being the number used to designate this particular photograph and of the negative thereof; that the same is a useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same at his place of business in said city of New York, and within the United States, entirely from his own

original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit, Exhibit A, April 14th, 1882, and that the terms 'author,' 'inventor,' and 'designer,' as used in the art of photography and in the complaint, mean the person who so produced the photograph."

Other findings leave no doubt that plaintiff had taken all the steps required by the act of Congress to obtain copyright of this photograph, and section 4952 names photographs among other things for which the author, inventor, or designer may obtain copyright, which is to secure him the sole privilege of reprinting, publishing, copying and vending the same. That defendant is liable under that section and section 4965 there can be no question, if those sections are valid as they relate to photographs.

Accordingly, the two assignments of error in this court by plaintiff in error, are:

1. That the court below decided that Congress had and has the constitutional right to protect photographs and negatives thereof by copyright.

The second assignment related to the sufficiency of the words "Copyright, 1882, by N. Sarony," in the photographs, as a notice of the copyright of Napoleon Sarony under the act of Congress on that subject.

With regard to this latter question, it is enough to say, that the object of the statute is to give notice of the copyright to the public, by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained.

This notice is sufficiently given by the words "Copyright, 1882, by N. Sarony," found on each copy of the photograph. It clearly shows that a copyright is asserted, the date of which is 1882, and if the name Sarony alone was used, it would be a

sufficient designation of the author until it is shown that there is some other Sarony.

When, in addition to this, the initial letter of the christian name Napoleon is also given, the notice is complete.

The constitutional question is not free from difficulty.

The eighth section of the first article of the Constitution is the great repository of the powers of Congress, and by the eighth clause of that section Congress is authorized:

"To promote the progress of science and useful arts, by securing, for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."

The argument here is, that a photograph is not a writing nor the production of an author. Under the acts of Congress designed to give effect to this section, the persons who are to be benefited are divided into two classes, authors and inventors. The monopoly which is granted to the former is called a copyright, that given to the latter, letters patent, or, in the familiar language of the present day, *patent right.*

We have, then, copyright and patent right, and it is the first of these under which plaintiff asserts a claim for relief.

It is insisted in argument, that a photograph being a reproduction on paper of the exact features of some natural object or of some person, is not a writing of which the producer is the author.

Section 4952 of the Revised Statutes places photographs in the same class as things which may be copyrighted with "books, maps, charts, dramatic or musical compositions, engravings, cuts, prints, paintings, drawings, statues, statuary, and models or designs intended to be perfected as works of the fine arts." "According to the practice of legislation in England and America," says Judge Bouvier, 2 Law Dictionary, 363, "the copyright is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the arts of printing in any of its branches."

The first Congress of the United States, sitting immediately after the formation of the Constitution, enacted that the "author or authors of any map, chart, book or books, being a

citizen or resident of the United States, shall have the sole right and liberty of printing, reprinting, publishing and vending the same for the period of fourteen years from the recording of the title thereof in the clerk's office, as afterwards directed." 1 Stat. 124, 1.

This statute not only makes maps and charts subjects of copyright, but mentions them before books in the order of designation. The second section of an act to amend this act, approved April 29, 1802, 2 Stat. 171, enacts that from the first day of January thereafter, he who shall invent and design, engrave, etch or work, or from his own works shall cause to be designed and engraved, etched or worked, any historical or other print or prints shall have the same exclusive right for the term of fourteen years from recording the title thereof as prescribed by law.

By the first section of the act of February 3d, 1831, 4 Stat. 436, entitled an act to amend the several acts respecting copyright, musical compositions and cuts, in connection with prints and engravings, are added, and the period of protection is extended to twenty-eight years. The caption or title of this act uses the word copyright for the first time in the legislation of Congress.

The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Unless, therefore, photographs can be distinguished in the classification on this point from the maps, charts, designs, engravings, etchings, cuts, and other prints, it is difficult to see why Congress cannot make them the subject of copyright as well as the others.

These statutes certainly answer the objection that books only, or writing in the limited sense of a book and its author, are within the constitutional provision. Both these words are susceptible of a more enlarged definition than this. An author in

that sense is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." Worcester. So, also, no one would now claim that the word writing in this clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist, as photography as an art was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted.

Nor is it to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, existed in England at that time, and the contest in the English courts, finally decided by a very close vote in the House of Lords, whether the statute of 8 Anne, chap. 19, which authorized copyright for a limited time, was a restraint to that extent on the common law or not, was then recent. It had attracted much attention, as the judgment of the King's Bench, delivered by Lord Mansfield, holding it was not such a restraint, in *Miller* v. *Taylor*, 4 Burrows, 2303, decided in 1769, was overruled on appeal in the House of Lords in 1774. Ibid. 2408. In this and other cases the whole question of the exclusive right to literary and intellectual productions had been freely discussed.

We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.

But it is said that an engraving, a painting, a print, does em-

body the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution in securing its exclusive use or sale to its author, while the photograph is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture. That while the effect of light on the prepared plate may have been a discovery in the production of these pictures, and patents could properly be obtained for the combination of the chemicals, for their application to the paper or other surface, for all the machinery by which the light reflected from the object was thrown on the prepared plate, and for all the improvements in this machinery, and in the materials, the remainder of the process is merely mechanical, with no place for novelty, invention or originality. It is simply the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit.

This may be true in regard to the ordinary production of a photograph, and, further, that in such case a copyright is no protection. On the question as thus stated we decide nothing.

In regard, however, to the kindred subject of patents for invention, they cannot by law be issued to the inventor until the novelty, the utility, and the actual discovery or invention by the claimant have been established by proof before the Commissioner of Patents; and when he has secured such a patent, and undertakes to obtain redress for a violation of his right in a court of law, the question of invention, of novelty, of originality, is always open to examination. Our copyright system has no such provision for previous examination by a proper tribunal as to the originality of the book, map, or other matter offered for copyright. A deposit of two copies of the article or work with the Librarian of Congress, with the name of the author and its title page, is all that is necessary to secure a copyright. It is, therefore, much more important that when the supposed author sues for a violation of his copyright, the

existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author should be proved, than in the case of a patent right.

In the case before us we think this has been done.

The third finding of facts says, in regard to the photograph in question, that it is a "useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit."

These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell, as it has done by section 4952 of the Revised Statutes.

The question here presented is one of first impression under our Constitution, but an instructive case of the same class is that of *Nottage* v. *Jackson*, 11 Q. B. D. 627, decided in that court on appeal, August, 1883.

The first section of the act of 25 and 26 Victoria, chap. 68, authorizes the *author* of a photograph, upon making registry of it under the copyright act of 1882, to have a monopoly of its reproduction and multiplication during the life of the author.

The plaintiffs in that case described themselves as the authors of the photograph which was pirated, in the registration of it. It appeared that they had arranged with the captain of the Australian cricketers to take a photograph of the whole team in a group; and they sent one of the artists in their employ from London to some country town to do it.

The question in the case was whether the plaintiffs, who owned the establishment in London, where the photographs

were made from the negative and were sold, and who had the negative taken by one of their men, were the authors, or the man who, for their benefit, took the negative. It was held that the latter was the author, and the action failed, because plaintiffs had described themselves as authors.

Brett, M. R., said, in regard to who was the author: "The nearest I can come to, is that it is the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that."

Lord Justice Cotton said: "In my opinion, 'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph;" and Lord Justice Bowen says that photography is to be treated for the purposes of the act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.

The appeal of plaintiffs from the original judgment against them was accordingly dismissed.

These views of the nature of authorship and of originality, intellectual creation, and right to protection confirm what we have already said.

The judgment of the Circuit Court is accordingly affirmed.

HOLLISTER, Collector, *v.* ZION'S CO-OPERATIVE MERCANTILE INSTITUTION.

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

WILLIS, Collector, *v.* BELLEVILLE NAIL COMPANY.

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

Argued March 5th, 1884.—Decided March 17th, 1884.

Internal Revenue—State Bank.

An order by A in favor of B, or bearer, upon C for "five dollars in merchandise at retail," paid out by A and used as circulation, is not a note within the meaning of the act of February 8th, 1875, imposing a tax of ten per cent. on notes used for circulation and paid out by persons, firms, associations other than national banking associations, corporations, State banks, or State banking associations.

These cases were heard together. The question at issue was whether notes to bearer for a given sum payable in merchandise at retail, paid out and used as circulation, were subject to the ten per cent. tax imposed by the statute of February 8th, 1875, 18 Stat. 311. In the case from Utah it appeared that the notes in question were paid out by the defendant in error, and used as circulation. In the case from Illinois it appeared that the notes were used as circulation, but it did not appear that they were paid out by the defendant in error. The principal opinion of the court relates to the Utah case.

Mr. Solicitor-General submitted the case for Willis on his brief, and argued the case for Hollister.

Mr. J. L. Rawlins and *Mr. Shellabarger* for defendant in each case.

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

For the purposes of this case, we must assume that the Zion's Co-operative Mercantile Institution used for circulation and paid out their own obligations in the following form:

"652.] SERIES A. [5.

"SALT LAKE CITY, Oct. 6th, 1876.

"Pay David O. Calder or bearer five dollars in merchandise at retail.

"Five. Five.

"To H. B. CLAWSON, G. H. SNELL.
Sup't. Z. C. M. I."

The question presented is whether these obligations are "notes" within the meaning of the act of February 8th, 1875, c. 36, sec. 19, 18 Stat. 311, which is in these words:

"That every person, firm, association other than national banking associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them."

This act was passed as an amendment to the internal revenue laws, and is, therefore, to be construed in connection with those laws. It is also part of the system adopted by Congress to provide a currency for the country, and to restrain the circulation of any notes not issued under its own authority. *Veazie Bank* v. *Fenno*, 8 Wall. 533. The laws on that subject may consequently be resorted to in aid of interpretation.

On the 17th of July, 1862, Congress first authorized the use of stamps as money, and by the same act, ch. 196, sec. 2, 12 Stat. 592, provided that no private corporation, banking association, firm, or individual should make, issue, circulate, or pay any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received or used in lieu of lawful money. It was decided in *United States* v. *Van Auken*, 96 U. S. 366, that obligations payable in goods were not included in the prohibitions of this act, because by fair implication, only obligations for money were affected. The national banking act of February 25th, 1863, c. 58, 12 Stat. 665, was passed at the next session of Congress, which authorized the issue of "notes for circulation."

Sec. 20. These notes were to be executed in such manner as to make them "obligatory promissory notes." Then followed, at the same session, the act of March 3d, 1863, ch. 73, 12 Stat. 709, "to provide ways and means for the support of the government," which required (sec. 7) all banks, associations, corporations, and individuals issuing notes or bills for circulation as currency to pay a duty of one per cent. each half year on the average amount of their circulation over a certain sum, and a duty of five per cent. on all issues of notes or bills in sums representing any fractional part of a dollar.

At the next session, the act of June 30th, 1864, c. 173, sec. 110, 13 Stat. 277, 278, provided for a duty upon the average amount of circulation issued by any bank, association, corporation, company, or person "including as circulation all certified checks, and all notes and other obligations calculated or intended to circulate, or to be used as money." Next came the act of March 3d, 1865, c. 78, sec. 6, 13 Stat. 484, which required every national banking association, State bank, or State banking association, to pay a tax of ten per cent. on the amount of notes of any State bank or State banking association paid out by them, after July 1st, 1866. This act was extended on the 13th of July, 1866, c. 184, sec. 9 (*bis*), 14 Stat. 146, so as to include the notes of persons, as well as of State banks and State banking associations, used for circulation. The acts of 1865 and 1866 were considered and enforced in *Veazie Bank* v. *Fenno*, *supra*. After this came the act of March 26th, 1867, c. 8, sec. 2, 15 Stat. 6, which imposed upon every national banking association, State bank, banker, or association, a tax of ten per cent. on the amount of notes of any town, city, or municipal corporation paid out by them.

All these statutes were re-enacted, without any material change of phraseology, in the Revised Statutes, the act of July 17th, 1862, being now § 3583; that of February 25th, 1863, § 5182; that of June 30th, 1864, § 3408; that of July 13th, 1866, § 3412, and that of March 26th, 1867, § 3413. The effect of the act of February 8th, 1875, now under consideration, was to extend § 3412, which included only banks and banking associations, to all persons, firms, associations, and corporations.

The subject-matter of the tax, to wit, "notes used for circulation paid out by them," remains the same.

From this review of the legislation on the general subject, and the apparently studied use by Congress of words of appropriate signification whenever it was intended to cover anything else than promissory notes, in the commercial sense of that term, we are led to the conclusion that only such notes as are in law negotiable, so as to carry title in their circulation from hand to hand, are the subjects of taxation under the statute. It was, no doubt, the purpose of Congress, in imposing this tax, to provide against competition with the established national currency for circulation as money, but as it was not likely that obligations payable in anything else than money would pass beyond a limited neighborhood, no attention was given to such issues as affecting the volume of the currency, or its circulating value. This was the principle on which the case of *United States* v. *Van Auken* was decided, from which we see no reason to depart.

The judgment of the Supreme Court of the Territory is, therefore, affirmed.

Jonathan C. Willis, Collector, &c., v. *Belleville Nail Company.* In error to the Circuit Court of the United States for the Southern District of Illinois. This case presents the same general facts as that of *Hollister* v. *Zion's Co-operative Mercantile Institution*, just decided, save only that it does not appear here that the notes were paid out by the Nail Company.

Affirmed.

Syllabus.

CANAL BANK & Others *v.* HUDSON & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Submitted February 12th, 1884.—Decided March 24th, 1884.

Devise—Equity—Lien—Parties—Statutes of Mississippi—Trusts.

The plaintiffs, as creditors, whose debts were secured by a deed of trust on land in Mississippi, having brought a suit in equity to enforce the trust and to sell the land, joined as defendants, by a supplemental bill, persons in possession, who claimed to own the land under a title founded on a sale made under a judgment recovered prior to the execution of the deed of trust, but which judgment had been held by this court, in the same suit (*Bank* v. *Partee*, 99 U. S. 325), before the filing of the supplemental bill, to be void, as against the plaintiffs. The defendants in possession set up a claim to be allowed for the amount they had paid in discharge of a lien or charge on the land created by a will devising the land to the original grantor in the deed of trust, and for taxes paid, and for improvements. These claims were allowed.

A devise of land was made by a will, upon specified conditions, "under the penalty, in case of non-compliance, of loss of the above property," the conditions being to pay certain money legacies, and a life annuity in money. Then other legacies in money were given. Then there was a provision, "that all the legacies which I have given in money and not charged upon any particular fund" should not be payable for two years "after my decease," followed by a provision as to the payment by the devisee of interest on the first-named money legacies after she should come into possession of the land devised. No other money legacies were given payable by any person on conditions, and there were no other legacies in money which could answer the description of legacies in money charged on a particular fund: *Held*, That the life annuity was a charge on the land devised.

The statute of Mississippi, Revised Code of 1857, chap. 57, article 15, p. 401, which provides, that "no judgment or decree rendered in any court held within this State shall be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof," does not apply to a decree of a Court of Chancery in Mississippi, establishing the arrears due on such life annuity as a specific lien on such land by virtue of such will, in a suit in chancery brought by the life annuitant.

The will being proved and recorded in the county where the land was situated, it was not necessary, in such suit in chancery by the life annuitant, to make as defendant the trustee in a deed of trust made by the devisee under the will, provided, in a suit to enforce the deed of trust, brought by the beneficiaries under it, they were given the right to contest the validity of the lien claimed by the life annuitant and to redeem the land from such lien, when established.

Opinion of the Court.

The defendants claiming title under the devisee, and she being entitled to a distributive share of the entire estate of the life annuitant, who died during the pendency of such suit in chancery, it is not proper to abate from the allowance to the defendants of the amount paid by them to discharge the decree in such suit, any sum on account of the distributive share of such devisee in the amount so paid.

The defendants having acquired their title under a deed of trust executed after the original bill in this suit was filed, and before the grantor in such deed was served with process in this suit, it was held that they, being in fact purchasers in good faith, were not chargeable with notice of the intention of the plaintiffs to bring this suit, within the provisions of the Revised Code of Mississippi, of 1871, chap. 17, article 4, § 1557, in regard to allowances for improvements on land to purchasers in good faith, until they were served with process on the supplemental bill.

The meaning of the words "good faith" in the statute, and as applicable to this case, defined.

The amount allowed by the Circuit Court, for improvements, upheld as proper, under the special circumstances.

Mr. William L. Nugent, *Mr. Assistant Attorney-General Maury* and *Mr. W. Hallett Phillips* for appellants.

Mr. Wiley P. Harris and *Mr. Frank Johnston* for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

The litigation involved in this appeal is a continuation of that which was before this court in *Bank* v. *Partee*, 99 U. S. 325. The plaintiffs in the suit were appellants then and are appellants now. The original bill was filed April 1st, 1873, in the Circuit Court of the United States for the Southern District of Mississippi, by the appellants, as creditors of Sarah D. Partee and William B. Partee, her husband, to secure to them the benefit of a deed of trust executed by the debtors to one Bowman, covering lands in Yazoo County, Mississippi, the object of the deed being to provide for the payment of debts, among which were those due to the appellants. The Circuit Court excluded the appellants from the benefit of the deed of trust, because of their failure to notify in writing within a time limited by the deed their acceptance of its terms, and that court also held that the title to certain of the land covered by the deed had failed in the trustee because of a para-

mount title thereto perfected under a judgment recovered against the debtors by one Stewart before the execution of the deed of trust. This court held that, notwithstanding the provision in regard to an acceptance in writing of the terms of the deed, the appellants were entitled to its full benefits, and that the judgment of Stewart was a nullity as respected Mrs. Partee, who was the debtor to Stewart, and was the owner of the lands covered by the deed of trust. This court reversed the decree below and remanded the cause for further proceedings, in April, 1879.

Stewart and James D. Partee, a son of the debtors, had become the purchasers of the land sold under the Stewart judgment. In May, 1879, after the filing in the Circuit Court of the mandate from this court, the appellants filed a supplemental bill. One acre of the land bought by Stewart and a part of the land bought by James D. Partee are involved in that bill and in the present appeal. The original deed of trust was made November 19th, 1866. The deed of the sheriff to James D. Partee, on the sale under the Stewart judgment, was made January 4th, 1869, the judgment having been recovered June 6th, 1866. The land so conveyed to James D. Partee was in quantity equal to $5\frac{1}{8}$ sections, and was all in township 9 of range 4 west in Yazoo County, embracing land in 7 different sections. The land constituted what is known in this controversy as 2 plantations called "No Mistake," and "Tyrone." In February, 1870, James D. Partee and his wife conveyed these plantations to one Barksdale, in trust to secure an indebtedness of $41,500 to the firm of Nelson, Lamphier & Co. Under this deed of trust the plantations were sold and conveyed by the trustee to one Nelson, a member of that firm, in June, 1872. On April 15th, 1873, Nelson conveyed the plantations to one Short, in trust to secure an indebtedness of $35,000, embracing 18 promissory notes, to said firm. Two of these notes came to be owned by Joseph P. Benson and two by Charles C. Ewing, as administrator of S. S. Ewing, and they, with holders of others of the notes, brought a suit in equity, in August, 1876, in the Chancery Court of Yazoo County to foreclose said trust deed. A decree of sale was made in January, 1877, and the said Benson and Ewing

and one Robert G. Hudson purchased the lands at the sale, in February, 1877. On July 3d, 1877, Benson conveyed to Ewing and Hudson all his interest in the plantations. They are the appellees in this appeal.

The plantations were originally the property of one James Dick, who was the uncle of Mrs. Sarah D. Partee. They were known together by the name of "No Mistake." By that name they were devised by Dick, by will, to Mrs. Partee. The will was proved in March, 1849. Mrs. Partee's parents were Christopher Todd and Sarah Todd. The will contained these provisions:

"To my niece, Sarah D. Todd, wife of William B. Partee, of New Orleans, and to her heirs, I give and bequeath: 1st. My plantation, commonly called 'No Mistake' plantation, near Satartia, Yazoo County, State of Mississippi, with all the negroes, horses, mules, cattle, buildings, and farming utensils that may be found on said estate at the time of my death and belonging to me. 2d. I give and bequeath to the said Sarah D. Todd and to her heirs about six thousand acres of land, situated in this State, and entered by E. Lawrence and Brashear in my name. This bequest is made to Sarah D. Todd, wife of William B. Partee, upon the following conditions under the penalty, in case of non-compliance, of loss of the above property: The first of said conditions is that the said Sarah D. Todd, wife of the said William B. Partee, shall within the next ensuing month after my death pay to Miss Elizabeth Calhoun, of Maury County, State of Tennessee, and to Nathaniel Calhoun, and to Christopher Calhoun, his brother, children of Margaret Todd, wife of Charles Calhoun, and residing in Maury County, Tennessee, the sum to each of twelve thousand dollars; that is to say, to Miss Elizabeth Calhoun the sum of twelve thousand dollars, to Nathaniel Calhoun the sum of twelve thousand dollars, and to Christopher Calhoun twelve thousand dollars, and in the case of the death of either or any of them without issue, then the sum or sums coming to said deceased parties or their heirs to be given to the survivor or survivors in equal proportions. The second of said conditions is that the said Sarah D. Todd and her heirs shall pay to Christopher Todd and to Sarah, his wife, my sister, one thousand dollars per annum during the life of either, payable as they or the survivor may require it."

The will then gives various lands and legacies in money to various persons named, and then proceeds:

"And my will is as follows: That all the legacies which I have given in money and not charged upon any particular fund is not demandable from any person whomsoever for the term of two years after my decease. . . . And should any legatee endeavor by action of any kind or nature, before any court in any State, to break, injure or destroy any of my dispositions, the bequest or legacy to such person or persons is annulled or rescinded by me. The legacies of $12,000 each to Elizabeth Calhoun, Nathaniel Calhoun and Christopher Calhoun may be paid by Sarah D. Todd, wife of William B. Partee, in the following manner, viz.: To Elizabeth Calhoun on the day of her marriage, and to Nathaniel and Christopher when they become of age, upon condition that the said Sarah D. Todd pays to the said legatees annually interest at seven per cent. upon their respective legacies, after she comes in possession of 'No Mistake' plantation."

Mrs. Todd having died in 1853, and Christopher Todd having been paid his annuity up to January 1st, 1861, he filed a bill in chancery, in November, 1867, in the Chancery Court of Yazoo County, against William B. Partee and his wife, claiming that such annuity was a charge on the land so devised to Mrs. Partee, and praying for a sale of the land to pay the arrears due on the annuity. Christopher Todd having died during the pendency of the suit, it was revived in the name of Edward Drenning, his special administrator, and the court, on June 8th, 1868, made a decree that there was due to Todd at his death, as an annuitant under said will, $7,680.04, that that sum was a lien on said "No Mistake" plantation, against all liens created thereon since the death of Dick, and that said land be sold to pay that sum. It was sold, by the same description as in said conveyance to James D. Partee, to said Hudson and Ewing, on April 15th, 1878, they being then the owners of the decree in the suit, and they received a deed of that date therefor. In 1871 James D. Partee, as owner of the land, had paid a part of the Drenning decree. In February, 1877, Drenning was paid the balance by Robert G. Hudson and assigned the decree

to him, under an order of the Chancery Court, the assignment being for the benefit of Benson, Hudson and Ewing. Afterwards Hudson and Ewing acquired all the interest of Benson therein.

Hudson and Benson, and Charles C. Ewing, individually and as administrator of S. S. Ewing, and Drenning, as executor of Stewart and as administrator of Todd, were made parties to the supplemental bill in this suit. That bill attacks the validity of the Drenning decree and claims an account of the rents and profits of the land. The parties defendant having put in answers, to which there were replications, the court ordered that the controversy as to Hudson and Ewing and Drenning proceed separately.

On the 29th of November, 1880, the court made a decree setting aside the deeds under which Hudson, Benson, and Ewing obtained title, and decreeing that the deed of April 15th, 1878, to Hudson and Ewing, on the sale under the Drenning decree, was subject to the right of redemption of the appellants as junior encumbrancers, under the original trust deed of November 19th, 1866; that Hudson and Ewing were entitled to be reimbursed what they had paid to Drenning in purchasing his decree, with interest, that amount being $9,391.23, paid February 5th, 1877, and being a paramount lien on the lands in controversy; that Hudson and Ewing were entitled to be reimbursed what they had paid for taxes, and the value of all improvements of a permanent character put on the lands by them, and repairs, but were responsible for a reasonable sum annually for the use and occupation of the lands up to January 1st, 1881; that for the balance due them on an accounting they should have a lien on the lands superior to that of the appellants; that the balance, if any, due by them should be deducted from the amount due them on account of the Todd legacy; that the appellants were entitled to foreclose their trust deed and sell the land subject to such prior claim of Hudson and Ewing; that an account be taken by commissioners as to the amount due to Hudson and Ewing on the Todd legacy decree, and for taxes paid, and as to the fair rental value of the lands during the time they had occupied

and cultivated or leased the same, and interest on such sums from the time they would usually become due and payable, and of the improvements and repairs put on the lands by Hudson and Ewing, "and interest on the value of such portions thereof, from the time of payment or making said repairs and improvements, as may have directly contributed to the enhanced rental value of said lands;" that, in estimating the fair rental value of the lands, the commissioners should inquire what they would have brought in money, if leased together or separately to a solvent lessee or lessees, on the usual or customary terms of leasing such lands as entire plantations or an entire plantation, without reference to any system of underletting pursued by Hudson and Ewing, with as well as without the improvements claimed for by them; and that for all improvements and repairs which directly contributed to enhance the rental value of the lands, the commissioners should allow the original fair cash value and interest from the date at which they were made or furnished, and for all other improvements which enhanced the permanent value of the lands, their actual value at the time of taking the account.

On the 24th of November, 1881, the commissioners made their report. It is set forth in the record, but the account annexed to it and the testimony taken by the commissioners are not set forth. The result was, that they found due to the appellants by the appellees $8,865.99, and to the appellees by the appellants $37,697.92, and that the balance due to the appellees was $28,831.93. The appellants excepted to the account and the report by 19 exceptions. Thereafter the exceptions were heard by the court, and it filed an opinion, which states that the account is not in accordance with the directions of the court or the equities between the parties. It then proceeds: "I have examined and re-examined the account filed by the defendants, and have maturely considered the testimony on both sides, and have arrived at conclusions which I am satisfied meet the equities on both sides as nearly as can reasonably be reached." It then states conclusions of fact on which the rent for 1877 is fixed at $1,000. It then sets forth certain improvements which the defendants made in 1878, and states that they charge there-

for $3,199.37, claiming that these improvements were necessary and enhanced the rental value of the premises; but it says that the improvements "ought not to have been considered as constituting part of the rents," but must be considered "as adding to the permanent value of the lands." It then says: "I have closely examined the account, and, making a liberal allowance for the cash value of the same on the 1st of January, 1881, when the same were surrendered to the receiver, the sum of $2,053.50 is all that should be allowed," with interest from January 1st, 1881. The opinion then sets forth other improvements which the defendants made in 1878, and states that it was claimed they "were necessary and enhanced the rental value of the place, and should be estimated at their original cost and interest;" but it says that the value of those improvements consisted "mainly in their permanency, which should be estimated at their cost value when the property was surrendered, but, as it did contribute to some extent to the rental value for that and succeeding years" during the defendants' occupancy, $4,897.35 was allowed, "at a fair estimate" under that rule, as the value of those improvements, being "more than the permanent value and less than the cost." The rent for 1878 was fixed at $1,500. Deducting from the $4,897.35 the rent for the two years, $2,500, left $2,397.35, with interest from January 1st, 1879. The opinion then states what improvements the defendants made in 1879, that they were "of the same character with those erected in 1878," and that they amounted, "at an estimate made under the rule above stated," to $2,997.68, "from which take the sum of $2,500, as estimated, as a reasonable rent for that year," which leaves to be allowed $497.68, with interest from January 1st, 1880. The opinion then states that the repairs made in 1880 were small, but there were several items charged for improvements made in 1878, 1879 and 1880, not before stated, and which could not be well stated, except as a whole. It then considers at length sundry items, and allows some and disallows others and reduces others, and allows for the items, "all taken together, including improvements made in 1880," $3,655.16, and deducts from that $3,000, as rent for 1880, leaving $655.16, with interest from January 1st, 1881. On

the rendering of that opinion, it was ordered, by consent of parties, that the opinion and the schedule attached to it (which was a statement of the items and amounts allowed in the opinion) should "be filed and treated as part of the record in the cause," and that the court might "by order, without reference to a commissioner, ascertain and fix the several amounts, as well as the aggregate sum due to the defendants Hudson and Ewing," under the decree of November 29th, 1880.

Thereupon, on the 18th of February, 1882, the court made a final decree. That decree states that the case was heard on the exceptions to the report of the commissioners; that the court, being of opinion that said report does not conform to the decree of November 29th, 1880, orders "that said report and the account therewith presented be set aside," and, "after argument of counsel, proceeding to the decision of the several questions of law and fact involved in the cause," adjudges that there is "due to the defendants Hudson and Ewing, under the judgment and findings of the court on said exceptions, on account of the Todd legacy decree," $12,365.77, and on account of the taxes paid on and by said defendants on the lands, $1,567.44, and that, "after ascertaining and crediting the amount due for reasonable rents" of the lands, "there is a balance due to the said defendants, on account of improvements, repairs and betterments," of $6,309.60, making a total sum due them of $20,242.83, with interest from that date. The decree then finds the amounts due to the several plaintiffs on their notes, being an aggregate of $47,136.06, with interest from that date, and adjudges that the plaintiffs are entitled to redeem the lands, and that on their paying within sixty days, to the defendants, the $20,242.83, with interest, they should be substituted to their rights as senior encumbrancers on the lands, and might enforce payment thereof by a sale of the lands; that, if the plaintiffs should not pay that sum, then the lien of the defendants and that of the plaintiffs should be enforced, and the lands should be sold, and out of the proceeds the amount so due to the defendants should first be paid. From this decree the plaintiffs have appealed.

The only questions presented by this appeal are as to the

allowance in respect of the Drenning decree, and as to the allowances for improvements and repairs and the charges for rent.

It is contended by the appellants that, under the will of Dick, the annuity legacy to Todd and his wife was not a charge on the plantation devised to Mrs. Partee, but was only a personal claim against her, to be enforced by proper proceedings for the forfeiture of the land, on a breach of the conditions specified in the will. The argument made is, that the penalty imposed by the will, of loss of the property in case of non-compliance with the conditions, shows that the testator did not intend to create a lien. But we are of opinion, that, taking the whole will together, a lien was created. The reference to the prior legacies given in money and not charged on any particular fund, of which there are many, shows that there must have been some prior legacies in money which were charged on a particular fund, and the fact that no other legacies in money but those which Mrs. Partee is to pay, as conditions on which the plantation is given to her, are given payable by any person as conditions on which property is given to such person, and that there are no other legacies in money which can answer the description of legacies in money "charged" on a "particular fund," all combine to furnish persuasive evidence that the legacies which Mrs. Partee was to pay were a lien on the plantation. The intention of the testator seems to be clear, and the plantation is not inappropriately called a "fund." Nor can the lien or charge be limited to the 6,000 acres of land. The conditions attach to the entire bequest, consisting of two items. They apply to the legacies to the three Calhoun children and to the annuity legacy to Christopher Todd and his wife; and the subsequent provision as to the times when Mrs. Partee may pay the several legacies to the Calhoun children, on condition that she pays them annually interest on such legacies after she comes in possession of the plantation, shows that that plantation is given to her on condition that she pays those legacies, and, if so, such annuity legacy must be in the same category. *Birdsall* v. *Hewlett*, 1 Paige, 32; *Harris* v. *Fly*, 7 id. 421; *Loder* v. *Hatfield*, 71 N. Y. 92, 97.

It is further contended that the Drenning decree, which was made June 8th, 1868, was barred, as to its lien, by the Mississippi statute of limitations, when it was purchased by Hudson for himself and Ewing and Benson, in April, 1877. The statute relied on is article 15 of chapter 57 of the Revised Code of Mississippi, of 1857, page 401, in these words:

"No judgment or decree rendered in any court held within this State shall be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof."

It is plain, we think, that this statute applied only to a judgment or decree rendered *in personam* against a defendant, for the recovery of so much money, and which became a general lien on the property of the defendant in the judgment or decree by virtue of another statutory provision, such as article 261 of chapter 61 of the same Code, page 524. Article 15 of chapter 57 has no reference to such a decree as the Drenning decree here, one establishing and enforcing a specific lien on devised property, created by a will, the decree being made in a suit in chancery brought for that especial purpose. The decree adjudges that the amount found to be due was made by the will of Dick a lien and charge on the plantation devised to Mrs. Partee, and decrees that the plantation stand charged with the payment of that amount, against all liens created thereon by the defendants in the suit since the death of Dick. The decree adjudges, it is true, that the defendants pay to the plaintiff the sum so found due, within thirty days, and that, in default thereof, enough of the plantation be sold to pay such sum. But no execution is awarded against the defendants as on a personal judgment, nor is there any provision for a decree for a deficiency. It was held in Mississippi, in *Cobb* v. *Duke*, 36 Miss. 60, in 1858, that a court of equity had no jurisdiction to make a decree *in personam*, for a deficiency on a bill to enforce a vendor's lien on land, or on a bill to foreclose a mortgage. The same principle applies to the lien in question here. The decree did not create a lien, but merely gave effect to the lien and charge which the will created. In a decree *in personam* for the recovery of money, the statute provided for a lien on

all the property of the defendant in the county; but this decree affected only the specific property in question, and, as to that, related back and overreached all liens on it since the death of Dick, while a judgment *in personam* became a lien only from the time it was rendered.

The bill filed by Todd to enforce his lien made defendants only William B. Partee and his wife. Bowman, the trustee in the appellants' trust deed, was not made a party. But, the will of Dick was proved and recorded in Yazoo County, and the appellants, claiming under Mrs. Partee, by a subsequent deed of trust, took the land subject to the lien and charge created by the will. The appellants aver, in their original bill, that a letter was written by Bowman, the trustee, two days after the deed of trust was made, to the appellants' attorneys in New Orleans, in a copy of which letter annexed to the bill it is stated, as a result of an examination of the records of Yazoo County, with the view of ascertaining what liens or encumbrances there were on the property of Mrs. Partee, that, under the will of Dick, from whom the property was derived, there was an annuity of $1,000 to be paid to one Todd during his lifetime. The only effect of the omission to make Bowman a party to the suit, was to leave the title of a purchaser under the decree in the suit subject to the right of the appellants, as junior encumbrancers, to contest the validity of the prior lien, and to redeem the property. This right has been accorded to them.

The appellants also claim, that there should be an abatement of a portion of the amount paid by the appellees to Drenning, to the extent of Mrs. Partee's distributive share in that amount, as a part of the estate of Christopher Todd, her father. In February, 1877, when Drenning received payment of the balance due on the decree, he was the legal owner of the decree. He had not then been made a party to this suit. Mrs. Partee had no claim in respect of any money due on the decree, other than such claim as she had to her proper share of the entire estate of her father, in due course of its administration. When the decree was purchased by the appellees, no claim of Mrs. Partee was attached to or impressed upon it, or the

moneys due or paid on it. She had no title to any specific part of the uncollected legacy, and could not interfere with its collection or administration. When her share in her father's estate should ultimately come to be ascertained, she might, if still owning the plantation and interested to free it from the charge of the legacy, set off against the decree the amount coming to her from the general estate. But, in the absence of any right, on her part, to any specific share of the legacy, there was nothing to affect or diminish or extinguish or merge the amount of the charge on the plantation. The Todd estate must be left to its due course of administration, and cannot be interfered with or administered in this suit.

The only material questions remaining are those connected with the allowances for improvements. In a decree made by the court below, in this suit, on November 20th, 1879, on a hearing on exceptions to the answer of Hudson and Ewing, it was adjudged that they, claiming title to a part of the property in controversy under a trust deed executed by Nelson, a defendant in the original bill herein, on the 15th of April, 1873, "prior to any process, publication, or appearance in this cause by said Nelson, are not estopped as to said property by the lis pendens, or the proceedings heretofore had in the cause, from answering the original bill," but "are proper parties defendant to the said original bill, as having a substantial interest in the original controversy." The title of Nelson, as a support to any title of the appellees to the land, was destroyed by the decision as to the Stewart judgment. The original bill herein was filed April 1st, 1873. Nelson was made a defendant to it. Process of subpœna was issued against him July 8th, 1873, but was not served. On November 10th, 1873, on an affidavit that Nelson resided in Tennessee, an order of publication against him was made. He appeared on the 30th of January, 1874, and answered on the 11th of February, 1874. Meantime, on the 15th of April, 1873, Nelson made to Short the deed of trust before mentioned, on a sale under which the appellees purchased the land, in February, 1877. The supplemental bill was filed May 27th, 1879, after the appellees had acquired all their titles. They were made parties to it and were served with process, Hudson

June 30th, 1879, and Ewing July 4th, 1879. They admit, in their answer, that, at the sale under the Drenning decree, on the 15th of April, 1878, one of the attorneys for the appellants appeared and asserted some claim in behalf of the appellants, in the hearing of Hudson. There is nothing more in the record on that subject, and just what the assertion of claim was or to what extent does not appear. Their answer alleges that "they purchased the property in good faith, and went into the possession of the same, believing they had a good title to the same and could hold it against the claims of all the world, and without any knowledge whatever of the claim of complainants or of this suit, and that they paid, including the Todd decree, the full value of all the property purchased by them in its then bad and dilapidated condition, and have since enhanced the value of the same very greatly by putting upon it permanent and valuable and not ornamental improvements;" and "that they are entitled to pay, in case they should be adjudged not to have the title to said property, for the valuable and permanent and not ornamental improvements they have put on said property, up to the time they were served with notice in this case, or, if not entitled to pay for all said improvements up to that date, they are for all said improvements up to the time" of said notification on April 15th, 1878. The answer also insists on the validity of the title of the appellees. By consent of parties and the order of the court made in February, 1880, they were allowed to remain in possession of the land for the year 1880, on giving a bond to account for the fair rental value for that year, if the court should finally decide that they should account for said rent. As has been seen, they were allowed for some improvements to the end of 1880. They entered into possession of the land January 1st, 1877, and surrendered possession to the receiver in this suit January 1st, 1881.

It is manifest that the claim for allowances for improvements, set up in the answer, is intended to be based on the provisions of the statute of Mississippi, Revised Code of 1871, chap. 17, article 4, § 1557, which enacts that "it shall be lawful, in all cases, for the defendant in ejectment, or in an action for mesne profits, to plead the value of all permanent, valuable and not

ornamental improvements, made by the defendant on the land, or by any one under whom he claims, before notice of the intention of the plaintiff to bring the action, giving notice, with his plea, of the character of the improvements, and the value thereof; and, if such improvements shall exceed the value of the mesne profits and damages, the jury shall find the actual cash value of such improvements, the value of the mesne profits and damages, and also the actual cash value of the land, without the improvements, and the defendant shall have a lien upon the land for the difference between the value of the mesne profits and the value of the improvements so found; . . . but no defendant shall be entitled to such compensation for improvements, unless he shall claim the premises under some deed or contract of purchase, made or acquired in good faith."

The Supreme Court of Mississippi interpreted this statute, in 1876, in *Cole* v. *Johnson*, 53 Miss. 94, in a suit in chancery brought by a person who had bought lands at a void probate sale, and paid for them and put valuable improvements on them, to restrain an ejectment suit against him, and to have an account taken of the rents and profits, and of the improvements and purchase money, the latter having been applied to pay the debts of the estate, and to set them off against each other, and charge on the land the balance due the plaintiff. Such relief was granted. It was urged for the defendants that, as the defects in the probate proceedings were patent on the record, by inspection, the plaintiff was not a purchaser in good faith, and did not pay his money in good faith. The court held that it was sufficient if the money was "genuinely paid," without any knowledge or suspicion of fraud, the item "good faith" being used in contradistinction to "bad faith;" and that the expressions as to "good faith" in § 1557 did not import that the claim to compensation for improvements could not be maintained if the purchaser could, by any possible research, have discovered the invalidity of his title, and meant nothing more than an honest belief on the part of the purchaser that he was the true owner. The court adopted the rule stated in *Green* v. *Biddle*, 8 Wheat. 1, 79, that a "bonæ fidei possessor" of land is one "who not only supposes himself to be

the true proprietor of land, but who is ignorant that his title is contested by some other person claiming a better right to it;" and that, after such occupant has notice of such claim, he becomes "a malæ fidei possessor." It further said: "Our view is, that, in order to deprive the occupant of land under color of title, of the value of permanent improvements erected thereon, there must be brought home to him either knowledge of an outstanding paramount title, or some circumstance from which the court or jury may fairly infer that he had cause to suspect the invalidity of his own title, but that this cannot be inferred merely because it could have been demonstrated by the records of the county." Speaking of "*crassa negligentia*," it added: "Where the purchase is made under circumstances which would warrant the imputation of such negligence to the purchaser, as if, for instance, a deed was received, without inquiry, from a mere stranger to the land, who had neither possession thereof nor any actual or apparent claim thereon, the claim of being a *bona fide* purchaser might well be rejected. But we do not think that such imputation can ever be predicated of a judicial sale because of defects in the record, where the land has been bought by a person disconnected with the proceedings, and with no actual notice or suspicion of the irregularities contained in them."

The Circuit Court, it is clear, found, in this case, that the appellees acquired their alleged title in good faith, under the rule thus established. The evidence is not in the record, and must be regarded as sufficient to support such finding. It is shown that the appellees purchased under a tax title in January, 1876, went into possession January 1st, 1877, purchased the Drenning decree February 5th, 1877, purchased at the sale under the deed of trust from Nelson to Short February 19th, 1877, and purchased at the sale under the Drenning decree April 15th, 1878. We do not think that the notice, whatever it was, given at the sale of April 15th, 1878, was sufficient to charge the appellees with *mala fides*, and that there was nothing amounting to the "notice" specified in the statute, until the process under the supplemental bill was served on the appellees.

The only questionable period left open is that which re-

mained until the close of 1880. The testimony on which the Circuit Court acted is not before us. It is plain, from the opinion of the court, that, from the testimony it had, it found that the improvements on the plantation, which was a cotton plantation, and the facilities for preparing the cotton crop for market, were dilapidated when the appellees took possession; that the improvements made, and the clearing of more land, in 1878, added 50 per cent. to the rent for that year; and that there was thus constituted a permanent fund for increased rent for after years, so that, with the additional improvements made in 1879, the rent for 1879 was equal to the rent for both of the two preceding years, and the rent for 1880 was increased $500 over that for 1879. The year 1879 must be considered as a whole from January to January. It is impossible to tell, as the proof is not before us, how much was allowed for improvements made in 1880, as the fencing allowed for 1880 is stated in the opinion to have been mostly made in 1878 and 1879, and it states that there are several items of charge for improvements made in 1878 and 1879 and less in 1880, which cannot well be stated otherwise than as a whole. As we have not the testimony which the Circuit Court had, and it appears to have been carefully and minutely considered by that court, and the appellees appear to have remained in possession during 1880 by consent and under the sanction of an order of the court, we cannot arrive at the conclusion, on this appeal, that the amount allowed ought to be reduced. It is not to be forgotten that the appellants were seeking merely a sale of the land by a resort to a court of equity, and that, while they had the benefit of some of the improvements in increasing rents, they had the benefit of the material and permanent ones in the increased value of the lands for the purpose of sale, including the increased area of cultivated land. In such a case there is no inflexible rule that the allowance for permanent improvements shall not exceed the rental value during the occupancy.

The present case has an analogy to that of a purchaser at a foreclosure sale, who makes valuable improvements in the belief that he has acquired an absolute title. He is entitled to be paid for them if the premises are redeemed. 2 Jones on Mort-

gages, § 428. Where a party lawfully in possession under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements. 2 Story Eq. Jur. § 1237, note 1; *Bright* v. *Boyd*, 1 Story, 478, and 2 id. 605; *Putnam* v. *Ritchie*, 6 Paige, 390; *Williams* v. *Gibbes*, 20 How. 535.

All the questions raised by the counsel for the appellants have been examined and considered, but we have not thought it necessary to comment on others than those above reviewed. Upon the whole case we are of opinion that

The decree of the Circuit Court must be affirmed.

DIXON COUNTY *v.* FIELD.

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

Submitted January 2d, 1884.—Decided March 24th, 1884.

Estoppel—Legislative Authority—Municipal Corporations—Nebraska.

There must be authority of law, by statute, for every issue of bonds of a municipal corporation as a gift to a railroad or other work of internal improvement.

When the Constitution or a statute of a State requires as essential to the validity of municipal bonds that they shall be registered in a State registry and receive by indorsement a certificate of one or more State officers showing that they are issued in pursuance of law, and the Constitution or law gives no conclusive effect to such registration or to such certificate, the municipality is not concluded by the certificate from denying the facts certified to.

A recital in a municipal bond of facts which the corporate officers had authority by law to determine and to certify estops the corporation from denying those facts; but a recital there of facts which the corporate officers had no authority to determine, or a recital of matters of law does not estop the corporation.

Section 2, Article XII. of the Constitution of Nebraska, which took effect November 1st, 1875, conferred no power upon a county to add to its authorized or existing indebtedness, without express legislative authority; but it limited the power of the legislature in that respect by fixing the terms and conditions on which alone it was at liberty to authorize the creation of municipal indebtedness.

Argument for Defendant in Error.

This was a suit to recover the amount of overdue interest coupons on bonds issued by the plaintiff in error in aid of a railroad. The defence was that the bonds were issued in violation of provisions of the Constitution of Nebraska which are set forth in the opinion of the court, and without legislative authority. The holder of the bonds contended that the municipality was estopped from setting up this defence by reason of certain recitals in the bonds, and of certain certificates of State officers on the back of them, which are also referred to in the opinion. The judgment below was against the county. This writ of error was sued out to review that judgment.

Mr. A. J. Poppleton and *Mr. J. M. Thurston* for plaintiff in error.

Mr. W. L. Joy and *Mr. George G. Wright* for defendant in error, to the point that the construction of the laws in question belongs to the domain of general jurisprudence, and that this court is not bound by the judgment of the State court, cited *Township of Pine Grove* v. *Talcott*, 19 Wall. 666; *Olcott* v. *Supervisors*, 16 Wall. 678; *Foote* v. *Johnson County*, 5 Dillon, 281; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Butz* v. *Muscatine*, 8 Wall. 575. To the point that the county was estopped by the recitals, they cited *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Bissell* v. *Jeffersonville*, 24 How. 287; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *Knox County* v. *Aspinwall*, 21 How. 539; *Meyer* v. *Muscatine*, 1 Wall. 384; *Mercer County* v. *Hackett*, Ib. 83; *Moran* v. *Miami County*, 2 Black, 722; *Town of Venice* v. *Murdock*, 92 U. S. 494; *Converse* v. *City of Fort Scott*, Ib. 503; *Commissioners of Douglass County* v. *Bolles*, 94 Ib. 104; *Commissioners of Johnson County* v. *January*, Ib. 202. To the point that, even if State courts had held the bonds invalid, the rights of a non-resident *bona fide* holder in a federal tribunal would not be affected thereby, they cited *Pana* v. *Bowler*, 107 U. S. 528. To the point that the plaintiffs could recover, even if the company had not complied with its contract, they

cited *Kirkbridge* v. *Lafayette County*, 108 U. S. 208; *American Life Insurance Company* v. *Bruce*, 105 U. S. 328; *Mayor* v. *Kelley*, 2 Fed. Reporter, 468. To the point that the certificates protected the holders of bonds, although issued in excess of the percentage, they cited *Humboldt* v. *Long*, 92 U. S. 642; *Wilson* v. *Salamanca*, 99 U. S. 494; *Hawley* v. *Fairbanks*, 108 U. S. 544; *County of Kankakee* v. *Ætna Life Insurance Company*, 106 U. S. 668; *Ottawa* v. *National Bank*, 105 U. S. 342; *Third National Bank of Syracuse* v. *Seneca Falls*, 15 Fed. Rep. 783.

Mr. Justice Matthews delivered the opinion of the court.

This writ of error brings into review a judgment in favor of the defendant in error, for the amount of certain overdue coupons upon municipal bonds, purporting to be obligations of the plaintiff in error.

The facts upon which the judgment is based are as follows:

1. The defendant in error is the innocent holder for value of the coupons sued on, and of the bonds to which they belong. These bonds are part of a series, eighty-seven in number, being for $1,000 each, payable to the Covington, Columbus and Black Hills Railroad Company or bearer, in New York, on January 1st, 1896, with interest from January 1st, 1876, until paid, at the rate of ten per cent. per annum, payable semi-annually. They are executed in proper form under the seal of the county, and were issued as a donation to the railroad company in aid of the construction of its road.

2. Each bond contained the recital that it was "issued under and in pursuance of an order of the county commissioners of the County of Dixon, in the State of Nebraska, and authorized by an election held in said county on the 27th day of December, 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the Constitution of said State, art. 12, adopted October, A. D. 1875.

3. On the back of each bond was the certificate of the county clerk reciting that this issue of bonds was the only one ever made by the county; that "the question of issuing said bonds was submitted to the people of the county by a resolution of the

county commissioners, dated November 24th, 1875, in the following form: Shall Dixon County issue to the C. C. & Black Hills Railroad Company, $87,000 ten per cent. twenty years' bonds, payable both principal and interest in New York city, and shall a tax be annually levied, in addition to the usual taxes, sufficient to pay the interest as it becomes due, and accumulate a sinking fund to pay the principal at maturity?" and further, "this question was decided by a vote taken December 27th, 1875, of 462 votes for and 120 against." This certificate is witnessed by the hand and official seal of the clerk, of date May 16th, 1876.

4. There was also indorsed on each bond the certificate of the secretary and auditor of the State of Nebraska, dated October 2d, 1876, that "it was issued pursuant to law," and the further certificate of the auditor of same date "that upon the basis of data filed in my office, it appears that the attached bond has been regularly and legally issued by the county of Dixon to C. C. & B. H. Railroad Company, and said bond, upon presentation thereof by said company, has this day been duly registered in my office in accordance with the provisions of an act entitled 'An Act to authorize the registration, collection and redemption of county bonds, approved February 25th, 1875.'"

5. That the assessed valuation of all the taxable property of the county of Dixon, the plaintiff in error, at the last previous assessment and valuation, made in the spring of 1875, and which continued in force until the spring of 1876, and which was shown and appeared from the books of public record of said county, was five hundred and eighty-seven thousand three hundred and thirty-one ($587,331) dollars and no more; and of which the amount of the bonds, issued in pursuance of said election, was more than ten per cent., but less than fifteen per cent.

The statute referred to on the face of the bonds, chapter 35 of the General Statutes of Nebraska, authorizes any county or city in the State "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 cent. of the assessed valuation of all taxable property in said

county or city," with an additional proviso requiring a previous submission of the question of issuing such bonds to a vote of the legal voters of the county or city, in the manner provided by law, for submitting to the people of a county the question of borrowing money. It was also provided that the proposition of the question should be accompanied by a provision to levy a tax annually for the payment of the interest on the bonds as it should become due, stating also the rate of interest and the time when the principal and interest should be made payable. Upon a majority of the votes cast being in favor of the proposition submitted, and a record thereof being made, and public notice given for a specific period of its adoption, it was required that the bonds should be issued. This act took effect February 15th, 1869. On February 17th, 1875, it was amended so as to require two-thirds of the votes cast at such an election, instead of a mere majority, to be in favor of the proposition, so as to authorize the issue of the bonds.

The Constitution of Nebraska took effect November 1st, 1875. Section 2, art. XII. of that Constitution is as follows:

"No city, county, town, precinct, municipality or other subdivision of the State, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law: *Provided*, That such donations of a county, with the donations of such subdivisions, in the aggregate, shall not exceed ten per cent. of the assessed valuation of such county: *Provided further*, That any city or county may, by a two-thirds vote, increase such indebtedness five per cent. in addition to such ten per cent., and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the Secretary and Auditor of the State, showing that the same is issued pursuant to law."

The defence insisted upon at the trial in the Circuit Court was that the bonds were issued without authority of law and were void; and being there overruled, it is now relied on as error in the judgment, for which it should be reversed.

In support of the judgment, and of the validity of the bonds

on which it rests, it is said, that by the terms of the statute of February 15th, 1869, as amended by the act of February 17th, 1875, authority was given to the county to issue such bonds to an amount not exceeding ten per cent. on the assessed valuation of the taxable property in the county; that this act was not repealed by the adoption of the Constitution in 1875, but in fact was expressly continued in force, by section 1, article XVI., the schedule of that instrument, whereby it was "ordained and declared that all laws in force at the time of the adoption of this Constitution, not inconsistent therewith, &c., shall continue to be as valid as if this Constitution had not been adopted;" and that the authority conferred by this act to issue bonds to the extent of ten per cent. upon the assessed valuation of the taxable property in the county, was enlarged and extended by the proviso in the 2d section of the 12th article of the Constitution, so as, upon a two-thirds vote, which was in fact cast, in favor of the original proposition, to authorize an issue of bonds to the additional amount of five per cent. upon the same valuation without additional legislative authority. The construction claimed for the constitutional provision is, that whenever the legislature has authorized an issue of bonds to the extent of ten per cent. upon the basis named, the Constitution operates, upon that authority, *ex proprio vigore*, and empowers the county officers to submit a proposition for an issue of bonds to the extent of fifteen per cent. upon the same valuation, and to issue the bonds accordingly, if sanctioned by a two-thirds vote of the electors of the county. It would result from the adoption of this interpretation, that an act of the legislature authorizing an issue of bonds limited to the extent of ten per cent. upon the assessment, but requiring a previous two-thirds vote in favor of that proposition, would be unconstitutional and void, so far as it sought to limit the right to issue bonds to less than fifteen per cent. upon the assessed valuation of the taxable property in the county; it being, upon this supposition, a constitutional right and power of the county, when the statute authorized an issue of bonds at all, to increase the authorized amount upon a two-thirds vote by the maximum addition fixed by the Constitution.

Opinion of the Court.

Such a construction of the Constitution seems to be predicated upon the idea that one of the evils sought to be remedied by such provisions is the reluctance of legislative bodies to grant to municipal corporations sufficiently extensive privileges in contracting debts for purposes of internal improvement; but the history of constitutional amendment does not seem to us to justify this assumption.

On the contrary, we regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing the public debts, by express and positive limitations upon the legislative power itself. There must be authority of law, that is by statute, for every issue of bonds as a donation to any railroad or other work of internal improvement; and the election required as a preliminary may be determined by a majority vote, if the legislature so prescribes, in which event the amount of the donation of the county, with that of all its subdivisions, in the aggregate shall not exceed ten per cent. of the assessed valuation of the taxable property in the county; but the legislature may authorize an amount, not to exceed fifteen per cent. on the assessment, on condition, however, that at the election authorized for the purpose of determining that question, the proposition shall be assented to by a vote of two-thirds of the electors. It would be an anomalous provision, that whenever statutory authority was given to issue a prescribed amount of bonds, it should operate as an authority, upon a popular vote, not otherwise directed, to issue an amount in addition. We cannot think it was any part of the purpose of the Constitution of Nebraska to enable a county, either to add to its existing or its authorized indebtedness any increase, without the express sanction of the legislature; and are persuaded, on the contrary, that the true object of the proviso is to limit the power of the legislature itself, by definitely fixing the terms and conditions on which alone it was at liberty to permit the increase, as well as the creation of municipal indebtedness. The language of the proviso that seems to countenance a contrary construction, by words apparently conferring immediate power upon counties to increase their indebtedness, must be taken in connection with the express and posi-

tive prohibition of the body of the section. This denies to municipal bodies all power to make any donations to railroads or other works of internal improvement, except by virtue of legislative authority, and an election held to vote on the particular proposition in pursuance thereof. The proviso makes a special rule for a special case, and authorizes an additional amount of indebtedness, but only to be contracted in the contingency mentioned, and subject to the condition already prescribed for all donations, that is, by means of an election to decide the question submitted, held in pursuance of statutory authority. An indebtedness to the extent of ten per cent. on the assessed value of the taxable property may be authorized by statute, to be sanctioned by a mere majority of the popular vote; but no more than that amount shall be permitted by the legislature, except when approved by two-thirds of the electors; and in no event more than fifteen per cent. upon the assessment, in the aggregate, including any pre-existing indebtedness. Whether the whole amount of indebtedness, authorized by the Constitution, to the extent of fifteen per cent. on the assessed value of the taxable property may be contracted, by authority of an act of the legislature, authorizing its creation at one election upon a single vote, it is unnecessary to decide, for, in the present case, there was no legislative authority to create a debt in excess of the ten per cent. upon the assessment.

These views coincide with those expressed by the Supreme Court of Nebraska in the case of *Reineman* v. *The Covington, Columbus, &c., Railroad Company*, 7 Nebraska, 310, where the very question raised here was discussed and decided; so that the construction we have adopted of the Constitution of the State we cannot but regard as not only correct in itself, but as now the settled rule of decision, established by the highest judicial tribunal of the State.

It follows that the bonds in question were issued without warrant of law, and if the defence is permitted, must be declared void, and insufficient to support the judgment.

But it is argued on the part of the defendant in error that the plaintiff in error is estopped, by the recitals in the bonds, to allege their invalidity on this ground.

Opinion of the Court.

The recitals in the bonds, which are relied on for this purpose, are as follows:

"This bond is one of a series of eighty-seven thousand dollars issued under and in pursuance of an order of the county commissioners of the county of Dixon, in the State of Nebraska, and authorized by an election held in the said county on the twenty-seventh day of December, A. D. 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the Constitution of the said State, article XII., adopted October, A. D. 1875."

These recitals, in conjunction with the certificate of the county clerk, and those of the Secretary and Auditor of State, it is claimed, declare a compliance with the law in the issue of the bonds, which, as against an innocent holder for value, cannot now be questioned.

The sixth section of chapter 35 of the General Statutes, act of February 15th, 1869, p. 93, provides that "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 an act passed February 25th, 1875, authorizes the registration of county bonds, with a view to their collection and redemption. It requires the county officers, in the first place, to make registration of all the named particulars in respect to the bonds issued by them, a certified statement of which, made out and transmitted by them, is required to be recorded by the Auditor of State. Whenever the holders of county bonds shall present the same to the Auditor of State for registration, the auditor, upon being satisfied that such bonds have been issued according to law, it is further provided, shall register the same in his office in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, and that such bonds have been registered in his office in accordance with the provisions of the act. This registration is made the basis on which he ascertains the amount of taxes annually to be levied to meet the accruing interest and sinking fund to

be certified to the county clerk, who is to ascertain and levy the tax for that purpose, to be collected and paid to the county treasurer.

The section of article XII. of the Constitution already cited, requires, as essential to the validity of municipal bonds, an indorsement thereon of a certificate signed by the Secretary of State and Auditor of State showing that the same is issued in pursuance of law.

No conclusive effect is given by the Constitution or the statute to this registration, or to these certificates; and in the consideration of the question of estoppel, they may be laid out of view. In any event, they could not be considered as more comprehensive or efficacious than the statements contained in the body of the bonds, and verified by the signature of the county officers and the seal of the county, except as additional steps, required to be taken in the process of issuing the bonds and rendered necessary to their validity.

Recurring then to a consideration of the recitals in the bonds, we assume, for the purposes of this argument, that they are in legal effect equivalent to a representation, or warranty, or certificate on the part of the county officers, that everything necessary by law to be done has been done, and every fact necessary, by law, to have existed, did exist, to make the bonds lawful and binding.

Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself.

And the estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital

should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains, that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is, that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect. So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument.

This principle is the essence of the rule declared upon this point, by this court, in the well-considered words of Mr. Justice

Strong, in *Town of Coloma* v. *Eaves*, 92 U. S. 484, where he states (p. 491) that it is, "where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with," that "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."

The converse is embraced in the proposition and is equally true. If the officers authorized to issue bonds, upon a condition, are not the appointed tribunal to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.

This is the rule which has been constantly applied by this court in the numerous cases in which it has been involved. The differences in the result of the judgments have depended upon the question, whether, in the particular case under consideration, a fair construction of the law authorized the officers issuing the bonds to ascertain, determine and certify the existence of the facts upon which their power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being. *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Commissioners of Douglas County* v. *Bolles*, 94 U. S. 104; *Commissioners of Marion County* v. *Clark*, 94 U. S. 278; *County of Warren* v. *Marcy*, 97 U. S. 96; *Pana* v. *Bowler*, 107 U. S. 529.

Opinion of the Court.

In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors: the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact, is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it.

The case is to be distinguished from *Marcy* v. *Township of Oswego*, 92 U. S. 637, where, although it was provided that the amount of the bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest, it was held that the existence of sufficient taxable property to warrant the amount of the subscription and issue, it not being designated as fixed by the as-

sessment, was one of those prerequisite facts to the execution and issue of the bonds, which was of a nature that required examination and decision, and had been referred by the statute to the inquiry and determination of the board. In *Sherman County* v. *Simons*, 109 U. S. 735, the county commissioners were constituted by the statute the tribunal for the purpose of determining the amount of the indebtedness, in excess of which the bonds were not to be issued, and their decision was accordingly held to be conclusive.

On the other hand, it is within the principle of the decision in *Buchanan* v. *Litchfield*, 102 U. S. 278, where it was said, at page 289, that, "the purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873." And it is directly within the decision in *National Bank* v. *Porter Township*, 110 U. S. 608. In that case, the existence of the power to issue the township bonds in suit, depended upon the fact that the county commissioners had not been previously authorized by a popular vote, or an unreasonable delay in taking one, to make a subscription on behalf of the county. It was there said: "Whether they had not been so authorized, that is, whether the question of subscription had or had 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 offi-

cers, 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."

We hold, therefore, that the plaintiff in error is not estopped by the recitals in the bonds to deny their validity; and that having been issued in contravention of the Constitution of the State, they are without warrant of law and are void.

The judgment of the Circuit Court is, therefore, erroneous, and must be reversed; and as the facts appear upon the pleadings and by a special verdict, the cause is remanded with directions to enter judgment for the defendant below.

McMURRAY & Others *v.* MALLORY & Another.

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

Argued March 11th, 12th, 1884.—Decided March 24th, 1884.

Patent.

If a patent is granted for a combination, one part of which is of a form described in the patent as adapted by reason of its shape to perform certain specified functions, and the patent is surrendered and a reissue taken which expands some of the claims so as to cover every other form of this part of the combination, whether adapted to perform those functions or not, the reissue is void as to such expanded claims.

A patent for a combination is not infringed by using one part of it combined with other devices substantially different from those described in the patent in form or mode of arrangement and combination with the other parts.

It is not competent for a patentee who has surrendered his letters patent and made oath that he believes that by reason of an insufficient or defective specification the surrendered letters are inoperative and void, and has taken out reissued letters on a new specification and for new claims, to abandon the reissue and resume the original patent by a disclaimer.

The original letters patent to Abel Barker, of May 17th, 1870, for an improvement in soldering machines was for a combination of a rod with a disk of a particular form and shape, which was essential to it. In the reissue the first three claims were so expanded as to embrace all forms of soldering irons in combination with a movable rod, and the reissue was void to that extent.

The first claim in the reissue to E. M. Lang & Co., October 29th, 1878, of a

patent for an improvement in soldering irons granted to Jabez A. Bostwick, June 21st, 1870, was for a different invention from that described in the original patent, and is void.

This was a suit in equity for an alleged infringement of a reissued patent for improvement in soldering machines. The defence denied the invention, and denied the validity of the reissued patent by reason of defects in the surrender, and because the reissue was not for the same invention which was described in the original.

The facts making the case appear in the opinion of the court.

Mr. Benjamin Price for appellants.

Mr. Robert H. Smith and *Mr. Sebastian Brown* for appellees.

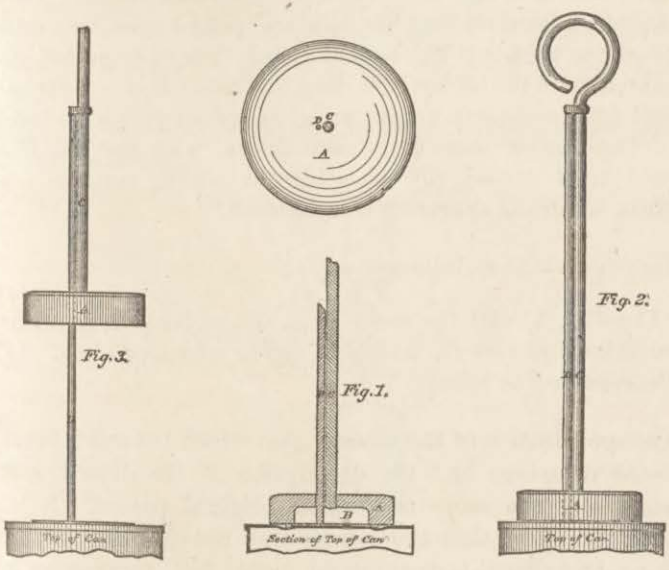
Mr. Justice Woods delivered the opinion of the court.

This bill was filed September 2d, 1879, by Louis McMurray, Edward M. Lang, and George Burnham, doing business as a firm under the name of McMurray, Lang & Burnham, against Dwight D. Mallory and Jesse C. Luddington, doing business as a firm under the name of D. D. Mallory & Co., to restrain the infringement by them of two certain letters patent. The first was a reissued patent "for certain new and useful improvements in soldering machines," the original of which had been granted to Abel Barker, May 17th, 1870, reissued to Edward M. Lang, one of complainants, January 11th, 1876, and again reissued to him July 1st, 1879; the second was a reissued patent for an "improvement in soldering irons," the original of which had been granted to Jabez A. Bostwick, June 21st, 1870, and reissued October 29th, 1878, to E. M. Lang & Co.

The answer of the defendants denied the infringement of either of the patents on which the suit was brought, denied that either Barker or Bostwick was the original inventor of the improvements for which the original letters patent were issued to them respectively, denied that either of the letters patent were ever surrendered according to law, and alleged that the reissues were not for the same inventions as those described in the original letters patent. Upon final hearing, the Circuit

Court dismissed the bill, and the complainants have brought that decree under review by this appeal.

We shall first consider the Barker patent. The original patent was described in the specification as "a new and useful machine for opening and closing or sealing fruit, oyster, and all other cans, hermetically sealed." The specification was illustrated by drawings, as follows:



They were described thus: "Figure 1 is a vertical section; Figure 2 is a representation of the machine as applied to a can in opening; Figure 3 as applied in closing or sealing with the disk withdrawn and the sliding-rod pressed upon the cover to hold it until the solder or sealing material hardens." The specification then proceeds as follows:

"In constructing this machine I make the disk or casting A of sufficient thickness to retain the heat, and of suitable size to cover the lid of the can, with the recess B in the under side to give room for the convex lid of the can, and to confine the soldering process to the outer edge of the lid or cover.

"To this disk I connect the handle C, of sufficient length to hold when heated.

"At the side of, and parallel with, the handle I connect the small rod or wire D, with a loop or ring connecting it with the handle at the top and the bottom, passing through the disk A, so as to allow it to slide up and down."

The process of sealing a can was thus described:

"The disk A is sufficiently heated to melt the solder. The rod D is pushed down through the disk, and placed upon the center of the cover to hold it. The heated disk is then to be pushed down, in contact with the solder or sealing material till it is melted, then turned back and forth till the solder is spread evenly around the lid. The disk is then to be withdrawn, with the rod D still pressed upon the lid, till the solder or sealing material sets or hardens, when the operation is completed."

The claim was as follows:

"The disk A, with the recess B in the under side, as set forth, in combination with the movable rod or wire D, to hold the lid while resealing or closing."

The specification of the reissue upon which the suit is brought, and the drawings and the description of the drawings, were substantially the same as for the original patent. It is apparent, therefore, that the reissue was not for the purpose of making the original specification more full, accurate or intelligible, or for the purpose of eliminating from it what the inventor had not the right to claim as new. The claims of the reissue, which were five in number, were as follows:

"1. In a soldering machine, a rod adapted to hold the can cap or lid in place, in combination with a soldering-iron mounted upon and arranged to be rotated about said rod, substantially as described.

"2. In a soldering machine, a rod adapted to hold the can cap or lid in place, in combination with a soldering-iron sliding upon said rod and adapted to be rotated about it, as set forth.

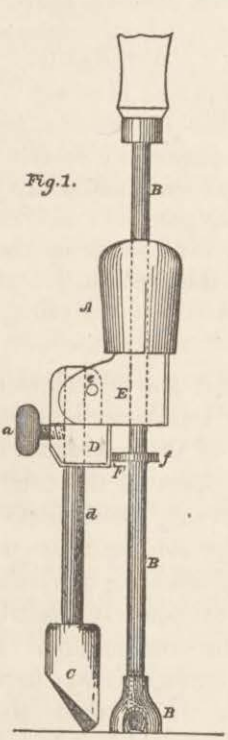
"3. In combination with a soldering tool or die, the rod D in passing through said tool or die to hold the can cap or lid in the process of soldering, substantially as described.

"4. In a soldering machine, the combination, with a soldering tool conforming in shape to the cap to be soldered, of an independently movable rod D, upon which the said tool is mounted, substantially as described

"5. The disk, or tool A, with the recess B in its under side, in combination with and mounted upon the independently movable rod or wire D, as set forth."

The proof showed that defendant used the instrument described in the letters patent issued to Tillery & Ewalt, May 21st, 1872.

The specification of these letters was illustrated by the following drawing:



The specification described the invention as follows:

"The invention consists, first, in making a soldering-tool ad-

justable radially from a hinge-joint, in order to adapt the same tool to be used with caps of varying size; second, in moving said tool out and in, at the same time fixing it at any point of adjustment by means of a screw that has a loop-head through which passes the holder.

"A represents our soldering-tool, provided with a cap-holder, B, which maintains the cap in position while the soldering-iron C is rotated. D is a stock, in which the shank *d* of soldering-iron is held at any point by a clamp-screw *a*. E is the body, in which the stock D is hinged at *e*, while the holder B passes vertically and loosely therethrough. F is a screw, having loop-head *f*, which connects the said holder B and stock D, while it allows them to be spaced at any desired distance apart. In order to effect a change in the radial distance between the centering holder B and the stock D that holds the soldering-iron, the holder is first removed and the screw F moved in or out. . . .

"The advantages of this tool consist, first, in the arc-shape by which we can see at a glance any point which has been left unsoldered or imperfectly soldered, and which defect can be remedied at once without removing the tool; second, in the option that it allows us using either wire solder or the cheaper drop solder, thereby saving one-half the expense."

There is no doubt that the first three claims of the reissued patent of Barker cover the device here described, but are void, because they are, each of them, broader than the claim of the original patent. The claim of the original patent was for a combination; that is to say, a combination of the disk A with the recess B on its under side, and the movable rod D to hold the lid of the can while resealing or closing. The specification mentioned a disk and particularly described and illustrated it as forming a part of the combination. By its size, shape, and the recess in its under surface, it was designed to perform certain specified functions. It was made thick so as to retain the heat; it was made circular, like the lid of the can, and of sufficient diameter to cover the lid, so as to reach its outer edge, where the soldering was to be done, and it had the recess in its under side sufficient to give room for the convexity of the lid

so as to confine the soldering process to the outer edge of the lid.

The patent did not therefore include every soldering-iron of whatever form and shape. In the case of *Prouty* v. *Ruggles*, 16 Pet. 336, it was said of a patent for a combination consisting of three parts, that "the use of any two of these parts only, or of two combined with a third which is substantially different in form, or in the manner of its arrangement and connection with the others," is not an infringement. "It is not the same combination if it substantially differs from it in any of its parts." The disk, therefore, in the Barker patent, substantially as described, is an essential element of the combination covered by that patent.

In the reissue the first three claims of the Barker patent are expanded so as to include all soldering-irons, no matter what their shape or size, or specific advantages, in combination with the movable rod *D*. The contention of the appellants that a device so unlike the soldering-tool described in the original Barker patent as the Tillery & Ewalt tool is embraced by the first three claims of the reissue, is striking proof of the expansion of the original claim. It is plain that the claims mentioned include many soldering devices not covered by the original patent. The claims are therefore void. *Gill* v. *Wells*, 22 Wall. 1; *The Wood Paper Patent*, 23 id. 568; *Powder Company* v. *Powder Works*, 98 U. S. 126; *Ball* v. *Langles*, 102 id. 128; *Miller* v. *Brass Company*, 104 id. 350; *James* v. *Campbell*, id. 356; *Heald* v. *Rice*, id. 737; *Johnson* v. *Railroad Company*, 105 id. 539; *Bantz* v. *Frantz*, id. 160; *Wing* v. *Anthony*, 106 U. S. 142.

The fourth and fifth claims of the reissued Barker patent are not, in our opinion, infringed by the defendants.

The fourth claim embraces as one element of the combination a soldering-iron in shape of the cap or lid to be soldered. The shape of the iron is expressly made an essential part of the combination. This element is wanting in the Tillery & Ewalt device used by the defendants. The soldering-iron used by them is totally unlike in shape a cap or lid or the disk described in the Barker patent. One of the two elements of the combination

covered by the fourth claim of the Barker reissue is, therefore, clearly wanting in the Tillery & Ewalt device, and there can consequently be no infringement.

The fifth and last claim of the reissued Barker patent is identical with the claim of the original patent, and is, therefore, free from the objection to which the first three are open. But we think it also is not infringed by the device used by the defendants. The soldering-iron described in both the original and reissued Barker patent is a disk of suitable size to cover the lid of the can to be soldered, with the recess B, in the under side, to give room for the convex lid of the can and to confine the soldering process to the outer edge of the lid or cover. This is entirely unlike the soldering-iron described in the Tillery & Ewalt patent, the tool used by the defendants. The latter is not a disk, but closely resembles the common soldering-iron, which is an old and familiar tool, and differs from it only in not having a pointed end, but one made so as to form a short arc of a small circle. The device covered by the Tillery & Ewalt patent was contrived for two purposes, neither of which the Barker contrivance is capable of accomplishing, namely, the adjustment of the soldering-iron radially from a hinge joint in order to adapt the same tool to be used with caps or lids of different sizes, and second, the giving of the soldering-iron such a shape as that it would not hide the process of soldering, but made it possible to see at a glance, without removing the tool, any part of the cap which had been left unsoldered.

The contention of the appellants, that the soldering-iron of the Tillery & Ewalt patent is merely the disk of the Barker patent with a large part of its circumference removed, defeats itself, for when a large part of the disk is removed it ceases to be a disk, and becomes the mere soldering-iron of the Tillery & Ewalt device; whereas, as we have seen, a disk is an essential element in the invention covered by the Barker patent.

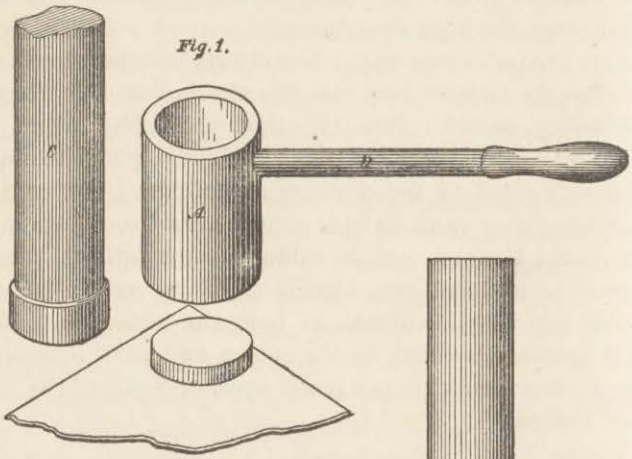
We think that by no stretch of construction can the device used by defendants be included in the fourth and fifth claims of the Barker reissued patent, and that the defendants do not infringe those claims.

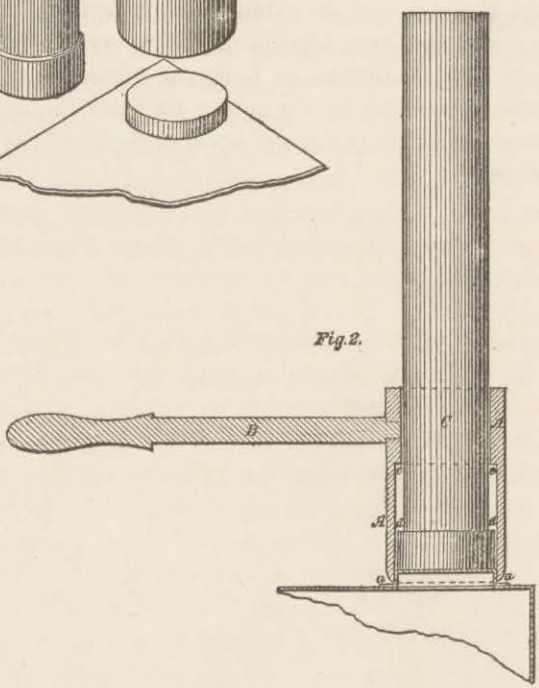
It remains to consider whether the appellants were entitled

to relief against the defendants for the alleged infringement of the Bostwick patent.

The original Bostwick patent was for "a new and useful soldering-iron, for soldering metallic caps or other projecting pieces on metallic vessels." It related, so the specification states, "to the construction and use of a hollow soldering-iron, for soldering metallic caps or other projecting pieces upon metallic oil-cans or other vessels; said iron, when made with an inclosing edge of the dimensions and form of the rim or edge of the cap or piece to be soldered, so as to conform thereto when placed thereon, and so extended and formed interiorly as to receive and embrace loosely a guiding-rod to be placed upon the cap to be soldered, to hold the latter down firmly until it has been secured by the solder, and at the same time guide the iron to its proper place upon or against the rim or edge of the cap."

The specification was illustrated by drawings, as follows:





The manner in which the device was to be used was thus stated:

"After the iron has been properly heated it is slipped over this rod, and the rod being then placed upon the cap, is held thereon firmly, while the lower rim of the heated iron, duly supplied with

solder, bearing upon the joint of the cap with the vessel, will instantly solder and secure the same about its entire circumference.

"By lifting the rod, its shoulder, engaging with the offset within the iron, will take up the latter with it in readiness to be placed upon another cap, and thus a number of caps may quickly and thoroughly be soldered at one heat of the iron."

The specification then proceeds:

"I contemplate making the soldering-iron A and its guiding-rod C of any form in transverse section which may be required, to cause it to fit upon any form of cap or other projection, whether round, square, oval, or of any other curved or polygonal shape. Its lower rim or edge need not be made continuous, but may be broken or slotted."

The claim was as follows:

"The hollow soldering-iron A, having a handle B and bevelled rim *a a* in combination with the rod C, substantially as herein described and set forth."

On September 3, 1878, Bostwick, with the assent of E. M. Lang & Co., the assignees, made application to the Patent Office for a reissue of his patent.

His application was granted, and his patent reissued with a largely expanded specification, and with two claims instead of one, which were as follows:

"1. A tool for soldering the caps on cans, consisting of a soldering-iron revolving about a central pivotal rod, which is made to rest upon and steady the cap during the operation of soldering.

"2. The combination of a hollow iron for soldering caps on cans with a separate and inclosed weight for steadying the cap on the can during the operation of the soldering."

Comparing the first claim of the reissue with the claim of the original patent, it appears that the former has been greatly broadened. The claim of the original patent was for a combination. One element of the combination was a hollow soldering-iron A, with the handle B and bevelled rim *a a*. This was

described in the specification as a hollow cylinder of metal, made to fit over and inclose the metallic cap to be soldered, its inner diameter at its lower end being somewhat greater than that of the cap. This was nothing more than the annular soldering-iron, which it is conceded was old when the Bostwick patent was issued. The second element was the rod C, whose lower end was described to be about equal in diameter to that of the cap to be soldered.

The first claim of the reissued patent is expanded to embrace as the first element of the combination any "tool for soldering caps," no matter what its shape or size. This tool is made to revolve about a central pivotal rod. The idea of revolving the soldering-tool about the pivotal rod is not suggested in the original patent, but is excluded by the statement in the specification that the inventor contemplated making the soldering-iron and the guiding-rod of any form in transverse section necessary to fit in any form of cap, whether round, square, oval, or of any other curved or polygonal shape.

The claim under consideration does not describe with any accuracy the device covered by the original patent, but is made broad enough to include any soldering-iron which is constructed to revolve about a central pivotal rod resting on the cap to be soldered. This claim, however, does accurately describe the Tillery & Ewalt device, and it is apparent, from the record, that it was drawn for the purpose of making the use of the latter an infringement on the reissued patent. It could not do this without expanding the claim of the original patent. In our judgment, therefore the invention thus described and claimed is a different invention from that described and claimed in the original patent, and the claim is therefore void.

The second claim of the reissued patent, it is clear, is not infringed by the use of the Tillery & Ewalt device. The latter employs no hollow soldering-iron, nor does it have a separate and inclosed weight for steadying the cap in the can during the process of soldering—both of which are essential, and they are the only elements of the claim.

The appellants have endeavored to avoid the objection to the reissued Bostwick patent by filing a disclaimer in the Patent

Office. The disclaimer was filed September 24th, 1883, more than two years and a half after the final decree in the Circuit Court, and while the case was pending on appeal in this court. If the appellants are, under these circumstances, entitled to have the disclaimer considered, it cannot aid their case.

In support of the application for reissue of his original patent, which was made by Bostwick with the assent and in behalf of the appellants, he took an oath as follows: "That he believes that by reason of an insufficient or defective specification his aforesaid letters patent are inoperative or invalid."

By the disclaimer referred to, the appellants declare that they thereby "disclaim all words, phrases and sentences introduced in the specification" of the reissued patent "which may mean or may be construed to contain any other or different invention than that justly belonging to the inventor and fairly included in the invention as originally described and claimed," and that they "desire that the reissued patent when the disclaimed matter is cancelled should read as follows." Then follows a specification and claim, which with the exception of six consecutive words, not affecting its meaning, is identical with the specification and claim of the original patent. The purpose of the disclaimer, and its effect, if valid, was to abandon the reissued patent and resume the original. We are of opinion that this could not be done by a disclaimer. The original patent had been declared on the oath of the patentee to be invalid and inoperative. It had been surrendered and cancelled and reissued letters patent granted in its place. It is not competent for the patentee or his assignees, by merely disclaiming all the changes made in the reissued patent, to revive and restore the original patent. This could be done only, if it could be done at all, by surrender of the reissued patent and the grant of another reissue.

It follows from these views that

The decree of the Circuit Court dismissing the appellant's bill must be affirmed.

Statement of Facts.

TAYLOR & Another, Executors, *v.* BOWKER.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

Argued March 12th, 13th, 1884.—Decided March 24th, 1884.

Statute of Limitations—Equity—Corporations.

If a statute enacts that when a corporation has unlawfully made a division of its property, or has property which cannot be attached, or is not by law attachable, any judgment creditor may file a bill in equity for the purpose of procuring a decree that the property shall be paid to him in satisfaction of his judgment, the right of action thus conferred, being an equitable right, does not accrue until the issue of execution on the judgment and its return unsatisfied.

If a statute confers upon a judgment creditor of a corporation an equitable remedy on the issue of an execution on the judgment and its return unsatisfied, and in a revision of the statutes the same equitable remedy is given, but without mention of the issue and return of execution, it is not to be presumed that the legislature intended by the omission to abrogate or modify an established rule of equity; that when it is attempted by equitable process to reach equitable interests fraudulently conveyed, the bill should set forth a judgment, issue of execution thereon, and its return unsatisfied.

By chapter 46 of the Revised Statutes of Maine of 1857, re-enacted in the Revised Statutes of 1871, it is, among other things, provided that—

"When the charter of a corporation expires, or is terminated, a creditor or stockholder may apply to the Supreme Judicial Court, which may appoint one or more trustees to take charge of its estate and effects, with power to collect its debts and to prosecute and defend suits at law. The court has jurisdiction in equity of all proceedings therein, and may make such orders and decrees, and issue such injunctions as are necessary," § 19; also, that "the debts of the corporation are to be paid in full by such trustees, when the funds are sufficient; when not, ratably to those creditors, who prove their debts as the law provides, or as the court directs. Any balance remaining is to be distributed among the stockholders, or their legal representatives, in proportion to their interests," § 20; further, that "when such a corporation has unlawfully made a division of any of its property, or has property

which cannot be attached, or is not by law attachable, any judgment creditor may file a bill in equity in the Supreme Judicial Court, setting forth the facts and the names of such persons as are alleged to have possession of any such property or choses in action, either before or after division. Service is to be made on the persons so named as in other suits in equity. They are, in answer thereto, to disclose on oath all facts within their knowledge relating to such property in their hands, or received by a division among stockholders. When any one of them has the custody of the records of the corporation, he is to produce them and make extracts therefrom and annex to his answer, as the court directs," § 34; still further, that "the court is to determine, with or without a jury, whether the allegations in the bill are sustained, and it may decree that any such property shall be paid to such creditor in satisfaction of his judgment, and cause such decree to be enforced as in other chancery cases. Any question arising may, at the election of either party, be submitted to the decision of a jury under the direction of the court," § 35.

These statutory provisions being in force, Bowker, the appellee, on the 7th day of June, 1866, brought his action against the Piscataqua Fire and Marine Insurance Company, in the Supreme Judicial Court of Maine, for the county of York, to recover the sum due him on a policy issued by that company, in the sum of $5,000, upon his interest in a certain vessel. It was duly entered at the September term, 1866, of that court. Before judgment was obtained, the legislature of Maine, by an act approved February 28th, 1867, accepted the surrender of the charter of the company, declaring therein that—

"Its affairs shall be wound up in the manner provided in sections nineteen and twenty of chapter forty-six of the Revised Statutes, and the organization of the company shall continue for the purposes provided for in said sections; *Provided*, That so much of said acts, or the act incorporating said company, or the act amending the same, as confer any special remedies against officers or stockholders of said corporation, shall not be affected hereby; nor shall this act relieve them from any personal liabilities under any of said acts, or under any of the statutes of this State, or prevent any creditor from pursuing any remedies con-

ferred by chapter one hundred and thirteen of the Revised Statutes," § 1; also, that "actions pending against said company when trustees are appointed as provided in said sections, may be discontinued without payment of costs; or continued, tried, and judgment rendered, as in other cases; actions may be also maintained upon claims disallowed in whole or in part by the trustees; all judgments shall be satisfied in the same manner as other claims against the company are satisfied by the trustees." § 2.

In the action instituted by Bowker, judgment in his behalf was entered April 4th, 1868, and execution thereon was issued April 8th, 1868. It was returned July 8th, 1868, with an indorsement by the officer that after diligent search, he had been unable to find any property of the corporation wherewith to satisfy it.

Before that judgment was rendered, the Supreme Judicial Circuit Court, for York County, in accordance with the provisions of the Revised Statutes, appointed trustees to take charge of the estate and affairs of the company, with power to collect its debts, and to prosecute and defend suits at law.

The present suit was instituted April 11th, 1874, by Bowker —he being a citizen of Massachusetts—in the Circuit Court of the United States for the District of Maine, to enforce the rights given to him, as a judgment creditor, by the statutes of Maine. The defendants were Wm. Hill, the testator of appellants and the trustees, to whom had been committed the custody of the property of the insurance company. Hill was the treasurer, and a stockholder of the company. The bill proceeded upon the ground that the company, prior to the surrender of its charter, had, in violation of the statute, made a division of portions of its property. The bill averred that it had had, and that its corporators still had, property which could not be attached; that Hill, at the commencement of the suit, had possession of part of the property so unlawfully divided, which could not be attached. The prayer of the bill was that the complainant's judgment be satisfied from the property so divided, transferred and delivered to Hill, or from its proceeds.

The trustees answered that there were no assets in their hands

with which to satisfy the judgment. Hill demurred upon the ground that the bill made no case entitling complainant to the discovery or relief asked. The demurrer was overruled, and Hill answered. One of the defences was, that the complainant's cause of action was barred by the statutes of limitations of Maine. Upon final hearing, a decree was entered against Hill for the amount of the judgment against the company. An appeal was taken from this judgment.

Mr. Josiah H. Drummond for appellants.

Mr. Edwin B. Smith for appellee.

Mr. Justice Harlan delivered the opinion of the court. He stated the facts in the foregoing language and continued:

The only point seriously insisted upon in argument, or which is necessary to be considered, is, that this suit was barred by limitation. The Revised Statutes of Maine, in force when it was brought, provided that "all actions of assumpsit or upon the case founded on any contract or liability, express or implied," should be commenced "within six years next after the cause of action accrues, and not afterwards." Rev. Stat. Maine, 1857, ch. 81, § 92. The judgment against the company was entered more than six years before the commencement of this suit. It is insisted that appellee's cause of action accrued upon the entry of the judgment; while it is contended, in behalf of appellee, that even if the foregoing limitation has any application in a suit in equity, brought in the Circuit Court of the United States, by a citizen of another State, his cause of action did not accrue until the return of execution against the company, which occurred within six years prior to this suit.

The counsel for appellee also insist that this suit can be maintained upon the general equitable principles recognized in the cases which hold that the capital stock of a corporation is a trust fund which may be followed by creditors into the hands of those who have notice of the trust; and, consequently that the right of a Circuit Court of the United States to give relief, according to the received principles of equity, cannot be controlled by any limitation prescribed by the State in actions of

assumpsit or upon the case founded on contract or liability, express or implied. Without entering upon a discussion of that question, and assuming, for the purposes of this case only, that the Circuit Court, in analogy to the limitation prescribed by the local statute, could properly have denied the relief asked, where the suit was not brought within six years after the cause of action accrued, we are of opinion that the decree was right and should be affirmed.

The proposition that Bowker's cause of action accrued upon the entry of his judgment against the company rests upon a very technical interpretation of the statute, which, in terms, gives a judgment creditor the right to file his bill in equity against any corporation which has unlawfully made a division of its property, or has property which cannot be attached, or is not, by law, attachable. As this right is given to a judgment creditor, his cause of action, it is claimed, accrues the moment he becomes such, that is, when he obtains a judgment. But such, we think, was not the intention of the legislature. The provisions, upon this subject, in the Revised Statutes of 1871, are brought forward from the revision of 1857. In respect of these matters, there is no difference, even of phraseology, in the two revisions. In reference to the revision of 1857, it was expressly decided, in *Hughes* v. *Farrar*, 45 Me. 72, that the principal design was to revise, collate and arrange the public laws, and, in revising, to condense, as far as practicable; that a mere change of phraseology should not be deemed a change of law unless there was an evident intention upon the part of the legislature to make such change. The special remedies given by the Revised Statutes of 1857, and which were not affected or withdrawn by the act of February 28th, 1867, were not then, for the first time, provided. Going back to the Laws of 1848, we find that, by an act approved August 10th, 1848, it was made unlawful for corporations, other than those for literary and benevolent purposes, banking, and such as, by the common law, were termed *quasi* corporations, to make any division of their corporate funds, or property, so as to reduce their stock below par value, except to close up the concerns of the corporation after all its debts are paid. And by the same

act it was provided that in all such cases of unlawful division of corporate property, "and in all cases where such corporation has corporate property of any kind which is undivided, and which cannot be come at readily to be attached, or which is not attachable, any judgment creditor or creditors of such corporation, or his or their attorney, may make complaint thereof to the Supreme Judicial Court, therein setting forth in substance his or their judgment, and alleging the same to be unsatisfied by reason of inability to find corporate property wherewith to satisfy the same," &c.

The provisions of the act of 1848 are preserved, although much condensed in words, in the later revisions of the statutes. Clearly, the special remedy given to a creditor by the act of 1848, was given upon the condition that his judgment was unsatisfied, "by reason of inability to find corporate property wherewith to satisfy the same." This condition could only be met, within the settled doctrines of the courts of Maine, by an issue of execution upon the judgment. But, because these words were omitted in subsequent revisions, it is claimed that the legislature intended that the creditor should have the privilege of filing his bill in the Supreme Judicial Court, even though it was in his power, by execution, to find corporate property wherewith to satisfy his judgment. In this construction of the revisions of 1857 and 1871 we do not concur. Although they do not, in terms, as did the act of 1848, require the creditor to allege in his bill, that his judgment remained unsatisfied by reason of his inability to find corporate property wherewith to satisfy it, we are not satisfied that there was any purpose to change the law, or to modify the grounds upon which relief in equity could be obtained in the Supreme Judicial Court. That court, as we infer from its decisions, would not have given relief under the revisions of 1857 and 1871, unless it appeared that the creditor could not otherwise obtain satisfaction of his judgment; for, as early as in 1848, in *Webster* v. *Clark*, 25 Maine, 313, it was announced, as a general rule, that "courts of equity are not tribunals for the collection of debts; and yet they afford their aid to enable creditors to obtain payment, when their legal remedies have proved to be inadequate. It is only by the

exhibition of such facts as show that these have been exhausted, that their jurisdiction attaches. Hence it is, that when an attempt is made by a process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, the bill should state that judgment has been obtained, and that execution has been issued and that it has been returned by an officer without satisfaction." See, also, *Corey* v. *Greene*, 51 Maine, 114; *Griffin* v. *Nitcher*, 57 id. 270; *Howe* v. *Whitney*, 66 id. 17. A different construction of the revisions of 1857 and 1871 can be maintained only upon the theory, that the legislature intended to abrogate or modify the established rule of equity announced in repeated decisions of the State court. We are not prepared to say that such was its intention.

But it is suggested that the insurance company, by the surrender of its charter, under the act of February 28th, 1867, ceased to exist, and that an execution upon a judgment obtained against it was unauthorized by law, and void; consequently, the appellee had a right to institute his suit in equity immediately upon the rendition of the judgment. This position is not, in our opinion, well taken. That act expressly saved special remedies given by former legislation, and provided that suits, pending at its passage, might be discontinued without payment of costs, or continued, tried, and judgment rendered as in other cases; and that all judgments should be satisfied in the same manner as other claims against the company are satisfied by the trustees. When the act of 1867 gave a creditor in pending suits the privilege of proceeding to judgment, and thereby establishing these demands, it gave him the right, if it did not impose upon him the duty, of putting himself in such a condition that he could, according to the principles of equity, have invoked the aid of the court to remove all obstacles in the way of obtaining satisfaction of his judgment. It is true that the corporate property was in the possession and charge of the trustees when the execution issued, and the effort to levy it became, perhaps, a form; but, as was well said by the circuit judge, it is by no means certain, in view of the strictness with which statutory forms are often required to be followed, that if this

form had been neglected the defendant might not have successfully contended that the complainant had neglected to meet the requirements of the statute. Besides, the act of 1867 did not, upon its face, show that the funds of the corporation would be insufficient to meet its debts in full. When the execution issued the trustees might, for aught that the judgment creditor knew, have caused it to be satisfied, and thereby dispensed with further proceedings upon the complainant's part against those who were supposed to have unlawfully received the property of the corporation. It was proper, therefore, that a creditor, desiring to resort to the special remedies reserved to him, should attempt by execution to secure payment of his judgment against the corporation before resorting to a court of equity.

For these reasons we are of opinion that the complainant's cause of action should not be deemed to have accrued until the return of the execution; consequently his suit was not barred by the limitation of six years.

The decree is affirmed.

MOORE & Another *v.* PAGE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted November 26th, 1883.—Decided March 24th, 1884.

Fraudulent Conveyance—Husband and Wife.

A husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud.

When a husband settles a portion of his property on his wife it should not be mingled up or confounded with that which he retains, or be left under his management or control without notice that it belongs to her.

This was a creditor's bill to reach property conveyed by the debtor to his wife, and have it applied to the payment of the debt. The decree below sustained the conveyance, from which the creditor appealed.

Mr. H. T. Helm for appellants.

Mr. Edward S. Isham and *Mr. William Burry* for appellee Page; *Mr. George W. Smith* for other appellees.

Mr. Justice Field delivered the opinion of the court.

It is no longer a disputed question that a husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit. And his direct conveyance to her, when the fact that it is intended as such settlement is declared in the instrument or otherwise clearly established, will be sustained in equity against the claims of creditors. The technical reasons of the common law growing out of the unity of husband and wife, which preclude a conveyance between them upon a valuable consideration, will not in such a case prevail in equity and defeat his purpose. *Shepard* v. *Shepard*, 7 Johns. Ch. 57; *Hunt* v. *Johnson*, 44 N. Y. 27; Story's Equity, § 1380; Pomeroy's Equity, § 1101; *Dale* v. *Lincoln*, 62 Ill. 22; *Deming* v. *Williams*, 26 Conn. 226; *Maraman* v. *Maraman*, 4 Met. Ky. 84; *Sims* v. *Rickets*, 35 Ind. 181; *Story* v. *Marshall*, 24 Texas, 305; *Thompson* v. *Mills*, 39 Ind. 528. Such is the purport of our decision in *Jones* v. *Clifton*, 101 U. S. 225. His right to make the settlement arises from the power which every one possesses over his own property, by which he can make any disposition of it that does not interfere with the existing rights of others. As he may give it or a portion of it to strangers, or for objects of charity, without any one being able to call in question either his power or right, so he may give it to those of his own household, to his wife or children. Indeed, settlements for their benefit are looked upon with favor and are upheld by the courts. As we said in *Jones* v. *Clifton*: "In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legally or

morally, to provide for them, as in the case of a wife, or children, or parents, the only question that can properly be asked is, does such a disposition of the property deprive others of any existing claims to it? If it does not, no one can complain, if the transfer is made matter of public record and be not designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee, whether it be by direct conveyance from the husband, or through the intervention of others."

Whilst property thus conveyed as a settlement upon the wife may be held as her separate estate, beyond the control of her husband, it is of the utmost importance to prevent others from being misled into giving credit to him upon the property, that it should not be mingled up and confounded with that which he retains, or be left under his control and management without evidence or notice by record that it belongs to her. Where it is so mingled, or such notice is not given, his conveyance will be open to suspicion that it was in fact designed as a cover to schemes of fraud.

In this case there was much looseness; and the transactions between the husband and the wife touching the property were well calculated to excite suspicion. It is, therefore, with much hesitation that we accept the conclusion of the Circuit Court. We do so only because of its finding that there was no deception or fraud intended by either husband or wife; that the appellants were not led to give him any credit upon the property, but acquired their interest in the judgment which they are seeking to have satisfied long after the transactions complained of occurred; that the title to the Dearborn Avenue property was taken by mistake in his name, and that the mistake was rectified before this litigation commenced; that the bonds and notes in bank which the creditors seek to reach represent the money advanced by her from the sale of that property for the purpose of meeting an alleged deficit in his account as administrator of the estate of Maxwell, and in equity belong to that estate; that the money applied in satisfaction of the mortgage upon the Lincoln Avenue property was part of

the proceeds of that sale, and that she was entitled to have the conveyance to her from Mrs. Maxwell treated as security for that money. Such being the case, the creditors have no claim upon the bonds and notes superior in equity to that of the Maxwell estate, nor upon the Lincoln Avenue property superior to that of the wife.

Decree affirmed.

GARRETSON *v.* CLARK & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Argued January 15th, 1884.—Decided March 24th, 1884.

Patent.

When a patent is for an improvement of an existing machine or contrivance, the patentee in a suit for damages for infringement must either show by reliable, tangible proof that the value of the machine or contrivance as a whole is due to the use of his patented invention, or he must separate and apportion, by proof of the same character, the part of the defendant's profits which are derivable from the use of it, in order to establish a claim for more than nominal damages.

This was a suit in equity for infringement of a patent for an improved mop-head. The sole question raised was whether the evidence of damages warranted a judgment for more than nominal damages.

Mr. James A. Allen for appellant.

Mr. William F. Coggswell for appellee.

Mr. Justice Field delivered the opinion of the court.

In this case the court below sustained the plaintiff's patents, adjudged that the defendants were infringers, and directed a reference to a master, to ascertain and report the profits and gains made by the defendants. The master reported that no proof was presented to him that they had made any profit, or

that the plaintiffs had suffered any damages. The court sustained the report, and the decree allowed the plaintiffs only nominal damages. From this decree the appeal is taken. *Garretson* v. *Clark*, 15 Blatchford, 70.

The patent was for an improvement in the construction of mop-heads, which may be described with sufficient accuracy as an improvement in the method of moving and securing in place the movable jaw or clamp of a mop-head. With the exception of this mode of clamping, mop-heads like the plaintiff's had been in use time out of mind. Before the master, the plaintiff proved the cost of his mop-heads, and the price at which they were sold, and claimed the right to recover the difference as his damages. This rule was rejected; and, no other evidence of damages being offered, the master reported as stated.

When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: "The patentee," he says, "must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

The plaintiff complied with neither part of this rule. He produced no evidence to apportion the profits or damages between the improvement constituting the patented feature and the other features of the mop. His evidence went only to show the cost of the whole mop, and the price at which it was sold.

And of course it could not be pretended that the entire value

of the mop-head was attributable to the feature patented. So the whole case ended, the rule was not followed, and the decree is therefore

Affirmed.

BLACK, Administrator *v.* THORNE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued January 24th, 1884.—Decided March 24th, 1884.

Damages—Patent.

Damages must be nominal in an action where the infringement of a patent was established, and it appeared that other methods in common use produced the same results with equal facility and cost, and there was no proof of the exaction of a license fee for the use of the invention, and its general payment.

This was a suit on the equity side of the court for the infringement of two patents, issued to the plaintiffs' intestate, one for an alleged "new and useful improvement for burning tan bark, bagasse, sawdust, and other kinds of fuel, in a wet state, for the purpose of creating heat to generate steam, or to be employed in heating or drying operations;" and the other for a "new and useful improvement in furnaces, in using as fuel bagasse and other carbonaceous substances, too wet to be conveniently burned in the usual way," with a prayer that the defendants may be decreed to account for and pay to the plaintiffs the gains and profits derived from making and using furnaces containing the inventions and improvements of the deceased; and be enjoined from further infringement.

The defendants contested the validity of the patents, but the court sustained them, and held that the defendants had infringed them by the use of furnaces containing the improvements patented in burning wet tan to generate heat employed in the tanning of hides. It therefore decreed that the plaintiffs recover the profits and gains which the defendants had made from this use of the improvements, and ordered a reference to

a master, to take testimony on the subject and state an account of them. It also granted the injunction prayed, restraining further infringement.

The master took testimony on the subject, and reported that the plaintiffs were entitled to recover from the defendants, as profits made by them from the infringement, the cost or value of the wood, which, but for the use of the patented inventions, they would have burned in generating heat for their tanneries, which amounted to over $44,000. Upon exceptions, this report was set aside, the court holding that the rule adopted to ascertain the profits made was erroneous. *Black* v. *Thorne*, 12 Blatchford, 20. The case was thereupon again sent to the master, and further testimony was produced, upon which he reported that there was no proof before him showing what profits, if any, had been made by the defendants from the use of the plaintiffs' improvements. This report was confirmed, and a decree entered pursuant to it, that no profits were to be recovered of the defendants. From this decree the case was brought here by appeal.

Mr. Charles N. Black for appellant.

Mr. D. B. Eaton for appellees.

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

The question presented for our determination relates to the correctness of these reports, the plaintiffs contending for the first one, the defendants for the second.

The rule adopted by the master in his first report, to ascertain the profits made by the defendants from the use of the improvements, was clearly wrong. The claims of the patents were confined to the use of the improvements to produce heat by the burning of wet fuel. The object sought was the production of heat. The question, therefore, was what advantage in its production did the use of the improvements in burning wet tan have over other known methods in common use of producing the same result, that is, the same heat. So far as the improvements by burning wet tan gave advantages in pro-

ducing heat over other methods, there was a profit or gain to the defendants. We can suppose that such advantage might arise from the rapidity with which the heat was produced, or from the diminished cost of its production, or in various other ways. The difference between the cost of generating heat by the use of the improvements and wet tan, and the cost of producing it by the use of wood as a fuel, could not be the measure of profit, unless, with those improvements or with other methods, wood was the only means besides wet tan of producing the same heat, and that was not shown. Other substances may have answered equally well as fuel.

On the second hearing before the master it was shown, and he so found and reported, that there were methods and furnaces, other than those of the plaintiffs, and other than those burning dry fuel alone, which would produce the same results in generating heat, for the purposes for which the defendants used the heat, and which methods and furnaces they had a right to use, and that the saving to them, or profits made by them, by the use of the plaintiffs' inventions, over the other furnaces, was not proved. Such being the case, the report could not have been otherwise than as it was.

It does not always follow, that because a party may have made an improvement in a machine and obtained a patent for it, another using the improvement and infringing upon the patentee's rights will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gains of the infringer, or impair the just rewards of the inventor. The inventor may indeed prohibit the use, or exact a license fee for it, and if such license fee has been generally paid, its amount may be taken as the criterion of damage to him when his rights are infringed. In the absence of such criterion, the damages must necessarily be nominal.

Decree affirmed.

PHŒNIX BANK *v.* RISLEY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Argued March 13th, 14th, 1884.—Decided March 24th, 1884.

Bank—Confiscation.

The rule that the relation between a bank and its general depositors is that of debtor and creditor, which was laid down in *Marine Bank* v. *Fulton Bank*, 2 Wall. 252, is affirmed and applied to deposits arising from collections on behalf of another bank, a correspondent.

A proceeding under the confiscation acts of August 6th, 1861, 12 Stat. 319, and July 17th, 1862, 12 Stat. 589, for the purpose of confiscating a general deposit in a bank, which was directed against a specific lot of money, and a condemnation and sale under such proceedings, and a payment by the bank to the purchaser at the sale, are no defence to the bank in a suit by an assignee of the depositor for valuable consideration, claiming under an assignment made before the proceedings in confiscation.

The confiscation act of August 6th, 1861, was directed to the confiscation of specific property, used with the consent of the owner to aid the insurrection and had no reference to the guilt of the owner, and could only apply to visible tangible property which had been so used.

The 37th Admiralty Rule, in force before the passage of the confiscation acts, provided a mode for attaching a debt in proceedings for its confiscation by giving notice to the debtor of the proceedings to charge the debtor with the debt and require him to pay it to the marshal or into court; and in the absence of such notice the District Court could obtain no jurisdiction over the debt, and could make no condemnation of it which would constitute a defence in an action by an assignee of the debt for a valuable consideration made before the proceedings in confiscation.

At the outbreak of the war the plaintiff in error was the correspondent in New York of the Bank of Georgetown in South Carolina, and had about $12,000 on deposit to the credit of the latter. On the 20th May, 1861, the Bank of Georgetown sold and assigned to the defendant in error $10,000 of this deposit. On the 4th January, 1864, the defendant in error demanded payment of the $10,000 of the plaintiff in error in New York. On the 5th January, 1864, proceedings were commenced for confiscating the deposit. The nature of these proceedings are described in the opinion of the court. They resulted in a decree of confiscation and payment of the money by the Phœnix Bank to the purchaser at the sale under con-

demnation. Risley then sued in the courts of New York to recover the $10,000, and judgment was finally given against the bank in the Court of Appeals of New York, on the ground that the confiscation proceedings were void. This writ of error was sued out to reverse that judgment.

Mr. William M. Evarts for plaintiff in error.

Mr. John E. Risley and *Mr. F. A. Wilcox* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Court of Appeals of New York.

The defendant in error recovered against the plaintiff in error the sum of $10,000 and interest by the verdict of a jury, which found, as matter of fact, that the Bank of Georgetown, South Carolina, having a balance with the Phœnix Bank of New York on the 20th day of May, 1861, assigned to Risley, the plaintiff in the State court, $10,000 of that sum, of which the Phœnix Bank had due notice by demand made by Risley January 4th, 1865. *Risley* v. *Phœnix Bank*, 83 N. Y. 518.

With the questions which arose out of this transaction in the State court we have nothing to do, except as they concern the defence set up by the bank that the money in its hands due to the Bank of Georgetown had been seized, condemned, and paid over to the marshal of the Southern District of New York by virtue of certain confiscation proceedings in the District Court of the United States for that district.

The sufficiency of those proceedings as a defence to the action raises a question of a claim asserted under an authority of the United States, and, as the Court of Appeals sustained the judgment of the inferior court of that State rejecting the defence, the case, as to that question, is cognizable in this court.

The record of the confiscation proceedings in the District Court was rejected by the State court when offered in evidence by defendant, and our inquiry must be directed to ascertain whether, if admitted, it would have been a good defence.

The judge, before whom the jury trial was had, refused to receive the record in evidence, because it showed that the con-

fiscation proceedings, being *in rem*, were directed against certain specific money, which was the property of the Georgetown Bank and which the Phœnix Bank held as a special deposit in the nature of a bailment, and not against the debt which the Phœnix Bank owed to the Georgetown Bank arising out of their relations as corresponding banks; that this debt being assigned to Risley, the plaintiff was unaffected by the confiscation proceedings, because it was not mentioned in them, and no attempt was made to subject that debt to condemnation.

That the relation of the Phœnix Bank and the Georgetown Bank was that of debtor and creditor and nothing more, has been the settled doctrine of this court, as it is believed to be of all others, since the case of the *Marine Bank* v. *The Fulton Bank*, 2 Wall. 252. In that case, it was said that "All deposits made with bankers may be divided into two classes, namely, those in which the bank is bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof, on demand." "It would be a waste of time," said the court, "to prove that this latter was a debtor and creditor relation." This proposition has been reaffirmed in *Thompson* v. *Riggs*, 5 Wall. 663; *Bank* v. *Millard*, 10 Wall. 152; *Oulton* v. *Savings Institution*, 17 Wall. 109; *Scammon* v. *Kimball*, 92 U. S. 362; and *Newcomb* v. *Wood*, 97 U. S. 581.

Mr. Parker, the cashier of the Phœnix Bank, speaking of the time when the marshal served the monition in the confiscation case on him, says that there were no specific funds, separate in kind, in the bank belonging to the Georgetown Bank, and only a general indebtedness in account for money, or drafts remitted, which had been collected. "It was a debt. No specific money or bills the property of the Georgetown Bank."

The libel of information in the District Court commences by saying that it is "against the estate, property, money, stocks, credits, and effects, to wit: against $15,000 (fifteen thousand

dollars), more or less, belonging to the Bank of Georgetown, a corporation doing business at Georgetown, in the State of South Carolina, which said $15,000 is now in *cash*, and is now on deposit in the Phœnix Bank, a corporation doing business in the city of New York, all of which are owned by and belonging to and are the property of the said Bank of Georgetown."

And it is alleged that, by reason of the use of this property in aid of the rebellion and the treasonable practices of the Georgetown Bank, the said property, estate, and effects are subject to lawful prize, capture, and seizure, and should be confiscated and condemned.

The monition, after reciting the libel against $15,000 belonging to the Georgetown Bank, which said $15,000 is now in cash and on deposit with the Phœnix Bank, commands the marshal to attach the said $15,000, and to *detain the same in his custody* until the further order of the court.

The return of the marshal is that he attached $13,000, more or less, deposited in the Phœnix Bank, belonging to the Bank of Georgetown, and gave notice to all persons claiming the same that the court would try the case on January 24th thereafter.

The decree of the court is, that he, the judge, doth hereby order, sentence, and decree that $12,117.$\frac{38}{100}$ belonging to the Bank of Georgetown, of Georgetown, in the State of South Carolina, and now on deposit in the Phœnix Bank, in the city of New York, which said $12,117.38 has been heretofore seized by the marshal in this proceeding, be and the same is hereby condemned as forfeited to the United States.

On this sentence a *venditione exponas* was issued to the marshal, in which he is ordered to sell this $12,117.38, and to have the moneys arising from the sale at the District Court on a day mentioned.

It is not possible to understand that this case proceeded on any other idea than the actual seizure of a specific lot of money, supposed at first to amount to $15,000, but which turned out to be less, and that that lot of money was seized, was formally condemned and ordered by the court to be sold, and the proceeds of the sale brought into court for distribution under the

confiscation law. The specific money is described by apt words, as the property of the Bank of Georgetown, for whose misconduct it is seized, condemned and forfeited.

The very language is used, and no other, that would be if it were twelve hundred horses instead of $12,000, of which the Georgetown Bank was owner, though in the possession of the Phœnix Bank.

There is not the slightest intimation in the libel, the monition, the return to that monition, or in the final decree, that a debt due by the Phœnix Bank to the Georgetown Bank is attached, and no language appropriate to such a purpose is found in the whole proceeding from the beginning to the end. On the contrary, the whole case presents the idea of tangible property, actual cash taken by manual seizure, in the hands of the Phœnix Bank, the ownership of which was in the Georgetown Bank; that these dollars, whether of gold, silver or bank bills, were to be placed in the hands of the marshal and sold, and the sum bid for them brought into court under its order.

In further illustration of this idea, the libel charges that the Bank of Georgetown, the owner of the property libelled, did purchase and acquire said property, and the same was sold and given to it by a person unknown to the attorney, with intent to them to use and employ, and to suffer the same to be used and employed, in aiding, abetting, and promoting the insurrection and resistance to the laws, and in aiding and abetting the persons engaged therein, and that the Georgetown Bank did knowingly use and consent to such use of the property, contrary to the provisions of "An Act to confiscate property used for insurrectionary purposes," approved August 6th, 1861.

It is beyond question that this act was directed to the confiscation of specific property used with the consent of the owner to aid the insurrection, and had no reference to the guilt of the owner, and could only apply to visible, tangible property which had been so used.

If the thing seized and condemned in the District Court was the actual dollars, *they* were the property of the Phœnix Bank, and the loss was its loss, and that did not satisfy the debt which at that time it owed to Risley; nor would it

have been otherwise if the debt had been then due to the Georgetown Bank, for the debt was not seized, but the dollars of the Phœnix Bank.

Counsel for plaintiff in error insists strenuously, however, that it *was* the *debt* which was intended to be seized and condemned, and which constitutes the *res* in the proceeding.

We are not able to see that this view of the matter places the case in any more favorable condition for the bank.

While the manner of seizing ordinary personal property or real estate, for the purposes of confiscation proceedings, under the two acts of Congress on which this libel professes to be founded, namely, the act of April 6th, 1861, and the act of July 17th, 1862, is easily understood and followed, namely, an actual seizure and actual possession by the officer under the monition, it has not been so plain what proceeding should be had in the confiscation of debts due to one who has incurred the penalty of such confiscation and who is not within the jurisdiction of the court.

In this class of cases, where the debt is evinced by a note, bond, or other instrument in writing whose possession carries the right to receive the debt, it may be that the manual seizure of that instrument gives jurisdiction to the court to confiscate it and the debt which it represents.

And we are not prepared to say that the debt itself may not be confiscated in the absence of the bond or note which represents it. But in this class of cases, and in the case of an indebtedness on a balance of accounts where no writing or other instrument represents the debt or ascertains its amount, or carries with it by transfer the right to receive it, it is obvious that something more is necessary than the statement of the marshal that he has attached or seized a certain sum of money.

In the case of *Miller* v. *United States*, 11 Wall. 268, which was a case of confiscation of stock in a railroad company, these difficulties are fully considered, and it is there held that the proper mode of seizure of such stock is by notice of the proceeding and attachment to the proper officer of the company, whose stock is the subject of the proceeding. And the same matter is very fully considered in the subsequent case of *Alex-*

andria v. *Fairfax*, 95 U. S. 774, where the sufficiency of the seizure was brought up collaterally in another suit, and the whole proceeding held void, because notice of the seizure or attachment of the debt of the city of Alexandria was not made to the officer of the city named by the statute of the State, though it *was* given to another officer of the city government.

The statute authorizing these confiscation proceedings requires that they be conducted according to proceedings in admiralty as near as may be, and hence libels, monitions, publications, and sentences have been the usual mode of enforcing confiscation. The 37th Admiralty Rule, in force long before this statute was enacted, provides how such seizures shall be made.

"In cases of foreign attachment, the garnishee shall be required to answer under oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded to him by the libellant; and if he should refuse so to do, the court may award compulsory process against him. If he admits any debts, credits, or effects, the same shall be held in his hands liable to the exigency of the suit."

Here was a plain mode of attaching the debt of the Phœnix Bank due to the Georgetown Bank pointed out by the very rule to which the act of Congress referred as prescribing the mode of practice in such cases.

In the first case, above referred to, the court, after referring to the practice in admiralty, said: "These are indeed, proceedings to compel appearance, but they are, nevertheless, attachments or seizures bringing the subject seized within the jurisdiction of the court, and, what is of primary importance, they show that, in admiralty practice, *rights in action, things intangible as stocks and credits*, are attached by notice to the debtor or holder without the aid of any statute."

In the latter case the court said: "We are compelled to inquire whether the simple statement of the marshal, that he had given notice to R. Johnson, auditor of the city, was a

sufficient seizure, in face of the conceded fact that he had made no actual or manual seizure of anything to give jurisdiction to the court. And in determining what it was of which Johnson had notice, it is, perhaps, fair to infer that the marshal read to him the paper issued by the district attorney."

The court, after saying there is no doubt that the stocks were credits and liable to confiscation within the meaning of the act, added:

"It is clear that there was a mode of reaching them under the act of Congress, notwithstanding the evidences of Fairfax's right to them were in his pocket and beyond the reach of the court. If the debt due him had been by an individual, there would have been no difficulty in serving such a process or notice on the debtor, as would have subjected him to the order of the court in regard to it."

The record of the District Court in the confiscation proceedings gives no evidence of any service of notice on the Phœnix Bank, the debtor in this case, and as it was an *ex parte* proceeding in the absence of the party whose property was condemned, the language of the court in *Alexandria* v. *Fairfax* is appropriate, that "where the seizure of it is a *sine qua non* to the jurisdiction of the court, and where, as in the present case, actual manucaption is impossible, the evidence which supports a constructive seizure should be scrutinized closely, and be of a character as satisfactory as that which would subject the party holding the fund or owing the debt, which is the object of the proceedings, to an ordinary civil suit in the same court." 95 U. S. at p. 779.

Assuming that, as argued by counsel, this was a proceeding to reach the debt of the Phœnix Bank to the Georgetown Bank, then it could not be the subject of actual manucaption or seizure, and there should be such evidence of service of the attachment or notice on the Phœnix Bank as would be sufficient in an ordinary civil suit for that debt.

Nothing of the kind is shown here. No notice of any kind to the Phœnix Bank is shown in that record.

But in the deposition of the cashier of the Phœnix Bank in the present suit, he is shown the monition in the confiscation

case, and says that paper was served on him on the 5th day of January, 1865, at 11.50 in the morning.

It admits of grave doubt whether the essential fact on which the jurisdiction of the court in the confiscation case depended, not being found in the record, can be supplied in another suit where it is introduced in evidence, by parol proof of that fact.

But if it could be done at all, the monition which was served on the cashier gave no intimation of a proceeding to charge the Phœnix Bank with a debt due from it to the Georgetown Bank, and require it to pay said debt to the marshal or into the court. Nothing in that monition required the bank to answer in regard to such a debt, and the bank made no answer. If it had been called on by that notice to answer, as it certainly would if a debt was claimed of it as being due to the Georgetown Bank, it would have been bound at its peril to have disclosed the assignment of that debt to Risley by the Georgetown Bank, and the demand and notice of Risley to the Phœnix Bank before the commencement of the confiscation proceedings. Indeed it is quite remarkable that no answer or appearance for the Phœnix Bank is made in that proceeding. If the money, the actual cash in the bank vaults, was attached, the bank must have known that the dollars were its dollars, and it should have defended. If it was the debt which was attached, its legal duty to its creditor, whether that was Risley or the Georgetown Bank, was to have stated the facts to the court.

It does not appear to us that any seizure or attachment of the debt due by the Phœnix Bank to the Georgetown Bank was made, by which the District Court, if it intended to do so, obtained jurisdiction to confiscate it.

On the whole case, we are of opinion—

1st. That the specific money in the Phœnix Bank, against which the confiscation proceedings seem to have been directed, and which was condemned, was the money of that bank, and not of the Georgetown Bank, and the loss, if any, is the loss of the Phœnix Bank.

2d. That no such seizure or attachment was made of the debt

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due by the Phœnix Bank to the Georgetown Bank, if any such debt existed, when the proceedings were commenced, as would give the District Court jurisdiction of that debt, and no actual condemnation of that debt, or order on the Phœnix Bank to pay it, was made, which can constitute a defence to the present action.

3d. That the right of Risley to recover the debt as assignee of the Georgetown Bank remains unaffected by those proceedings.

The judgment of the Court of Appeals of New York is affirmed.

CHESAPEAKE & OHIO RAILROAD COMPANY *v.* WHITE.

ORIGINAL.

Argued March 11th, 1884.—Decided March 24th, 1884.

Jurisdiction—Practice—Removal of Causes.

When a cause is properly removed from a State court to a Federal court, and the State court nevertheless proceeds with the case, and forces to trial the party upon whose petition the removal was made, the proper remedy is by writ of error after final judgment, and not by prohibition or punishment for contempt. *Insurance Company* v. *Dunn*, 19 Wall. 214, and *Removal Cases*, 100 U. S. 457, again reaffirmed.

This was a petition for an original process from this court to stay proceedings in the Circuit Court of Greenbrier County, West Virginia, in a suit in which the defendant in these proceedings was plaintiff and the plaintiff in these proceedings was defendant, on the ground that the cause was removed to the Federal courts under the removal act, and that the substantial rights of the parties were involved in a suit, pending in this court, in error to the Court of Appeals of West Virginia. The facts upon which the motion was founded appear in the opinion of the court.

Mr. W. S. Hogeman for the railroad company, petitioner.

Mr. Henry M. Matthews opposing.

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

The motion papers in this case present the following facts:

On the 17th of September, 1881, A. E. White, as administrator of the estate of John D. White, sued the Chesapeake and Ohio Railroad Company in the Circuit Court of Greenbrier County, West Virginia. The summons was returnable on the first Monday in October, and on that day a declaration was filed. On the filing of the declaration an order was entered at rules that judgment be entered for the plaintiff for his damages, unless the defendant appear and plead to issue on the first Monday in November. The defendant failing to appear on that day, an order was entered, also at rules, for the assessment of damages at the next term.

On the 10th of November, which was during the next term, the defendant did appear and demur generally to the declaration, in which the plaintiff joined. At the next term, on the 18th of April, 1882, the defendant again demurred to the declaration and to each count thereof, and then presented a petition, with sufficient bond, for the removal of the suit to the District Court of the United States for the District of West Virginia, sitting at Charleston, and exercising Circuit Court powers. This petition the State Circuit Court refused to receive, on the ground that it was not filed before or at the term at which the cause could be first tried. The defendant then pleaded not guilty and a special plea, and again presented his petition and bond for the removal of the suit, which was also refused and on the same ground.

On the first of May the defendant filed in the District Court of the United States a copy of the record, and, on its motion, the suit was docketed in that court. On the 29th of June the plaintiff moved the State Circuit Court to proceed with the trial of the action, but this was refused on the ground that the case had been docketed in the District Court of the United States. On the 14th of October the plaintiff applied to the Supreme Court of Appeals of the State for a mandamus requiring the Circuit Court to proceed with the trial of the cause, and a rule

was awarded, directed to the judge of the Circuit Court, returnable on the tenth day of the next regular term, calling on him to show cause why a peremptory writ should not issue. On the 6th of November a judgment of nonsuit was entered in the District Court, the plaintiff having failed to appear and prosecute the original action there. The rule of the Court of Appeals was served on the judge of the Circuit Court on the second of December, 1882, and on the railroad company on the fourth of the same month.

On the 10th of January, 1883, the railroad company filed its bill in equity in the District Court of the United States against White, as administrator, to enjoin him from proceeding any further with his application for mandamus in the Court of Appeals, and on the 12th of the same month a preliminary injunction was granted as prayed for.

On the 30th of June, 1883, a judgment was entered by the Court of Appeals awarding a peremptory mandamus, both the judge and the railroad company having answered the rule on the 20th of January previous. From this judgment a writ of error was taken to this court and a bond accepted which operated as a supersedeas. That writ was docketed here on the 30th of July.

At the November term, 1883, of the Circuit Court of Greenbrier County, White, the plaintiff in the original suit, applied for a trial of his action. To this the railroad company, defendant, objected. The court declined to proceed to a trial at that term, but entered an order that it would proceed at the next term, which will begin on the 21st of April, 1884. The railroad company thereupon filed its petition in this court, praying "for a writ of prohibition, or such other process as may be deemed appropriate, directed to the Circuit Court of Greenbrier County, West Virginia, and to the Honorable Homer A. Holt, judge of said court, and to the said A. E. White, administrator as aforesaid, and to Alexander F. Matthews, attorney of said White, prohibiting them, and each of them, or such of them as may be thought proper, from any and all further proceedings in the action aforesaid, until the final disposition of the aforesaid writ of error by the Supreme Court of the United States,

and for such other proceedings and process as the circumstances may require and justify."

We can find no authority for any such action in this court as is here prayed. Our proceedings in this suit must be confined to such as relate to a review of the judgment of the Court of Appeals and the enforcement of any order we may make upon the final hearing. If we affirm the judgment, the writ awarded by the Court of Appeals can issue; if we reverse, it cannot. The supersedeas does not operate on the State Circuit Court so as to prevent it from proceeding, nor on White to prevent him from applying to that court for a trial; it simply prevents the use of the process of the Court of Appeals, under the judgment awarding the writ, to compel the Circuit Court to go on. A supersedeas stays the execution of the judgment which is under review. Anything short of an effort to enforce the judgment will not amount to a contempt of the authority of the reviewing court. If the judgment of the Court of Appeals should be reversed in this court, and a mandamus refused, White would not be guilty in law of contempt, if, notwithstanding the refusal, he applied again to the Circuit Court to proceed with the trial.

The judgment of this court would not be a prohibition to that court against proceeding, but only a refusal to order it to proceed. Our judgment could be appealed to as authority for refusing a trial, but not as a command that it should be refused.

The Circuit Court, when, in June, 1882, it declined to order a trial, did not abandon its jurisdiction. It still retained the suit, so far as any action of its own was concerned. If a sufficient case for removal was made in the Circuit Court the rightful jurisdiction of that court is gone, and it cannot properly proceed further, but if it does proceed and does force the defendant, who applied for the removal, to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt. The proper practice in such cases was fully considered in *Insurance Company* v. *Dunn*, 19 Wall. 214; *Removal Cases*, 100 U. S. 457; *Railroad Company* v. *Mississippi*, 102 U. S. 135; *Railroad Company* v. *Koontz*, 104 U. S. 51.

If the suit in the Court of Appeals for mandamus is to be

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deemed part of the original suit in the Circuit Court, and not an independent proceeding, we have no jurisdiction of the writ of error which has been taken, because the judgment of the Court of Appeals is not a final judgment in the action. If it is an independent suit, the writ of error gives us no more control over the Circuit Court, so as to stop its proceeding in the original suit, than it does over the District Court to prevent it from punishing White for a violation of the injunction allowed against his application to the Court of Appeals for a mandamus.

The petition is denied, with costs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY *v.* WOODWORTH, Administrator.

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

Argued March 18th, 1884.—Decided March 31st, 1884.

Conflict of Law—Corporation—Executor and Administrator.

A policy of life insurance, issued by a company incorporated in one State, payable to the assured, his executors or administrators, is assets for the purpose of founding administration upon his estate in another State, in which the corporation, at and since the time of his death, does business, and, as required by the statutes of that State, has an agent on whom process against it may be served.

Under § 18, chap. 3, of the Revised Statutes of Illinois, of 1874, a husband is entitled to administration on the estate of his wife, if she left property in Illinois.

Letters of administration which state that the intestate had at the time of death personal property in the State, are sufficient evidence of the authority of the administrator to sue in that State, in the absence of proof that there was no such property.

The New England Mutual Life Insurance Company, a corporation of the State of Massachusetts, issued a policy of life insurance, on September 21st, 1869, by which, for a consideration received from Ann E. Woodworth, of Detroit, in the State of Michigan, described as "the assured in this policy,"

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and of an annual premium to be paid, it agreed to pay, at its office in Boston, the amount of $5,000, "to the assured under this policy as aforesaid, her executors, administrators or assigns, in sixty days after presentation of satisfactory proof of the death of said Ann E. Woodworth, for the benefit of her husband, S. E. Woodworth, if he shall survive her." The policy was signed by the president of the company, but was not under seal. The proof referred to was to be furnished at the Boston office.

On the 10th of January, 1877, letters of administration were granted by the County Court of the county of Champaign, in the State of Illinois, on the estate of Ann E. Woodworth. The letters ran in the name of the People of the State of Illinois, and recited: "Whereas Ann E. Woodworth, of the county of Seneca, and State of New York, died intestate, as it is said, on or about the 25th day of October, A. D. 1875, having, at the time of her decease, personal property in this State, which may be lost, destroyed, or diminished in value if special care be not taken of the same;" and then proceeded: "To the end, therefore, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Stephen E. Woodworth, of the county of Champaign, and State of Illinois, administrator of all and singular the goods and chattels, rights and credits, which were of the said Ann E. Woodworth at the time of her decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of him by law."

On the 11th of February, 1878, Stephen E. Woodworth, as administrator of the estate of Ann E. Woodworth, deceased, commenced an action at law, in a court of the State of Illinois, against the company, on the policy, to recover the $5,000 named therein. The summons was served on the company in Cook County, Illinois, by reading and by delivering a copy thereof to one Cronkhite, "attorney for service of legal process" of the company in the State of Illinois, on the 20th of February, 1878, the president thereof not being found in the county.

The declaration stated that the plaintiff was "Stephen E.

Woodworth, who sued as the administrator of the estate of Ann E. Woodworth, deceased, for the benefit and use of S. E. Woodworth." It averred that said Ann E. Woodworth died October 21st, 1875, at Seneca Falls, New York; "that the said Stephen E. Woodworth, for whose use and benefit this suit is brought, is the said S. E. Woodworth mentioned in the said policy of insurance as the husband of the said Ann E. Woodworth, and the same party for whose benefit the said defendant contracted and agreed, in said policy of insurance, to pay the said sum specified therein; that the said Ann E. Woodworth was, at the time of the making, executing and delivering the said policy of insurance as aforesaid, the wife of the said Stephen E. Woodworth, and that they were at the said time living together as lawful husband and wife, and that, at the time of the decease of the said Ann E. Woodworth as aforesaid, she left her surviving her said husband, the said Stephen E. Woodworth, who since her death has been a resident of the county of Champaign, State of Illinois;" and that the plaintiff was duly appointed such administrator by said letters. The declaration contained three special counts and money counts in assumpsit.

The defendant petitioned for the removal of the suit into the Circuit Court of the United States for the Southern District of Illinois. It stated, in the petition, that it was, at the time of the commencement of this suit, and still is, "a foreign corporation duly incorporated under and by the laws of the State of Massachusetts and doing business in that State," and had and still has its principal office or place of business at Boston; that the plaintiff was and is a citizen of Illinois; and "that it was served with process of summons herein" on February 20th, 1878, the service being on said Cronkhite, "its general agent at Chicago, in the said State of Illinois." The State court allowed the removal.

Issue being joined, the case was tried before a jury, which found for the plaintiff and assessed his damages at $5,348.73, for which amount, with costs, judgment was entered. The defendant sued out a writ of error. There was a bill of exceptions, the whole of which is as follows:

Argument for Plaintiff in Error.

"At the trial of the above entitled action, which was assumpsit upon a policy of life insurance, a copy of which is hereto annexed and made part of this bill of exceptions, it appeared that said Ann E. Woodward, at the date of the issuing of said policy, resided and was domiciled in the State of Michigan. It appeared that she had never been domiciled in the State of Illinois, and had no other assets to be administered there than this policy; that she died at Seneca Falls, New York, October 25th, 1875; that the plaintiff, the administrator, Stephen E. Woodworth, has resided continuously in Champaign County, State of Illinois, since January 1st, 1876, and had his domicil there at the time of the issue of letters of administration and the commencement of this suit, and then and there had in his possession this policy of insurance. On this state of facts, the defendant, a corporation of the State of Massachusetts, at the time this suit was brought doing business in the State of Illinois by virtue of the laws of said last named State, requested the presiding judges to rule that the present plaintiff, as administrator appointed in Illinois, could not maintain this action. A copy of the letters of administration, which were the only evidence of the plaintiff's authority to sue, is hereto annexed and made part of this bill of exceptions. The presiding judges refused so to rule, and did rule that the plaintiff, if in other respects he showed a good cause of action, was entitled to recover, to which ruling the defendant immediately excepted and prayed that his exception might be allowed. This bill contains all the evidence on the point herein above made."

Mr. Alfred D. Foster and *Mr. George F. Hoar*, for plaintiff in error.—I. Letters of administration may be attacked collaterally, and will be adjudged void for want of jurisdiction whenever and wheresoever the jurisdictional power of the court granting them is shown not to exist. *Griffith* v. *Frazier*, 8 Cranch, 9; *Insurance Company* v. *Lewis*, 97 U. S. 682; *Holyoke* v. *Haskins*, 5 Pick. 20; *S. C.* 9 Pick. 259; *Crosby* v. *Leavitt*, 4 Allen, 410; *Embry* v. *Miller*, 1 A. K. Marshall, 221; *Miltenberger* v. *Knox*, 21 La. Ann. 399; *Patillo* v. *Barksdale*, 22 Geo. 356. This is the law in Illinois. *Unknown Heirs of Langworthy* v. *Baker*, 23 Ill. 484; *Ferguson* v. *Hunter*, 2 Gillman (Ill.) 657; *Farrel* v. *Patterson*, 43 Ill. 52.—II. No administration

can be granted in any jurisdiction where there are no local assets. *Wyman* v. *Halstead*, 109 U. S. 654.—III. All simple contract debts, of which this policy of insurance was one, are local assets at the domicil of the debtor. The domicil of the original defendant, the plaintiff in error, is in Massachusetts, where the corporation was created, has its domicil and corporate home, and where, by its express terms, the policy is payable. *Wilkins* v. *Ellett*, 9 Wall. 740; *Wyman* v. *Halstead*, above cited.—IV. The intestate having been domiciled in Michigan at her decease, the principal administration, to which all others are subordinate, must be in that State. There being no other assets in Illinois, this contract of insurance does not constitute *bona notabilia* in Illinois, "without regard to the place where the instrument is found or payable." And no Illinois court was authorized to grant limited or ancillary administration on her estate. *Cureton* v. *Mills*, 13 So. Car. 409.—V. By the statutes of Illinois, a duly appointed Michigan administrator might bring suit on this policy in Illinois. Rev. Stat. Ill. ch. 3, § 42.—VI. An administrator might be appointed in Massachusetts who could bring an action upon it there.—VII. Even if the Illinois administration was valid, by reason of the existence of local assets there, the Illinois special administrator could not bring an action on this contract.—VIII. It cannot be contended, even plausibly, that the debtor corporation had an Illinois domicil sufficient to justify the administration in that State. *Insurance Company* v. *Lewis*, 97 U. S. 682; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588; *Railroad Company* v. *Koontz*, 104 U. S. 5; *Relf* v. *Rundel*, 103 U. S. 222; *Paul* v. *Virginia*, 8 Wall. 168; *Canada Southern Railway Company* v. *Gebhard*, 109 U. S. 527.

Mr. J. S. Lothrop and *Mr. Geo. W. Gere* for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

It is contended for the plaintiff in error, that the County Court which granted the letters of administration had no power

to do so, unless property belonging to Ann E. Woodworth when she died was left by her within the jurisdiction of that court; that she was not domiciled in Illinois at the time of her death, and, therefore, it was necessary that assets belonging to her should have existed in that State at that time, to warrant jurisdiction to issue the letters, and it could not be obtained by bringing into the State afterwards property which was hers when she died; that, on the facts in the case, the debt of the company to her was not property of hers in Illinois when she died, even if the policy was in Illinois when she died; and that such a debt was a simple contract debt and was local assets only at Boston, which was the only domicil of the debtor.

The letters of administration state that Ann E. Woodworth had, at the time of her decease, personal property in the State of Illinois. The plaintiff's authority to sue was shown *prima facie* by the letters. The case was one provided for by the statute of Illinois, Revised Statutes of 1874, chap. 3, § 18, p. 107, which was as follows:

"Administration shall be granted to the husband upon the goods and chattels of his wife, and to the widow or next of kin to the intestate, or some of them, if they will accept the same and are not disqualified; but in all cases the widow shall have the preference; and if no widow or other relative of the intestate applies within sixty days from the death of the intestate, the County Court may grant administration to any creditor who shall apply for the same. If no creditor applies within fifteen days next after the lapse of sixty days, as aforesaid, administration may be granted to any person whom the County Court may think will best manage the estate. In all cases where the intestate is a non-resident, or without a widow, next of kin, or creditors in this State, but leaves property within the State, administration shall be granted to the public administrators of the proper county; *Provided*, That no administration shall in any case be granted until satisfactory proof be made before the County Court, to whom application for that purpose is made, that the person in whose estate letters of administration are requested is dead, and died intestate; *And provided, further*, That no non-resident of

this State shall be appointed administrator, or allowed to act as such. R. S. 1845, § 55, p. 547."

It is plain, that under this statute the husband had a right to administration on the property of his wife, if she had property in Illinois, as the letters state she had, when she died. Such was necessarily the decision which was made in the granting of these letters, and we have been referred to no decision in Illinois which holds to the contrary. The first branch of the statute covers all cases of intestacy where property is left to be administered; and the second branch, where the public administrator is brought in, does not apply where there is a husband surviving his wife, who applies for letters on her estate.

The letters being valid on their face, and in the form prescribed by the statute, Revised Statutes of 1874, chap. 3, § 21, p. 108, and apparently authorized by law, their validity must be distinctly negatived by what is set forth in the record, if the plaintiff's authority to sue is not to be supported by them. This is not done. On the contrary, the declaration of the letters that the intestate had personal property in Illinois when she died, is, we think, supported by what appears in the record, even if such property consisted solely of this policy.

In the growth of this country, and the expansions and ramifications of business, and the free commercial intercourse between the States of the Union, it has come to pass that large numbers of life and fire insurance companies and other corporations, established with the accumulated capital and wealth of the richer parts of the country, seek business and contracts in distant States which open a large and profitable field. The inconveniences and hardships resulting from the necessity on the part of creditors, of going to distant places to bring suits on policies and contracts, and from the additional requirement, in case of death, of taking out letters testamentary or of administration at the original domicil of the corporation debtor, in order to sue, has led to the enactment in many States of statutes which enable resident creditors to bring suits there against corporations created by the laws of other States. Such a statute

existed in Illinois, in the present case, requiring every life insurance company not organized in Illinois to appoint in writing a resident attorney, upon whom all lawful process against the company might be served with like effect as if the company existed in Illinois, the writing to stipulate that any lawful process against the company, served on the attorney, should be of the same legal force and validity as if served on the company, a duly authenticated copy of the writing to be filed in the office of the auditor, and the agency to be continued while any liability should remain outstanding against the company in Illinois, and the power not to be revoked until the same power should be given to another, and a like copy be so filed; the statute also providing that service upon said attorney should be deemed sufficient service on the company. Revised Statutes of 1874, chap. 73, § 50, p. 607.

In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil, so as to uphold the grant of letters of administration there. The corporation will be presumed to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died.

The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of

founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in *Wyman* v. *Halstead*, 109 U. S. 654. But the reason why the State which charters a corporation is its domicil in reference to debts which it owes, is because there only can it be sued or found for the service of process. This is now changed in cases like the present; and in the courts of the United States it is held, that a corporation of one State doing business in another, is suable in the courts of the United States established in the latter State, if the laws of that State so provide, and in the manner provided by those laws. *Lafayette Insurance Company* v. *French*, 18 How. 404; *Railroad Company* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Company* v. *Koontz*, 104 U. S. 5, 10.

It is argued for the plaintiff in error, that administration could have been taken out in Michigan on the policy, on the view that that was the domicil of the assured, and that it could have been taken out in Massachusetts, without regard to the location of the policy at the time of the death of Mrs. Woodworth, and without regard to the fact that she died in another jurisdiction; and the case of *Bowdoin* v. *Holland*, 10 Cush. 17, is cited as holding that administration may be granted in Massachusetts, on the estate situated there of a person who died while residing in another State, although the will of the deceased had not yet been proved in the State of his domicil, on the view that otherwise debts due in Massachusetts, to or from the intestate's estate, could not be collected. The reason assigned for taking out letters in Massachusetts has equal force when applied to a State where the debtor does business under the laws of that State, and can be sued as fully as in Massachusetts, and is sure to be found so as to be served with process. If the defendant is to be sued in Illinois, administration must be taken out there; and administration in Massachusetts or in Michigan would not suffice as a basis for a suit in Illinois. The consent and capacity to be sued in Illinois still require, if an administrator is to be the plaintiff, that letters should be issued in Illinois; and by the terms of the policy, on the death of the assured, the suit must be by her executor or administrator. So

it results, that the question in this case must be decided on the same principle as if Illinois were the only State in which suit could be brought, and therefore, the State in which letters of administration must be taken out for the purpose of a suit.

Nor is there anything inconsistent with this view in the fact that, as a corporation of Massachusetts, the defendant removed the suit from the State court on the ground of diversity of citzenship. It was not, as in *Memphis, &c., Railroad Company* v. *Alabama*, 107 U. S. 581, a corporation of the State in which the suit was brought as well as a corporation of the State which originally chartered it, but it was exclusively a corporation of Massachusetts for the purpose of availing itself of the privilege of removing the suit. Its diversity of citizenship for such purpose may well remain, because it does not desire a trial in the State tribunal. Yet its availing itself of the privilege of doing business in Illinois, and subjecting itself to the liability to be sued in a court in Illinois, with the effect of making the policy assets in Illinois, were voluntary acts, which, though not affecting the jurisdiction of the Federal court, may well be held to give a locality to the debt for the purposes of administration, so that a suit may be brought under such letters in Illinois.

There is nothing in the foregoing views which is in conflict with what was decided in *Wyman* v. *Halstead*, *ubi supra*. In consonance with what was said in that case, payment of this debt to the administrator appointed in Illinois will be good against any administrator appointed elsewhere; and the defendant will be protected in paying this judgment, especially as the husband is the exclusive beneficiary under the policy, and is the administrator and the plaintiff, and the money paid cannot be liable for any debts of the wife.

Nor is this case governed by the decision in *Insurance Company* v. *Lewis*, 97 U. S. 682. The question there was as to the authority of a public administrator in Missouri, under a statute of that State, to bring an action on the policy. It appeared affirmatively that the intestate resided in Wisconsin when he died, and died there, and that there was already an adminstrator appointed in Wisconsin, so that the defendant could not be

protected against a future suit by a proper representative of the estate.

The record of this case shows that a special plea was put in, setting up that at the time of her death the assured was not a citizen or resident of Illinois, and left no property situate in that State, and that her entire estate was the claim under this policy. This plea was held bad on demurrer. Error in sustaining the demurrer is assigned, but, as it appears by the bill of exceptions, that under the general issue, the defendant gave evidence of the matters set up in the special plea, and they constitute no defence, the overruling of the plea worked no injury to the defendant.

These views cover all the questions which are controlling in this case, and

The judgment of the Circuit Court is affirmed.

COOPER & Another *v.* SCHLESINGER & Another.

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

Argued March 19th, 1884.—Decided March 31st, 1884.

Damages—Fraudulent Representations—Trial.

Where a charge embraces several distinct propositions, a general exception is of no effect if any one of them is correct.

When the issue made up by the pleadings and evidence for the jury is whether one party was induced to enter into the contract in suit by false and fraudulent representations of the other party, and isolated passages from the charge are excepted to, if the charge as a whole and in substance instructs the jury that a statement recklessly made without knowledge of its truth was a false statement knowingly made, within the settled rule, it is sufficient and will be supported.

Where a person is induced by false representations to buy an article at an agreed price, to be delivered on his future order, the measure of damages, in an action to recover for the injury caused by the deceit, is the diminution caused thereby in the market price at the time of delivery.

This was an action at law brought in the Circuit Court of the United States for the Northern District of Ohio, by the

defendants in error, trading as Naylor & Co., against the plaintiffs in error, trading as George Cooper & Co. The suit was brought to recover the sum of $570.56, with interest from March 5th, 1877, for goods sold, part of which was a quantity of star spring steel. Cooper & Co. set up, in their answer to the petition, as a defence, counterclaim and set-off, that the star spring steel was delivered under a contract between the parties, made in March, 1876, whereby Naylor & Co. agreed to sell to Cooper & Co. 300 tons of said steel at $5\frac{5}{8}$ cents per pound, the same to be delivered on Cooper & Co.'s order, at various times in the future; that Naylor & Co. were steel makers, and Cooper & Co. were steel carriage spring makers; that the latter had been for a long time using the star spring steel made by the former; that a change from the use thereof involved expense and delay, and Cooper & Co. could not compete with others in the business, unless they could purchase the steel at as low a price as others in the business could; that Naylor & Co. knew all this, and the contract was made with reference thereto; that, in order to induce Cooper & Co. to purchase the 300 tons of steel, Naylor & Co., by their agent, falsely and fraudulently represented to Cooper & Co. that the condition of their furnaces and business was such that they could not make and sell during 1876, exclusively of the amounts already ordered by their customers, more than 600 tons of such steel, including the 300 tons which they then requested Cooper & Co. to purchase, and such that they could not make or sell during 1876, exclusively of the amounts already ordered by their customers, more than 300 tons of such steel to makers of carriage springs, to wit, the 300 tons which they then requested Cooper & Co. to purchase, and which the latter then did so agree to purchase; that it was a part of the contract, and Naylor and Co. agreed, that they would not make and sell during 1876, exclusively of the amount already ordered by their customers, more than 600 tons of such steel, including the amount so contracted to be sold to Cooper & Co., and would not make and sell during 1876, exclusively of the amounts already ordered by their customers any star spring steel to makers of carriage springs; that each and all of said representations

were false, fraudulent and untrue, and that Naylor & Co. and said agent made the same knowing them to be false, fraudulent and untrue, and for the purpose and with the intent of inducing Cooper & Co. to make said contract and purchase said 300 tons of steel at a price in excess of the then and future market price of such steel; that Cooper & Co. believed and relied upon said representations, and in such belief and reliance entered into said contract; that said price was in excess of the then price of steel, and so continued to be during the whole time of the delivery of the steel; that the condition of the furnaces and business of Naylor & Co. was not in any respect as so represented, but, as Naylor & Co. and said agent well knew, said condition was such that they could make and sell large quantities of such steel during 1876 in addition to said 600 tons and said amounts so ordered, and could make and sell to makers of carriage springs large quantities of such steel in addition to said 300 tons and said amounts so ordered, during 1876; that, during 1876, Naylor & Co. did make and sell large quantities of such steel, in addition to said 600 tons and said amounts so ordered, and did make and sell large quantities of such steel to makers of carriage springs, in addition to said 300 tons and said amounts so ordered; that during 1876 Naylor & Co. delivered to Cooper & Co. under said contract, and at various times, 572,900 pounds of such steel, for all of which Cooper & Co. paid at the price of $5\frac{5}{8}$ cents per pound, as agreed, and Naylor & Co. also delivered to them the steel embraced in the petition, and not paid for; that by such acts of Naylor & Co. the market price of such steel and of carriage springs was largely decreased, and during 1876 Cooper & Co. were compelled to and did pay for all the steel delivered to them under said contract a price greater than the market price and a price greater than such steel was sold for by Naylor & Co. to others and to other makers of carriage springs, and were unable to compete with other makers of carriage springs, to their damage $6,000; and that they claim as a set-off so much of the $6,000 as is equal to the claim of Naylor & Co., and ask for judgment for the remainder. There was a reply denying the material allegations of the answer and counterclaim. The case was tried by a jury

and resulted in a verdict for Naylor & Co. for $667.27; on which there was a judgment for that amount, with costs. Cooper & Co. sued out this writ of error.

Mr. Henry E. Davis (*Mr. Albert G. Riddle* was with him), for plaintiff in error, cited, as to the false representations, *Williamson* v. *Allison*, 2 East, 446; *Frenzel* v. *Miller*, 37 Ind. 1, 17; *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Sharp* v. *Mayor*, 40 Barb. (N. Y.), 256, 269; *Smith* v. *Richards*, 13 Pet. 26, 36–7; *Smith* v. *Babcock*, 2 Woodb. & M. 246; *Harding* v. *Randall*, 15 Me. 332; *Hazard* v. *Irwin*, 19 Pick. 95, 108–9; *Craig* v. *Ward*, 36 Barb. (N. Y.), 377, 385; *Bankhead* v. *Alloway*, 6 Cold. (Tenn.), 56; *Fisher* v. *Mellen*, 103 Mass. 503; *Wilcox* v. *Iowa University*, 32 Iowa, 367; *Graves* v. *Lebanon Bank*, 10 Bush (Ky.), 23; *Foard* v. *McComb*, 12 Bush (Ky.), 723. And as to the measure of damages, Field on Damages, § 707; *Crater* v. *Bininger*, 33 N. J. L. 513; Sedgwick on Damages, 88, 160; *Masterton* v. *Mayor*, 7 Hill, 61; *Abbott* v. *Gatch*, 13 Md. 314; *Parringer* v. *Thorburn*, 34 N. Y. 634; *Milburn* v. *Belloni*, 39 N. Y. 53; *Booth* v. *Spuyten Duyvil Rolling Mill Company*, 60 N. Y. 487; *Thompson* v. *Burgey*, 36 Penn. St. 403; *Cline* v. *Myers*, 64 Ind. 304; *Murray* v. *Jennings*, 42 Conn. 9; *Thompson* v. *Burgey*, *ubi supra*; *Stetson* v. *Croskey*, 52 Penn. St. 230; *Nye* v. *Iowa City Works*, 51 Iowa, 129; *White* v. *Smith*, 54 Iowa, 233; *Mason* v. *Raplee*, 66 Barb. 180; *Drew* v. *Beall*, 62 Ill. 164; *Cline* v. *Myers*, *ubi supra*; *Page* v. *Wells*, 37 Mich. 415; *Morse* v. *Hutchins*, 102 Mass. 439; *Morris* v. *Parham*, 4 Phil. (Penn.), 62; *Morrison* v. *Lovejoy*, 6 Minn. 319; *Clifford* v. *Richardson*, 18 Vt. 620; *Moorehead* v. *Hyde*, 38 Iowa, 382.

Mr. H. L. Terrell for defendants in error submitted on his brief.

Mr. Justice Blatchford delivered the opinion of the court. After reciting the foregoing facts he continued:

The only exceptions presented by the bill of exceptions are to the charge of the court to the jury. The entire charge is set out. There is a general exception by the defendants to the

charge, but that is of no avail. Where a charge embraces several distinct propositions, a general exception is of no effect if any one of them is correct. *Lincoln* v. *Claflin*, 7 Wall. 132, 139. The defendants did except, however, to the four distinct parts of the charge which are below put in brackets, and they also excepted generally to the rule given as to the measure of damages. They did not ask for any specific instructions. The court said in its charge:

"It is not necessary, to constitute a fraud, that a man who makes a false statement should know precisely that it is false. It is enough if it be false, and if it be made recklessly, and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon, and has been acted upon by him accordingly. It is important that this party knew, or had reason to know, that the representations he was making at the time were false, so as to make an element constituting a fraud that would entitle a party like the defendants to maintain a suit upon it. . . . A false representation does not amount to a fraud in law, unless it be made with a fraudulent intent. There is, however, a fraudulent intent if a man, either with a view of benefiting himself, or misleading another into a course of action, makes a representation which he knows to be false or which he does not believe to be true. . . . It is not every misrepresentation in the making of a contract that constitutes a fraud upon which a party may rely to set aside the binding obligation of the contract. The misrepresentation must be in relation to a fact or a state of facts which is material to the transaction, and the determining ground of the transaction. There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it, or at least not on the same terms. Both facts must concur. There must be a false and a material representation, and the party seeking relief should have acted upon the faith and credit of such representation. . . . [A representation, to be material, should be in respect of an existing and ascertainable fact, as distinguished

from a mere matter of opinion or advice.] In many of these trading transactions there is a system of misrepresentation in regard to the value of property, and several other things that sometimes enter into a contract, that does not constitute representations of existing facts, but simply the opinion or advice of the party that makes the representations; and that class of representations does not constitute and lay a foundation for the maintenance of an action of fraud. [It must be a representation of existing facts that turn out to be false and that the party at the time knew to be false.] These are general principles that you are to look into in order to ascertain, in the light of the evidence, whether the defendants in this action have been able to substantiate, by a fair preponderance of proof on their side, taking all the evidence together, that these representations were of this character—that they were false, that the party knew them to be false, and that they were made for the purpose and with the intent of defrauding this party at the time they were made, these all constituting elements necessary to be made in order to maintain this sort of an action."

The court then passed to the question of damages, and said:

"It is claimed on behalf of the defendants, that their measure of recovery is the reduced market price of the steel before and at the time of the delivery of the respective quantities of steel that were to be delivered by the terms of the contract. It seems that the steel was to be delivered at different times, on the order of the defendants, as they might want the steel. On the other hand, it is claimed by the plaintiffs that the measure of damages is simply the market value of the steel at the time when this contract for the purchase of the 300 tons was made. [The general rule for an action of that kind, and for a fraud of that kind, would be the difference between the agreed price that was procured by fraudulent representations, and the market price of the article purchased, at the time when the sale was made]; for, if the property was of the value that was agreed to be paid at the time, then there was no fraud perpetrated as to the price which was agreed to be paid for the steel, growing out of any representations in relation to it. But these representations are of a peculiar nature. It is said that the representation was, that these

parties had but three hundred tons of steel to be put upon the market during the year for the purpose of being manufactured into springs, and that they had but six hundred tons of steel to be put upon the market during the whole year for all purposes. Now, I direct you that if this representation was false, and these parties did go and place upon the market greater quantities of steel than they said in their representations they had, then, to whatever extent the placing of that quantity of steel would have reduced the market price of steel, the defendants in this action would be entitled to recover. [But they would not be entitled to recover a reduction in the price and value of steel occasioned by other things over which the plaintiffs in this suit had no control, and not growing out of the fact that these plaintiffs did, contrary to the representations and statements of this agent, place upon the market a greater quantity of steel.] Look into the evidence and see whether the fact that these parties did put eight or nine hundred tons, as claimed by the defendants, upon the market, affected the market price of the steel; for, if a party may be induced by false representations to make a purchase of a quantity of goods at a certain time, and does not pay any more than the market price for them, then he takes the risk of the falling of the price of the article at the time when it is delivered, and the contract price fixes the amount to be paid, at the time when the contract is made, and not at the time of the delivery of the goods. If, in this case, the defendants were to pay the contract price at the delivery, then, of course, that would be another question; but they agree by this contract to fix a price which they shall pay for the whole three hundred tons, to be delivered as they might direct. If these representations were false, and these parties did, contrary to the representations, place upon the market this increased quantity of steel, and that affected the market, then to the extent of that affectation of the market these defendants would be entitled to recover from the plaintiff their damages."

In the first two sentences excepted to, the court was dealing with the subject of the representations as to existing facts. The answer alleges that the representations were false and fraudulent, and that Naylor & Co. and their agent made them knowing them to be false, fraudulent and untrue, and for the purpose of inducing Cooper & Co. to make the contract at the

alleged excessive price, and knew the condition of their furnaces and business to be the opposite of that represented. So far as the cause of action on the part of Cooper & Co. is based on representations of the condition of the furnaces and business of Naylor & Co. with reference to the quantity of steel they had facilities for making in 1876, such cause of action is set forth as one founded on knowledge of the falsity of the representations. Taking the two sentences excepted to in connection with the rest of the charge, the jury were properly instructed, that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule. In the charge on this branch of the case we see no error.

As to so much of the answer as set forth a contract by Naylor & Co. not to do certain things in the future, and a breach thereof and a claim of damages therefor, if there be such a separable cause of action set up, it is sufficient to say that there is no exception to any part of the charge which may be supposed to be addressed to such a question, and the case was, as to the entire claim of the defendants, properly presented to the jury. The plaintiffs were not responsible for any reduction in price or value occasioned by other causes than their putting on the market more steel than the quantity agreed upon.

As to the rule of damages, the court, after setting forth the general rule correctly, stated the rule applicable to the special circumstances of this case; and we understand that rule to have been substantially given as claimed by the defendants. It was, that where a person is induced by false representations to buy an article, at an agreed price, to be delivered on his future order, he can recover, as damages for the deceit, the diminution caused thereby in the market price at the time of delivery. The instruction as claimed by the defendants having been given, they cannot complain of it.

There being no error in the record,

The judgment is affirmed.

Statement of Facts.

MOORES *v.* CITIZENS' NATIONAL BANK OF PIQUA.

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

Argued March 6th, 7th, 1884.—Decided March 31st, 1884.

Certificate of Stock—Corporation—Fraud.

A lent money to B for his own use, and, as security for its repayment, and on his false representation that he owned, and had transferred to A, a certificate of stock to an equal amount in a national bank of which B was cashier, received from him such a certificate, written by him in one of the printed forms which the president had signed and left with him to be used if needed in the president's absence, and certifying that A was the owner of that amount of stock "transferable only on the books of the bank on the surrender of this certificate," as was in fact provided by its by-laws. B did not surrender any certificate to the bank, or make any transfer to A upon its books; never repaid the money lent, and was insolvent. The bank never ratified, or received any benefit from, the transaction. *Held,* That A could not maintain an action against the bank to recover the value of the certificate. *Held, also,* That the action could not be supported by evidence that in one or two other instances stock was issued by B without any certificate having been surrendered; and that shares, once owned by B, and which there was evidence to show had been pledged by him to other persons before the issue of the certificate to A, were afterwards transferred to the president, with the approval of the directors, to secure a debt due from B to the bank, without further evidence that such issue of stock by B was known or recognized by the other officers of the bank.

This is an action against a national bank to recover the value of a certificate of stock therein, which the bank had refused to recognize as valid.

The amended petition and other pleadings are stated in the report of the case at a former stage, at which this court, for an erroneous ruling of the Circuit Court on a question of the statute of limitations, reversed a judgment for the defendant, and ordered a new trial. 104 U. S. 625. A recital of the pleadings is unnecessary to the understanding of the case as now presented.

The undisputed facts, as appearing by the admissions in the petition, by the evidence introduced by the plaintiff before the jury at the new trial, and by the defendant's admissions at that trial, were as follows:

Statement of Facts.

The defendant was organized in 1864, under the act of Congress of June 3d, 1864, ch. 106, the twelfth section of which provides that the capital stock shall be "transferable on the books of the association in such manner as may be prescribed by the by-laws or articles of association." 13 Stat. 99, 102. The defendant's by-laws relating to transfers of the stock were as follows:

"SECT. 15. The stock of this bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfer of the stock of this association shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends; and, except in cases of agreement to the contrary expressed in the assignment, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

"SECT. 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and cancelled, and new certificates issued."

The defendant's capital stock was one thousand shares of one hundred dollars each, the whole of which was in fact, and was alleged in the petition to have been, taken and paid for, and certificates therefor issued to the stockholders, at the time of its organization in 1864. The president and cashier of the bank were charged with the keeping of its transfer books and the issuing of certificates of stock, and the books of the bank were always open to the inspection of the directors. On July 15th, 1867, G. Volney Dorsey was president and Robert B. Moores was cashier of the bank, and said Moores, who had previously owned two hundred and seventy-five shares of the

stock, appeared on the books of the bank to be still the owner thereof. He and John B. C. Moores, the plaintiff's husband, were sons of William B. Moores.

On that day, the plaintiff agreed to lend $9,100 of her own money to Robert and William for use in their private business; they agreed to give her, as security for its repayment, a certificate of ninety-one shares, which Robert represented to her that he owned, and also the contract of guaranty hereinafter set forth; and Robert sent to the plaintiff's husband, as her agent, the following letter and certificate:

"Citizens' National Bank of Piqua,
"Piqua, O., July 15th, 1867.

"John: Herewith I hand you the stock transferred to Carrie. I don't know what day I will be down, and you can keep the contract there, and I will sign it the first time I am down. I will have to take a receipt for the stock from father, to file with my papers, to show where the stock is gone to. All well; may be down any day.

Y'rs, R. B. Moores."

"The Citizens' National Bank of Piqua,

No. 56. State of Ohio. 91 Shares.

"This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares of one hundred dollars each of the capital stock of the Citizens' National Bank of Piqua, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate.

"Piqua, O., July 15th, 1867. [Seal.]

"Rob't B. Moores, G. Volney Dorsey,
"Cashier. President."

This certificate was in the usual form of printed certificates used by the bank, and bore the genuine seal of the corporation, and the genuine signatures of the president and cashier; and the whole certificate, except the printed part and the president's signature, was in the cashier's handwriting, filled up by him in one of two or three blanks signed by the president and left with him to be used if needed in the president's absence.

Statement of Facts.

Upon receiving the letter and certificate, the plaintiff paid the money to Robert B. Moores; and on July 18th he and William signed and sent to her the following contract:

"For value received, namely, the sum of ninety-one hundred dollars, Robert B. Moores has assigned and transferred to Caroline A. Moores ninety-one shares of stock of the Citizens' National Bank of Piqua, Ohio.

"Now it is agreed that the said Caroline A. Moores shall, upon demand by Robert B. Moores, or his assigns, reassign to said R. B. Moores the said stock for the same amount. And it is also agreed that, whenever the said Caroline A. Moores shall require it, the said Robert B. Moores shall purchase said stock at the amount aforesaid, and pay the same to her in cash. And in the meantime it is agreed, and the said Robert B. Moores and William B. Moores do hereby guarantee and assure to said Caroline A. Moores an annual dividend upon said stock of not less than ten per cent. upon the par value of said stock, namely, ninety-one hundred dollars, which guaranty shall be performed and fulfilled at the end of each year herefrom, or at the time of each dividend declared, if such dividend shall be declared oftener than once a year, and all deficiencies in said dividends shall be made good at the time of such repurchase or transfer to R. B. Moores.

"In witness whereof the said Caroline A. Moores and J. B. C. Moores, her husband, and Robert B. Moores and William B. Moores, hereunto set their hands on this 15th day of July, 1867.

"Caroline A. Moores.
"J. B. C. Moores.
"Robt. B. Moores.
"W. B. Moores."

Robert B. Moores surrendered no certificate to the bank, and made no transfer to the plaintiff on its books. The plaintiff had no other knowledge of the rule requiring the surrender of an old certificate of stock before the issue of a new one, or of any fraud on the part of Robert, than was obtained by her reading and possession of the certificate. The value of the stock of the bank at that time was ninety per cent. of its par value. Robert B. Moores was insolvent, and the money lent to him by the plaintiff was never repaid.

Statement of Facts.

The plaintiff put in evidence two letters to her husband from Dorsey, the president of the bank; one dated June 25th, 1872, stating that the writer had just learned that he held a certificate of stock purporting to be issued by the bank, and asking for its number, date and amount; and the other dated July 5th, 1872, the body of which was as follows:

"There is no such certificate as mentioned in yours of June 27th on our books. No. 56 is marked on the stub in our certificate book 'destroyed' in R. B. Moores' handwriting. Your wife's name was never entered among our stockholders and the certificate is a fraud. We never heard of this certificate until you mentioned it to Dr. Parker, who first informed me of it."

Robert B. Moores and Dorsey, being called as witnesses for the defendant, testified that it had no interest in the transaction of July 15th, 1867. Moores testified that at that date he had pledged to Jason Evans and other persons all the stock he had previously owned, and did not own any stock; and that he issued the certificate to the plaintiff without any authority from the bank, or any knowledge of the other officers. Dorsey testified that he had no knowledge of the issue of the certificate until June 25th, 1872, and that the bank never paid any dividends upon it; and he produced the certificate book of the bank, which showed the stub of a certificate, in its regular order, corresponding in number with that produced by the plaintiff, and having the word "destroyed" upon it, in the handwriting of Robert B. Moores.

The plaintiff offered in evidence, and the court declined to admit, the record of a meeting of the board of directors of the bank, on August 9th, 1869, containing the following entry:

"On motion, the following resolution was adopted and ordered to be placed upon the minutes: Whereas Robt. B. Moores, who was the owner of 275 shares of the capital stock of this bank (evidenced by certificate No. forty-seven (47) for fifty shares, dated May 2d, 1867; certificate No. forty-eight (48) for fifty shares, dated May 2d, 1867; certificate No. forty-nine (49) for sixty-five shares, dated May 2d, 1867; certificate No. fifty-three (53) for

Statement of Facts.

seventy shares, dated June 11th, 1867, and certificate No. fifty-four (54) for forty shares, dated June 11th, 1867), became indebted to this bank in the sum of thirty-seven thousand two hundred and forty-seven 29-100 dollars, ($37,247.29), and did, on the 16th day of January, 1868, transfer one hundred and eighty-five shares of said stock, and on the 15th day of May, 1869, did transfer ten shares of said stock, on the books of this bank, to G. Volney Dorsey, in consideration that said G. Volney Dorsey pay to this bank the sum of nineteen thousand five hundred dollars of said indebtedness; and whereas Jason Evans, who became the holder of seventy shares of said stock, issued as aforesaid and transferred to him by the said R. B. Moores on the books of this bank September 4th, 1867, as per certificate No. 59, did, on the 20th day of February, 1869, transfer to G. Volney Dorsey, on the books of this bank, by his power of attorney, all his right, title and interest in the same; therefore said transfers, as hereinbefore stated, are approved and affirmed by the directors of this bank."

The plaintiff also offered evidence that there were one or two other instances in which stock was issued by the cashier without any certificate being surrendered. But, as she offered no evidence, other than the directors' record of August 9th, 1869, that the other officers of the bank had any knowledge at the time of such transactions, or subsequently recognized them, the court excluded the evidence.

The plaintiff offered to prove that there was an arrangement between Robert and her husband, by which interest, equal to ten per cent. on $9,100, on a debt due from the latter to his father, was to be treated as dividends upon this stock. But the court excluded the evidence as immaterial.

The court instructed the jury that the plaintiff having knowledge of the fact that Robert B. Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier, in reference to the matter of issuing this certificate, she was not an innocent holder of the stock, and as the certificate was issued without authority, in fraud of the rights of the bank, they should return a verdict for the defendant. A verdict was returned accordingly, and judgment rendered thereon, and the plaintiff excepted to the

exclusion of evidence and to this instruction, and sued out this writ of error.

Mr. John W. Warrington and *Mr. E. W. Kittredge* for plaintiff in error.—I. The issuing of such a certificate of stock, signed by the president and the cashier of the defendant, and under its corporate seal, is the corporate act of the defendant, and not the act of the president and cashier, as mere agents of the corporation. Such certificate is, to all intents and purposes, the certificate of defendant corporation in its corporate capacity. *Wilson* v. *Salamanca*, 99 U. S. 499; *Pollard* v. *Vinton*, 105 U. S. 7; *Scotland County* v. *Thomas*, 94 U. S. 682.—II. The by-laws of defendant required a certificate for stock owned by its cashier or president to be in the same form, and issued and transferred in the same manner as certificates of stock owned by any other stockholder of defendant. The fact, therefore, that the plaintiff's certificate was understood by her at the time to be issued upon a surrender or transfer of stock owned by Robert B. Moores, the defendant's cashier, was not notice of any irregularity in the issuing of said certificate, or want of validity thereof, to the plaintiff. *Titus* v. *Great Western Turnpike*, 61 N. Y. 237; *S. C.* 5 Lansing, 250; *Western Maryland Railroad* v. *Franklin Bank*, 60 Md. 36; *American and English Corporation Cases*, Jan. 1884, p. 46; *Willis* v. *Fry et al.* 13 Phila. Penn. 33; *Ashton* v. *Atlantic Bank*, 3 Allen, 217.—III. The defendant is estopped to deny, as against a *bona fide* purchaser for value, the validity of such a certificate, if it was not an over-issue; and if it was an over-issue, the defendant is responsible for the loss sustained by such a *bona fide* purchaser for value. *Bank* v. *Lanier*, 11 Wall. 369; *Case* v. *Bank*, 100 U. S. 446; *Johnston* v. *Laflin*, 103 U. S. 800; *New York & New Haven Railroad Company* v. *Schuyler et al*, 34 N. Y. 30; *Bruff* v. *Mali*, 36 N. Y. 200; *Holbrook* v. *New Jersey Zinc Company*, 57 N. Y. 616; *Titus* v. *Great Western Turnpike*, 61 N. Y. 237; *Tome* v. *Parkersbury Railroad*, 39 Md. 36; *Western Maryland Railroad* v. *Franklin Bank*, 60 Md. 36; *Machinists' National Bank* v. *Field*, 126 Mass. 345; *Bank of Kentucky* v. *Schuylkill Bank*, 1 Parsons Sel. Cases,

180; *In re Bahia & San Francisco Railroad Company*, L. R. 3 Q. B. 584.—IV. It was negligence for the president of the defendant to sign certificates in blank, and leave them with its cashier. And the rule of law applies that where one of two innocent persons must suffer by the fraud of a third party, he who has, by his trust and negligence, enabled such third party to commit the fraud must answer for the loss. *Merchants' Bank* v. *State Bank*, 10 Wall. 604 (citing on page 646, with approval, *New York, &c., Railroad Company* v. *Schuyler*, 34 N. Y. 30); *Pompton* v. *Cooper Union*, 101 U. S. 196; *Dair* v. *United States*, 16 Wall. 1.—V. If, at the date of said certificate, Robert B. Moores was the owner of any stock in the defendant corporation, the plaintiff became entitled to it, to the extent of ninety-one shares, whether it was then surrendered and cancelled or not; and it was error for the court to exclude Exhibit K, and to assume, and to charge the jury, upon the evidence adduced, that Robert B. Moores was not the owner of such stock and that defendant was entitled to a verdict. *Moores* v. *National Bank*, 104 U. S. 625; *Bridgeport Bank* v. *New York & New Haven Railroad*, 30 Conn. 231.

Mr. William M. Ramsey and *Mr. E. M. Johnson* for defendant in error.

Mr. Justice Gray delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The petition alleges that the false and fraudulent representations made by Robert B. Moores, and relied on by the plaintiff, that he had assigned and transferred the stock in question to her on the books of the bank, were made by him both as cashier and as stockholder; that the bank afterwards fraudulently permitted and procured him to transfer all the stock owned by him, or standing in his name, to its president, for its benefit; that the bank, through its cashier, fraudulently concealed from her the facts that no transfer had been made to her on its books at the time of the issue and delivery of the certificate to her, that the certificate was not authorized or recognized as valid

by the bank, and that the stock standing in his name had been transferred on its books to its president; and concludes by alleging that by reason of such fraudulent conduct and acts of the bank the certificate was invalid and worthless in her hands. But the evidence offered at the trial does not support the allegations of fraudulent conduct on the part of the bank.

The petition alleges "that the plaintiff relied upon the representations of said Robert B. Moores, as cashier and officer of the defendant, that the said certificate was duly issued, and that the stock had been duly transferred by said Robert B. Moores to the plaintiff on the books of said bank; and said plaintiff relied upon said certificate of stock which she received as genuine and valid for what it purported to be." And at the trial the plaintiff relied upon the representations made to her by Robert B. Moores orally and in the letter enclosing the certificate and in his contract of guaranty, as well as upon those arising out of the certificate itself. The two may be conveniently considered separately.

His representations outside of the certificate may be first disposed of. The plaintiff dealt with Robert B. Moores, and not with the bank. Her agreement was with him personally, and she lent her money to him for his private use. His representations to her that he owned stock in the bank, and that such stock had been transferred to her, were representations made by him personally, and not as cashier; and there is no evidence that the plaintiff understood, or had any reason to understand, that those representations were made by him in behalf of the bank. The duty of transferring his stock to the plaintiff before taking out a new certificate in her name was a duty that he, and not the bank, owed to the plaintiff. The making of such a transfer was an act to be done by him in his own behalf as between him and the plaintiff, and in the plaintiff's behalf as between her and the bank. There is nothing, therefore, in his extrinsic representations, for which the bank is responsible.

The certificate which he delivered to the plaintiff was not in his name, but in hers, stating that she was entitled to so much stock, and showed, upon its face, that no certificate could be lawfully issued without the surrender of a former certificate

and a transfer thereof upon the books of the bank. The by-laws, passed under the authority expressly conferred by the act of Congress under which the bank was organized, contained a corresponding provision, designed for the security of the bank as well as of persons taking legal transfers of stock without notice of any prior equitable title therein. *Union Bank* v. *Laird*, 2 Wheat. 390; *Black* v. *Zacharie*, 3 How. 483, 513. The very form of the certificate was such as to put her upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert B. Moores for stock which she supposed him to hold as his own. She knew that she had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer thereof made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity.

Of the great number of cases referred to in the thorough and elaborate arguments at the bar, we shall notice only some of the most important. None of those cited by the learned counsel for the plaintiff affirm a broader proposition than this: A certificate of stock in a corporation, under the corporate seal, and signed by the officers authorized to issue certificates, estops the corporation to deny its validity, as against one who takes it for value and with no knowledge or notice of any fact tending to show that it has been irregularly issued.

When a corporation, upon the delivery to it of a certificate of stock with a forged power of attorney purporting to be ex-

ecuted by the rightful owner, issues a new certificate to the present holder, who sells it in the market to one who pays value for it, with no knowledge or notice of the forgery, the corporation is doubtless not relieved from its obligation to the original owner, but must still recognize him as a stockholder, because he cannot be deprived of his property without any consent or negligence of his. *Midland Railway* v. *Taylor*, 8 H. L. Cas. 751; *Bank* v. *Lanier*, 11 Wall. 369; *Telegraph Company* v. *Davenport*, 97 U. S. 369; *Pratt* v. *Taunton Copper Company*, 123 Mass. 110; *Pratt* v. *Boston & Albany Railroad*, 126 Mass. 443. And the corporation is obliged, if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation. *In re Bahia & San Francisco Railway*, L. R. 3 Q. B. 584. Whether, before the last sale has taken place, the corporation is liable to the holder of the new certificate, is a question upon which there appears to have been a difference of opinion in England. According to the decision of Lord Northington in *Ashby* v. *Blackwell*, 2 Eden, 299; *S. C.* Ambler, 503; it would seem that the corporation would be liable. According to the decisions of Sir Joseph Jekyll in *Hildyard* v. *South Sea Company*, 2 P. Wms. 76, and of the Court of Appeal in *Simm* v. *Anglo-American Telegraph Company*, 5 Q. B. D. 188, it would seem that it would not, because the holder of the new certificate takes it, not on the faith of that or any other certificate of the corporation, but on the faith of the forged power of attorney. However that may be, it is clear that the corporation is not liable to any one taking with notice of the forgery in the transfer, or of any other fact tending to show that the new certificate has been irregularly issued, unless the corporation has ratified, or received some benefit from, the transaction.

In *Hart* v. *Frontino Mining Company*, L. R. 5 Ex. 111, the plaintiff, a *bona fide* purchaser of the shares, had paid assessments thereon to the company upon the faith of the certificate issued by it to him after his purchase. In *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, and in *Mackay* v. *Commer-*

cial Bank, L. R. 5 P. C. 394, the bank had derived a benefit from the fraud of its agent, and was held liable upon that ground. The decision in *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, that a bank was liable upon its official manager's representation to one of its customers that the credit of a certain person was good, was reversed in the Exchequer Chamber. *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301. The decision in the Exchequer Chamber in *The Queen* v. *Shropshire Union Company*, L. R. 8 Q. B. 420, that a railway company, owning shares of its own stock, the legal title of which was registered in the name of one of its directors as trustee for the corporation, should transfer them to a person who, believing the director to be the absolute owner of the shares, had lent him money on the deposit of the certificate as security, was contrary to the judgment of the Court of Queen's Bench, and was reversed in the House of Lords. L. R. 7 H. L. 496.

The American cases on which the plaintiff principally relies are decisions in the courts of Connecticut, New York, Pennsylvania and Maryland, the soundness of some of which we are not prepared to affirm, but all of which are distinguishable from the case at bar.

The leading cases in Connecticut and New York arose out of what have been known as the Schuyler frauds. Robert Schuyler, the president and general transfer agent of the New York and New Haven Railroad Company, issued, beyond the capital limited by its charter, but in the form prescribed by its by-laws, purporting to be transferable on its books on surrender of the certificates, a large amount of certificates of stock, annexed to which were printed forms of assignment and power of attorney. In *Bridgeport Bank* v. *New York & New Haven Railroad*, 30 Conn. 231, a bank which had received, as collateral security for money lent to a firm of which Schuyler was a member, certificates of stock so issued by him, was held entitled to maintain an action against the corporation for the value of these certificates, upon the single ground that it was admitted that when the plaintiff took these certificates the firm held more than an equal amount of genuine certificates. In *New York & New Haven Railroad* v. *Schuyler*, 34 N. Y. 30, it appeared

that Schuyler had issued, in one and the same form, large numbers of genuine as well as of false certificates, and had raised on both indiscriminately large amounts of money which had been applied for the benefit of the corporation, that all his transactions appeared on its books, and that the directors had for years been guilty of negligence in not making any examination of the books or of the conduct of the transfer office; and none of the purchasers of the false certificates, for the value of which the corporation was held to be liable, had any notice, or means of knowing, that they were not such as Schuyler was authorized to issue.

In *Titus* v. *Great Western Turnpike*, 61 N. Y. 237, the certificates upon which the corporation was held liable stated the stock to be owned by the person who as officer of the corporation issued them, not by the person to whom they were issued, and the latter had no notice of any fraud or irregularity in the issue. In the other New York cases cited for the plaintiff, the certificates had been purchased in good faith, in the market. *Bruff* v. *Mali*, 36 N. Y. 200; *McNeil* v. *Tenth National Bank*, 46 N. Y. 325; *Moore* v. *Metropolitan Bank*, 55 N. Y. 41; *Holbrook* v. *New Jersey Zinc Company*, 57 N. Y. 616. See *Merchants' Bank* v. *Livingston*, 74 N. Y. 223.

In *Kentucky Bank* v. *Schuylkill Bank*, 1 Parsons, 180, the certificates upon which the corporation was held to be liable were in the hands of innocent purchasers without notice. The opinion in *People's Bank* v. *Kurtz*, 99 Penn. St. 344, 349, goes no farther. On the other hand, in *Wright's Appeal*, 99 Penn. St. 425, where the president of a bank, having no authority to borrow money in its behalf, induced his aunt, a stockholder therein, to surrender to him her certificates of shares with blank powers of attorney, by means of false and fraudulent representations that they were needed to aid the bank; gave her his own note therefor, sold the stock, and applied the proceeds to his own use; and afterwards, by a fraudulent combination with the other officers of the bank, issued stock in excess of the lawful limit, and gave her new certificates for those that he had obtained from her; it was held that he was her agent in the original transaction, and that, as she gave no value to the bank

for the new certificates, the loss must fall upon her, and not upon the bank.

In *Tome* v. *Parkersburg Railroad*, 39 Maryland, 36, there was no by-law requiring a surrender and transfer of old certificates before the issue of new ones, and no limit of the amount of stock to be issued; and it was not contended that there had been any over-issue, or that the plaintiff had any notice of fraud or want of authority in the officers of the corporation. In *Western Maryland Railroad* v. *Franklin Bank*, 60 Maryland, 36, the certificates were not issued to the plaintiff, but bought in the market, without any notice of their having been fraudulently or illegally issued.

In *Hackensack Water Company* v. *De Kay*, to which the plaintiff has referred us, the Court of Errors of New Jersey said: "Indeed, as is apparent from all the cases cited, the doctrine which validates securities within the apparent powers of the corporation, but improperly and therefore illegally issued, applies only in favor of *bona fide* holders for value. A person, who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a *bona fide* holder of the same security." 9 Stew. (N. J.) 548, 565.

The general doctrine was stated with like limitations by this court in the case of *Merchants' Bank* v. *State Bank:* "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists." 10 Wall. 604, 644.

This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually, and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on

surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier.

The exceptions to the exclusion of evidence cannot be sustained. The evidence that in one or two other instances stock was issued by the cashier without the surrender of old certificates, and that the directors of the bank approved certain transfers to its president of shares once belonging to the cashier, was quite insufficient to prove that the bank ratified or received any benefit from the issue of the certificate to the plaintiff, or was guilty of any fraud towards her. The action of the directors was adapted to the single purpose of securing payment of a debt due from the cashier to the bank.

The evidence introduced and offered being insufficient to support a verdict for the plaintiff, the Circuit Court rightly directed the jury to return a verdict for the defendant. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478.

Judgment affirmed.

Mr. Justice Bradley dissented.

Mr. Justice Matthews, having been of counsel, did not sit in this case, or take any part in its decision.

WARE & Another *v.* GALVESTON CITY COMPANY.

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

Argued March 19th, 1884.—Decided March 31st, 1884.

Action—Limitations, Statute of—Parties—Trust.

If one deals with an agent as principal, and the right of action against the agent becomes barred by the statute of limitations, it is also barred against the principal, unless circumstances of equity are shown to prevent the operation of the statute, or unless it appears that there was fraud in the concealment of the agency.

Opinion of the Court.

The circumstances of this case disclose no trust in favor of the complainants. The heir at law of a deceased person is not the proper party to enforce an alleged trust in personal property made for the benefit of the deceased.

The facts making the case are stated in the opinion of the court.

Mr. P. C. Baker and *Mr. Walter Gresham* for appellants submitted the case on their brief.

Mr. W. H. Goddard for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is an appeal from a decree dismissing a bill in chancery, upon general demurrer for want of equity.

The complainants, also appellants, are the heirs-at-law of David White, deceased, citizens respectively of Alabama and Florida; the defendant, the appellee, is alleged to be a corporation incorporated by an act of the Congress of the Republic of Texas, and a citizen of that State.

It is alleged in the bill, which was filed October 11th, 1880, that the Republic of Texas, on January 25th, 1838, issued a patent to Michael B. Menard, in consideration of $50,000, for one league and *labor* of land on and including the east end of Galveston Island; that David White, the ancestor of the complainants, advanced and paid that sum for Menard, to secure repayment of which the latter executed and delivered his mortgage on the land to White. Menard at the time had associates, jointly interested with him in the purchase, and others became so subsequently, and the association was a partnership, with a view of organizing a joint stock company for the sale of the land, for profit, in lots, and distribution of the net proceeds as dividends to shareholders, Menard being, however, the managing partner, and until April 18th, 1837, holding the legal title, the indebtedness to White having been incurred in his own name, and the mortgage executed by him individually for the repayment of the same.

About the date last mentioned, Menard released to one Triplett 640 acres of the land to compromise a conflicting claim of

title; and afterwards, about June 15th, 1837, the whole original tract, including that released to Triplett, was conveyed by all parties in interest, to trustees in trust, for the purpose of carrying into effect the original plan, Triplett and those interested with him becoming co-associates with Menard and his associates. To that end, the trustees were to issue 1,000 shares of stock, of which 400 were set aside to provide for certain certificates previously issued under the Menard interest, and the remaining 600 shares were to be sold and the proceeds applied first to the payment of expenses, and then to be divided, one-third to the Triplett interest and two-thirds to the Menard interest, but the debt to White was to be provided for out of the Menard shares; and provision was made for issuing trustees' certificates to the individual owners of interests, which was in fact done, and the holders of certificates, which were assignable, became associated as the Galveston City Company.

It is alleged, however, that out of the 600 shares, a number deemed sufficient for which no certificates were issued, but part of those which otherwise would belong to the Menard interest, were reserved to be sold for the purpose of paying the debt to White, so as to relieve the Triplett interest from any charge on that account, and so as also to indemnify Menard individually against his liability therefor. The precise number of the shares thus set apart and appropriated, it is alleged, is not known; but it is charged that on March 10th, 1851, twenty-nine shares of the original number so appropriated still remained in the hands of the company undisposed of.

On April 13th, 1838, the holders of these certificates seem to have organized as stockholders of a future corporation, the Galveston City Company, and elected five directors, to whom, as directors of the association, the legal title to the land was conveyed by the trustees. Thereafter the outstanding trustees' certificates were called in, and "renewal certificates," so called, were issued in exchange, which represented the shares of the company.

It is further alleged that about November 7th, 1838, the company, by Menard, its president and agent, but in his individual name, paid White $25,000 on account of the debt due

to him out of the proceeds of the stock reserved for that purpose; and about the same time entrusted Menard, as agent of the company, with fifty shares of the reserved stock, for sale, to pay the remainder of the debt to White. Menard sold twenty-one of these shares and paid to White the proceeds thereof, being $10,550, in 1839, which, with the previous payment, is all that has been paid on account of the debt due to him, leaving $14,450 of the principal sum unpaid.

On February 5th, 1841, the stockholders of the association became incorporated by an act of the Congress of the Republic of Texas as the Galveston City Company, the defendant below.

Long after the organization of the corporation, on March 10th, 1851, Menard made a written report to the company of his agency in the sale of the fifty shares entrusted to him for the purpose of paying the debt to White. In that report, he recounted the circumstances of the history of the transaction, and the facts as to the sale of the twenty-one shares, and the payment made to White, showing the balance due, as above set forth, for which he stated a suit was then pending against him individually, and for which he held the remaining twenty-nine shares of stock. Valuing them at $5,800, which he estimated to be their market value, there would be a deficiency of $8,650 to provide for on the amount due to White. He also claimed that he was in advance for the company, in the sum of $13,000, on other accounts, and asked that the company make provision for his reimbursement by a par credit on its books for the full amount of $21,650. The board of directors, by resolution, admitted the correctness of Menard's statement of his account, and ordered a credit to him on its books for the amount stated.

The suit referred to by Menard, as pending against him, had been brought in the name of one Lipscomb, administrator of White, the latter having died December 10th, 1841, to recover the balance due to White's estate, and to enforce the lien of the mortgage upon the land. To this action, Menard had pleaded the statute of limitations as a bar, and about May 20th, 1851, it was dismissed, on his motion, for want of prosecution.

It is alleged that nothing further has ever been done by Menard, who died insolvent, in 1856, nor by the defendant, towards the payment of the debt due to White's estate; and that neither the plaintiffs nor the personal representatives of White had any knowledge, or by reasonable diligence could have learned, of the facts, of which they obtained information only within two years prior to the filing of the bill, in reference to the liability of the corporation as the principal, for whom Menard acted as agent, to pay the debt due to White, nor of the acknowledgment made of it by the company in 1851, as already detailed, nor of the trust of the twenty-nine shares of stock appropriated for that purpose; and that, in fact, everything that would lead to such knowledge has been studiously concealed from them by the defendant, its officers and agents.

The bill prays for an account of what is due; that the amount be decreed to be a lien on the land of the defendant; that the twenty-nine shares of stock alleged to have been reserved for the purpose be sold for the payment of the amount found to be due, and for general relief.

It seemed to be supposed in argument that some support for this bill may be found in the allegations that charged the defendant as the successor in law, liable for their obligations, of the associates who were the undisclosed principals, on whose behalf Menard contracted the debt with White. But manifestly the statute of limitations that barred the claim against Menard, and the express lien of the mortgage, a defence not denied to have become perfect as to them, would equally protect those on whose behalf Menard acted as agent, there being no circumstances of equity to prevent the operation of the statute in their favor. None such are alleged, the mere ignorance of the appellants, and even the concealment of the fact that Menard was merely an agent, and of those for whom he was agent, no fraud on their part being charged, manifestly is insufficient for that purpose.

It is equally plain that there is no trust as to the twenty-nine shares of stock alleged to have been placed in Menard's hands as a fund for the payment by him of the debt to White. That arrangement is stated to have been intended as an indemnity

to Menard against his own personal liability, and as a guaranty in favor of the Triplett interest. And when, in 1851, Menard made his report, and its recommendations were adopted by the company, the trust as stated seems rather to have been an out-and-out sale to him of these shares, for he has credit upon the books of the company for the amount of his advances and liabilities, and thus, as between himself and the company, becomes the principal debtor, and there is no ground for an inference that the shares in question were, or continued to be, in the control of the company.

But even were this otherwise, it would be impossible to construe the arrangement into a trust for the benefit of White's estate. There was no privity, and no notice, and the arrangement obviously was merely an adjustment, made among the parties for their own convenience, of the accounts between them, not intended to confirm or to confer any rights upon the appellants.

The objection that the suit should have been brought by a personal representative of White, and that it cannot be maintained by his heirs-at-law, seems also to be well taken, as no sufficient reason is alleged why the administrator, who prosecuted the suit for the foreclosure of the mortgage, might not have been complainant in the present suit.

The claim itself, both as a debt and a lien upon the land, against the party with whom it was contracted, as we have said, is admitted to be barred by the lapse of time; there is no ground stated in this bill why, in equity, it should be revived against the appellee.

The demurrer was properly sustained, and the decree dismissing this bill is accordingly

Affirmed.

Statement of Facts.

COVELL *v.* HEYMAN.

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

Argued March 17th, 1884.—Decided March 31st, 1884.

Conflict of Law.

The possession by a marshal of a court of the United States of property by virtue of a levy under a writ of execution issued upon a judgment recovered in a Circuit Court of the United States is a complete defence to an action in a State court of replevin of the property seized, without regard to its rightful ownership. *Freeman* v. *Howe*, 24 How. 450, affirmed and applied to the facts in this case. *Krippendorf* v. *Hyde*, 110 U. S. 276, affirmed. *Buck* v. *Colbath*, 3 Wall. 334, distinguished.

The principle that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, applies both to a taking under a writ of attachment on mesne process and to a taking under a writ of execution.

The defendant in error was the plaintiff in the State court, and brought her action of replevin for the recovery of specific personal property, to which she claimed title, and which she alleged was wrongfully detained from her by the plaintiff in error. The defendant below was deputy marshal of the United States, and, as such, had possession of the property replevied by virtue of an execution issued upon a judgment of the Circuit Court of the United States for the Western District of Michigan against Adolph Heyman, having taken the same, by virtue of a levy under said execution, as the property of the judgment debtor. Judgment was rendered in the Supreme Court of the State for the plaintiff below, upon a finding in favor of her title to the property, reversing a judgment for the defendant below in the Circuit Court for the county of Kent. To reverse that judgment this writ of error was prosecuted.

Mr. Roger W. Butterfield for plaintiff in error.

Mr. Lyman D. Norris for defendant in error submitted on his brief.

Opinion of the Court.

MR. JUSTICE MATTHEWS delivered the opinion of the court. He stated the facts in the foregoing language and continued:

The sole question presented for our decision is whether it was error in the State court to permit a recovery of the possession of property, thus held, against a marshal of the United States or his deputy, in behalf of the rightful owner; and whether, on the other hand, it should not have adjudged in favor of the defendant below, that his possession of the property by virtue of the levy under the writ was, in itself, a complete defence to the action of replevin, without regard to the rightful ownership.

The case of *Freeman* v. *Howe*, 24 How. 450, was precisely like the present in its circumstances, except that there the process under which the marshal had seized and held the property replevied, was an attachment according to the State practice in Massachusetts, being mesne process, directed, however, not against property specifically described, but commanding a levy, as in cases of *fi. fa.*, upon the property of the defendant. Whether that difference is material is, perhaps, the only question to be considered, for the doctrine of that decision is too firmly established in this court to be longer open to question. The proper answer to it will be found by an examination of the principles on which the judgment in that case proceeded, and of those cases which preceded, and of others, which have followed it.

In the opinion in that case, Mr. Justice Nelson refers to the case of *Taylor* v. *Carryl*, 20 How. 583, as a conclusive and sufficient authority on the point. He said: "The main point there decided was, that the property seized by the sheriff, under the process of attachment from the State court, and while in the custody of the officer, could not be seized or taken from him by a process from the District Court of the United States, and that the attempt to seize it by the marshal, by a notice or otherwise, was a nullity, and gave the court no jurisdiction over it, inasmuch as to give jurisdiction to the District Court in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process." And referring to the grounds of the dissent in that case, he continues: "The majority of the court was of opinion that according to the

course of decision in the case of conflicting authorities under a State and federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question which jurisdiction had first attached by the seizure and custody of the property under its process."

The opinion then proceeds to show that no distinction can be made, affecting the question, between process *in rem*, and an attachment issued by a common-law court, although the latter is not the foundation of the jurisdiction, and the property seized is not the subject matter of the suit, which is simply for the recovery of a debt, without a lien or charge upon the property, except that resulting from its seizure, as security for the judgment. The objection that the process was directed against the property of the defendant and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit, is then answered, the court saying— "for the property having been seized under the process of attachment, and in the custody of the marshal, and the right to hold it being a question belonging to the Federal court, under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the State court to interfere with it."

The opinion of the court then points out the error of Chancellor Kent, in his statement, 1 Kent, 410, that, "if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the State courts have jurisdiction to protect the person and the property so illegally invaded." Commenting on this statement, it is said, that the effect of the principle, if admitted, would be to draw into the State courts, "not only all questions of the liability of property seized upon mesne and final process issued under the authority of the Federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne and imprisonment upon final process of the person in

both civil and criminal cases, for in every case the question of jurisdiction could be made;" and the court adds: "We need scarcely remark, that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

To meet the objection, that the party whose property had been wrongfully taken and withheld would be left without remedy, unless by virtue of citizenship he could sue in a Federal court, the opinion then explains the remedy in such cases, by an ancillary proceeding in the court whose process has been made the instrument of the wrong; a remedy the principle and procedure of which we had occasion recently in the case of *Krippendorf* v. *Hyde*, 110 U. S. 276, to restate and reaffirm.

The point of the decision in *Freeman* v. *Howe*, *supra*, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or federal, having jurisdiction over the parties and the subject matter. And *vice versa*, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the pur-

pose of enforcing the supremacy of the Constitution and laws of the United States.

The doctrine of *Freeman* v. *Howe*, *supra*, was further defined by the decision in *Buck* v. *Colbath*, 3 Wall. 334, which checked and corrected an attempted misapplication of its principle, which, if permitted, would cover actions against the officer for trespasses, not involving any interference with the property itself while in his possession. It was there satisfactorily shown that the officer was protected against such an action, only in that class of cases where he could justify under process or order of a court directing expressly the very act alleged to be wrongful; and not in that other class, where the writ or order, such as a writ of attachment or other mesne process, and the final process of execution upon a judgment, commands the seizure of property described not specifically, but only generally, as the property of the party named in the writ. In the latter, the officer acts at his peril, and is responsible in damages to the party injured for the consequences of any error or mistake in the exercise of his discretion in the attempt to enforce the writ. In the former, as he has no discretion, it is the court itself which acts, and the officer is protected in his obedience to its command. Of this class, the case of *Connor* v. *Long*, 104 U. S. 228, was an example; that of *Buck* v. *Colbath*, *supra*, fell within the latter. And in distinguishing that case from *Freeman* v. *Howe*, *supra*, Mr. Justice Miller stated the principle of the latter decision—"a principle," he said, "which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction;" "that principle is," he continued, "that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

Here it will be perceived that no distinction is made between

writs of attachment and executions upon judgments, and that the principle embraces both, as indeed both are mentioned as belonging to the same class elsewhere in the opinion.

And there is nothing in the nature, office, or command of the two descriptions of process, by which, so far as the question here involved is concerned, they can be distinguished. One is mesne process and the other final; but in the courts of the United States the attachment cannot be used, as in the practice of other jurisdictions, as means of compelling the appearance of the defendant, or of founding jurisdiction as a proceeding *in rem*. Both alike command the seizure of the property of the defendant without a specific description, and in obeying the precept, the officer exercises precisely the same discretion, and with the same consequences, if he commits a wrong under color of it. The court has the same control over both forms of its process, and has custody of the property seïzed by virtue of them in the same sense. The circumstance that, as to property held under an attachment, the final judgment may direct its sale, while the execution is issued upon præcipe of the party, and is executed without further order, cannot alter the relation of the court, either to the officer or the property. It has jurisdiction over the latter to meet and satisfy the exigency of either writ, and that jurisdiction can be maintained only by retaining the possession acquired by the officer in executing it. A third person, a stranger to the suit and claiming as owner, may prosecute his right to restitution in either case, in the same methods as pointed out in *Krippendorf* v. *Hyde*, 110 U. S. 276, or he may pursue his remedy for damages against the officer, either personally for the trespass, as in *Buck* v. *Colbath*, *supra*, or for the breach of his official duty, upon his bond and against his sureties, as in the case of *Lammon et al.* v. *Feusier et al.*, *ante*, page 17.

The very point was involved in the decision in *Hagan* v. *Lucas*, 10 Pet. 400, where it was expressly held that property held by a sheriff under an execution from a State court could not be taken in execution by a marshal of the United States by virtue of final process upon a judgment in a Federal court. Mr. Justice McLean, delivering the opinion of the court, said:

"Had the property remained in the possession of the sheriff under the first levy, it is clear the marshal could not have taken it in execution, for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the Federal or State authority, withdraws the property from the reach of the process of the other." "A most injurious conflict of jurisdiction would be likely often to arise between the Federal and State courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer; and especially by an officer acting under a different jurisdiction."

That which cannot be done by final process, is equally out of the reach of original or mesne process.

The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The

regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. "The jurisdiction of a court," said Chief Justice Marshall, "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised." *Wayman* v. *Southard*, 10 Wheat. 1.

The principle which defines the boundaries of jurisdiction between the judicial tribunals of the States and of the United States, the application of which effectually prevents their confusion, was set forth and vindicated in the judgment of this court in *Ableman* v. *Booth*, 21 How. 506. It was there said by Chief Justice Taney, p. 516, that "the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye." And speaking of the procedure in cases of *habeas corpus*, issued under State authority, and admitting the duty of the officer of the United States, holding the prisoner under its process, to return the fact and show his warrant, the Chief Justice continues: "But after the return is made and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." . . . "No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and any attempt to enforce it beyond these boundaries is nothing less than lawless violence." And in *Tarble's Case*, 13 Wall. 397, commenting on this language of Chief Justice Taney in *Ableman* v. *Booth*,

supra, Mr. Justice Field points out, that it was not intended merely to meet cases where the authority of the United States was undisputed, but cases where its validity was questioned, and it appeared that the prisoner was held under claim and color of such authority, in good faith, and not by way of mere pretence and imposition. And the exclusive authority of the court issuing the writ extends, not only to the decisions of all questions affecting its jurisdiction, and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but also of all questions affecting the identity of the person or property seized and held under color of its authority, and the right to exempt them from its operation. It does not avail therefore to say, that, as the writ commands the officer to take the property of the defendant, he cannot under that claim to take and hold the property of another; because the property which he does actually take, he takes and holds as the property of the defendant, claiming it to be such, and therefore he has it in his possession under color of process and claim of right.

In *Lammon et al.* v. *Feusier et al.* already cited, it was said by Mr. Justice Gray, in reference to the case of a common-law attachment, that "the taking of the attachable property of the person named in the writ is rightful, the taking of the property of another person is wrongful; but each, being done by the marshal in executing the writ in his hands, is an attempt to perform his official duty and is an official act." The same is true of a similar levy under an execution, as we have shown that there is no difference, relevant to the point, between the two writs.

Property thus levied on by attachment, or taken in execution, is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right, to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him. That

was the defence made and relied on by the plaintiff in error in the present case, and to which the Supreme Court of Michigan refused to give its due and conclusive effect. For that error its judgment is reversed, and the cause is remanded with directions to affirm the judgment of the Circuit Court for the County of Kent, in favor of the plaintiff in error; and

It is so ordered.

ROSENTHAL *v.* WALKER, Assignee.

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

Argued March 21st, 1884.—Decided March 31st, 1884.

Bankruptcy—Statute of Limitations—Evidence.

Where an action by an assignee in bankruptcy is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar of the statute of limitations, Rev. Stat. § 5057, does not begin to run until the fraud is discovered. *Bailey* v. *Glover*, 21 Wall. 342, cited and affirmed. *Wood* v. *Carpenter*, 101 U. S. 135, and *National Bank* v. *Carpenter*, 101 U. S. 567, distinguished.

It is competent, as tending to prove a fraudulent transfer of property in contemplation of bankruptcy, to show a prior valid sale from the bankrupt to the same party, if it can be connected with evidence tending to show a secret agreement by which the bankrupt acquired an interest in the goods sold.

Evidence that a letter properly directed was put in the post office is admissible to show presumptively that the letter reached its destination; and if the party to whom the letter was addressed denies its receipt, it is for the jury to determine the weight of the presumption.

Proof that a bankrupt when being examined respecting his property refuses to answer questions on the ground that the answers might criminate him, as an indictment was pending against him for a criminal offence, under the bankrupt laws, does not so put the assignee on inquiry as to fraudulent transfers of the bankrupt's property as to deprive him of the benefit of the rule respecting the statute of limitations laid down in *Bailey* v. *Glover*, 21 Wall. 342, and affirmed in this case.

This was an action brought by the assignee of a bankrupt to recover the value of property alleged to have been fraudulently transferred by the bankrupt in violation of the provisions of the bankrupt act. The defendant below resisted the recovery

on the ground that the action was not brought within two years from the time when the cause accrued; and also on the merits. The plaintiff below replied as to the statute of limitations that the facts were fraudulently concealed, and that the suit was brought within two years after they came to his knowledge. Some exceptions were taken to the rulings of the court on the admission of evidence, all of which more fully appear in the opinion of the court. Verdict for the plaintiff. The defendant sued out this writ of error.

Mr. Shellabarger for plaintiff in error.

Mr. Chester H. Krum and *Mr. E. H. Lewis* for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

This was an action at law brought December 30th, 1879, by Preston Player, as assignee in bankruptcy of Thomas Carney, against the plaintiff in error, Joseph Rosenthal, under section 5047 of the Revised Statutes, which authorizes an assignee in bankruptcy to recover by suit in his own name all the estate, debts and effects of the bankrupt. The suit was brought to recover from Rosenthal certain money paid and property sold to him by Carney in fraud, as was alleged, of the bankrupt act. A petition in involuntary bankruptcy had been filed against Carney by his creditors, October 20th, 1875. He was adjudicated a bankrupt March 18th, 1876, by the District Court for the Eastern District of Missouri, and on May 1st, 1876, Player, the defendant in error, was appointed assignee of the estate. The petition having averred the foregoing facts, alleged that Carney, being insolvent and in contemplation of insolvency, as Rosenthal had reasonable cause to believe, on June 22d, 1875, with intent to defeat the operation of the bankrupt law, and to evade its provisions, as Rosenthal well knew, sold and transferred to him five hundred cases containing 50,000 pairs of boots and shoes of the value of $45,000, and that on July 20th, following, to make effectual the fraudulent transfer, Rosenthal agreed that Carney should have an equal interest with him in the goods so

sold and transferred, and accordingly recognized and admitted such interest. The petition also averred that Carney, being insolvent and in contemplation of insolvency, as Rosenthal had reasonable cause to believe, and with intent to hinder the operation of the bankrupt law, and evade its provisions, as Rosenthal well knew, on July 22d, 1875, sold and transferred to him one hundred barrels of whiskey, &c., of the value of $9,400, and Carney also stipulated that he should retain an interest in the whiskey equal with that of Rosenthal, who then and there recognized said interest accordingly, and that Rosenthal, between July 20th, 1875, and March 1st, 1876, disposed of and converted to his own use all the property so sold and transferred to him.

The petition further alleged that Carney, between July 20th, and August 23d, 1875, inclusive, being insolvent and in contemplation of insolvency, as Rosenthal had reasonable cause to believe, and with the purpose of defeating the object and hindering the operation of the bankrupt law, as Rosenthal well knew, made to him certain payments of money, amounting in the aggregate to $30,000.

The petition then made the following averment:

"The plaintiff states that both the said Carney and the defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the said aggregate sum of $30,000, hereinbefore mentioned, and of all the component parts thereof; and also kept concealed from him the fact of the sale, transfer, and conveyance of the said goods and merchandise hereinafter set forth, and that he, the said plaintiff, did not obtain knowledge and information of the said matters, or either of them, until the 29th day of November, 1879, and then for the first time the said matters were disclosed to him and brought to his knowledge."

Rosenthal excepted to the petition on two grounds: First, because as appeared on its face, the suit was not brought within two years from the time when the cause of action accrued; and, second, because the said sale of boots and shoes, alleged to have been made by Carney to Rosenthal on June 22d, 1875,

was not made within three months next before the filing of the petition in bankruptcy against Carney.

The court overruled the first exception absolutely, and ordered that the second exception

"be dismissed so as not to prejudice the right of plaintiff to prove any of the transactions alleged in said petition to have taken place on the 20th day of July, 1875, and within three months next before the institution of proceedings in bankruptcy against the bankrupt, Thomas Carney, and maintaining said ground of exception only so far as relates to the transfer and sale of five hundred cases of boots and shoes, alleged to have been made on the 22d day of June, 1875. But the plaintiff shall have the right to prove, as by him alleged, that subsequently to 22d June, 1875, the bankrupt, by agreement with defendant, was reinvested with an interest in said goods, and thereafter, within three months, the goods were disposed of as alleged."

On March 3d, 1880, Rosenthal filed his answer, which was a general denial of all the averments of the petition. On December 7th following, after the trial had commenced, he filed the following plea and supplemental answer:

"Now comes the defendant and pleads the prescription of two years, as provided for in the bankruptcy act, sec. 5057, of the Revised Statutes of the United States, in bar of plaintiff's action.

"And for supplemental answer to petition of plaintiff, defendant specially denies that the matters and things alleged in plaintiff's petition were first disclosed to him on November 29th, 1879, as alleged; but avers that said plaintiff had full knowledge of all transactions that ever took place between the defendant and Carney, bankrupt, at the time said plaintiff was elected assignee."

On the motion of the plaintiff the supplemental answer was stricken out, and the defendant excepted, but, as the record shows,

"During the trial of the cause no restraint was put upon the defendant in offering evidence as to the knowledge of plaintiff, as alleged in that part of the supplemental answer which was stricken out, and both sides offered evidence as to such knowledge,

and the court, upon this point, left it to the jury to say whether the action was commenced within two years from the time when the plaintiff knew, or by due diligence might have known, of the cause of action."

The pleadings having been thus made up, the issues of fact were submitted to a jury, which returned a verdict for the plaintiff for $17,500, on which the court rendered judgment against the defendant. To reverse that judgment this writ of error is prosecuted. Player, the original assignee, having died after the judgment in the Circuit Court, W. R. Walker was appointed assignee and substituted as defendant in error in his stead.

The petition disclosed upon its face that the suit was brought more than four years after the cause of action arose, and more than three years after the appointment of the defendant in error as assignee. Section 5057 of the Revised Statutes provides as follows:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against the assignee. And this provision shall not in any case revive a right of action barred at the time when the assignee is appointed."

The first question raised by the assignments of error is, whether the averments of the petition excuse the failure to bring the suit within two years after the cause of action accrued to the defendant in error. These averments are in substance that Carney, the bankrupt, and Rosenthal, the plaintiff in error, kept concealed from the defendant in error the payments of money and transfers of property charged in the petition, and that the defendant in error did not obtain information of said matter until November 29th, 1879, when for the first time they were disclosed to him and brought to his knowledge.

The judgment of the Circuit Court, by which it was held

that these averments excused the failure to bring the suit within two years after the cause of action accrued, is sustained by the opinion and decree of this court in the case of *Bailey* v. *Glover*, 21 Wall. 342. That case was a bill in equity filed by the complainant as assignee in bankruptcy of Glover, one of the defendants, to set aside a conveyance made by him of his property to defraud his creditors. The suit was brought more than two years after the appointment of the assignee. To excuse the delay and take the case out of the operation of the statute, the following averment was made: the bankrupt and the other defendants, to whom he had conveyed his property, "kept secret their fraudulent acts and endeavored to conceal them both from the knowledge of the assignee and his one creditor, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that even up to the present time they had not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property." The court held that "as the bill contained a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which was sought to be redressed," the case was not subject to the bar of the statute. The court added: "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." The court also declared that the exception to the bar of the statute was applicable to suits at law as well as in equity.

The case of *Bailey* v. *Glover* is a decision construing the statute which is relied on in this case, and unless subsequently overruled by this court is conclusive of the point under discussion. It has never been overruled. The plaintiff in error relies on the case of *Wood* v. *Carpenter*, 101 U. S. 135, and *National Bank* v. *Carpenter*, Id. 567. The first was an action at law, the second a suit in equity. The court in both cases was called on to construe a statute of limitations of the State

of Indiana, and it followed the adjudications of the Supreme Court of that State upon the same statute. Neither case refers to the opinion of the court in *Bailey* v. *Glover*, or can be held to overrule or modify it. The case of *Bailey* v. *Glover* has been often cited by this court, but has never been doubted or qualified. *Wood* v. *Bailey*, 21 Wall. 640; *Wiswall* v. *Campbell*, 93 U. S. 347; *Gifford* v. *Helms*, 98 U. S. 248; *Upton* v. *McLaughlin*, 105 U. S. 640. We are of opinion, therefore, that the assignment of error under consideration is not well founded.

The next complaint of the plaintiff in error is, that after the Circuit Court had struck out of the petition the averments relating to the sale on June 22d, 1875, of 500 cases of boots and shoes, by Carney to the plaintiff in error, the court admitted, in spite of the objection of the latter, the depositions of Louis Temm and other witnesses, which related solely to that sale. The contention is that this evidence, relating as it did to a sale that was perfectly valid and the averments concerning which had been stricken from the petition, was immaterial and tended to mislead and confuse the jury to the injury of the plaintiff in error.

The bill of exceptions shows that the court, in overruling the objection to the admission of this evidence stated, that "the facts and circumstances surrounding the case should be submitted to the jury; and the facts of the sale on June 22d, 1875, and its circumstances, were allowed to be proved on the representation of counsel that said evidence was to be followed up by testimony showing a subsequent investment of an interest in said goods in the bankrupt by agreement with defendant."

In accordance with this representation of counsel, proof tending to show that on July 1st, 1875, the bankrupt, by a secret agreement with the plaintiff in error, acquired title to a half interest in the goods sold to the latter on June 22d preceding, was offered by the defendant in error and admitted.

We think the court was right in admitting the depositions relating to the sale of June 22d. Besides the charge made in the petition of the fraudulent sale of goods on June 22d, 1875, there was an averment of another sale by the bankrupt to

Carney of other goods of the value of $9,400 on July 22d, 1875, and within three months next before the proceedings in bankruptcy. It was averred that this sale was made by Carney in contemplation of insolvency, and that the plaintiff in error had reasonable cause to believe such to be the fact. To establish these propositions it was perfectly competent to show what had been the business dealings between Carney and the plaintiff in error before the sale in question. Thus, to prove that plaintiff in error had reasonable cause to believe that the sale made to him by Carney on July 22d was in contemplation of insolvency, it was competent to show that on June 22d, just one month before, Carney had made another sale to the plaintiff in error of fifty thousand boots and shoes worth $45,000; and then within eight days thereafter, by a secret agreement, had reinvested Carney with the ownership of one-half the property so sold.

Evidence tending to establish both these facts was produced and submitted to the jury. It clearly tended to show that Carney was trying to cover up his property from his creditors, and that plaintiff in error was aiding him to do it, and that when Carney made the subsequent sale to the plaintiff in error on July 22d, the latter had reasonable cause to believe that it was made in contemplation of insolvency. The evidence objected to was, therefore, proof of one of two facts, which, taken together, tended to establish a material and necessary averment of the petition, and was, therefore, properly admitted.

The next assignment of error relates to the admission in evidence by the Circuit Court of certain letter-press copies of letters written by Carney to the plaintiff in error.

The record shows that Carney testified that, while he was in St. Louis and the plaintiff in error in New Orleans, they were corresponding with each other; that several letters were written by each to the other, and were received by each from the other; that Carney, having so testified, produced two letters purporting to have been addressed by the plaintiff in error, in New Orleans, to him at St. Louis, and which he testified he had received through the mails. These letters having been admitted in evidence, Carney produced certain letter-press

copies of letters which he testified he had written to the plaintiff in error, and mailed with his own hand in the post office at St. Louis, postage prepaid, directed to the plaintiff in error at New Orleans, and to his proper address in that city.

The record also shows that in response to a subpœna *duces tecum* the plaintiff in error swore that he never received the letters addressed to him by Carney.

Upon this state of the evidence, the defendant in error offered to read to the jury the letter-press copies of the letters which Carney swore he had mailed to the plaintiff in error. They were objected to, but were admitted by the court in spite of the objection. This action of the court is now urged as a ground for reversing the judgment.

We think the copies were properly admitted in evidence. The point in dispute between the parties was whether the original letters had been received by the plaintiff in error. One of the letters from the plaintiff in error to Carney is clearly in answer to two of the letters which Carney swears he mailed to him, and is proof that those letters were received by him. Independently of this fact, the proof that the letters were received by the plaintiff in error was *prima facie* sufficient, and the court properly allowed the copies to go to the jury, leaving them to decide, on all the evidence, whether the originals had been received.

The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. *Saunderson* v. *Judge*, 2 H. Bl. 509; *Woodcock* v. *Houldsworth*, 16 M. & W. 124; *Dunlop* v. *Higgins*, 1 H. L. Cas. 381; *Callan* v. *Gaylord*, 3 Watts. 321; *Starr* v. *Torrey*, 2 Zabr. 190; *Tanner* v. *Hughes*, 53 Penn. St. 289; *Howard* v. *Daly*, 61 N. Y. 362; *Huntley* v. *Whittier*, 105 Mass. 391. As was said by Gray, J., in the case last cited, "the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty and the usual course of busi-

ness, and when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not."

The presumption that a letter was received is based on such considerations that it is perfectly clear that it applies without regard to the contents of the letter. The contention, therefore, of counsel for plaintiff in error that the presumption fails when the contents of the letter would, if the letter were received, tend to subject the party sending it to a penalty or forfeiture, is not well founded.

The rule and the authorities cited in support of it sustain the action of the court in admitting in evidence the copies of the letters, and in submitting to the jury the question whether the letters had been received to be decided upon all the testimony bearing upon the point.

The next assignment of error relates to the charge given by the court to the jury, and its refusal to charge as requested by the plaintiff in error.

It appears from the record that Player, the original assignee in bankruptcy of Carney, was sworn on the trial as a witness in his own behalf. He testified that he was an attorney; that he had been one of the solicitors of the creditors of Carney in the proceedings to have him adjudicated a bankrupt; that in pursuance of his rights as assignee he had in May, 1876, subjected the bankrupt to an examination pursuant to the provisions of the bankrupt act, at which said bankrupt, after having testified at great length, finally refused to answer any other questions relating to his property or affairs, on the ground that his answers might criminate him, as there was an indictment for a criminal offence under the bankrupt laws of the United States then pending against him; that thereupon said examination ceased, and defendant in error took no further steps to compel said bankrupt to answer, because he thought it would be better not to press him at that time, and the defendant in error did not again examine the bankrupt until November, 1879.

The plaintiff in error contends that upon this evidence the

court should have charged the jury, as he requested it to do, that the knowledge, in 1876, on the part of the assignee, that the bankrupt had refused to answer proper questions, relating to his property and effects, when under an examination authorized by law, on the ground that his answers might criminate him, and the knowledge of the fact that the bankrupt was under indictment for an offence committed against the provisions of the bankrupt law, created such a state of affairs as put the assignee on inquiry in relation to the alleged fraudulent sales; that, being put on inquiry in 1876, he must be presumed to have known all that he could have found out by due diligence, and that it followed as matter of law that he had knowledge of the fraudulent sales, and that there was therefore no concealment, such as would take the case out of the bar of the statutes.

The question raised by the pleadings, to be decided by the jury, was, whether the cause of action had been fraudulently concealed from the defendant in error. The concealment was averred by the petition and denied by the answer. The charge which the court was asked to give the jury assumed that the only evidence on this point was that relied on by the plaintiff in error. But this was not the fact. The record shows that there was evidence, and persuasive evidence, tending to prove actual concealment by the bankrupt and the plaintiff in error of the facts upon which the cause of action was founded. Besides, the bill of exceptions does not profess to give all the evidence upon this question. The court was therefore, in effect, asked to charge the jury to consider the evidence on one side of a disputed issue and disregard all the evidence on the other. Instead of doing this the court said to the jury:

"It is for you to say whether it is a case where this assignee has failed to make the discovery because he did not use due diligence, or whether it is a case where, using due diligence, he failed to make the discovery because the parties to the transaction, who were already the repositories of its existence, one or more of them, wickedly concealed it and filed oath upon oath in effecting that concealment. . . . So far as the instruction

asked assumes any fact I decline to give it, and I shall leave the whole question of prescription or no prescription to be determined by you. It is undoubtedly true that if he was put upon inquiry as a reasonable man, which he refused to follow up, and which, if you found as a fact, if he had followed up would have led to a knowledge, then the statute would have been a bar. But it is for you to say whether, upon all the evidence, there has or has not been such concealment and so continued as would qualify the rule as to prescription."

We are of opinion that the issue was fairly presented by the charge given by the court, and that the instructions requested by the plaintiff in error would have been unjust to the defendant in error, and have required the jury to shut their eyes to all the evidence on one side of the issue to which the charges referred.

But if the charges requested had been unobjectionable, the court, having in its own way fairly presented the issues, was not bound by its duty to give them. *The Schools* v. *Risley*, 10 Wall. 91.

We are of opinion, therefore, that there was no error in the refusal of the court to charge the jury as requested by the plaintiff in error or in the charge given to the jury.

There are other assignments of error which have not been argued by the counsel for the plaintiff in error. Most of them have been covered by what we have said. The others present, in our opinion, no good ground for the reversal of the judgment. We find no error in the record.

The judgment of the Circuit Court is affirmed.

STEPHENS *v.* MONONGAHELA BANK.

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

Argued March 17th, 1884.—Decided March 31st, 1884.

Pleading—Usury.

The defence of another action pending can only be set up by plea in abatement, and the action below upon the plea is not subject to review. The dictum in *Piquignot* v. *Pennsylvania Railroad,* 16 How. 104, cited and approved.

The remedy given by Rev. Stat. § 5198 for the recovery of usurious interest paid to a national bank is exclusive. *Barnet* v. *National Bank,* 98 U. S. 555; *Farmers' & Mechanics' Bank* v. *Dearing,* 91 U. S. 29; and *Driesbach* v. *National Bank,* 104 U. S. 52, cited and approved.

In an action by a national bank against a surety upon a note to recover the amount of the note, the surety has no right to have usurious interest paid by the principal in discounts and renewals of the note applied to the payment of the principal.

This suit was brought by the Monongahela National Bank of Brownsville, Pennsylvania, and judgment was given against Barzilla Stephens, the defendant, for want of a sufficient affidavit of defence. The grounds of defence as set forth in the affidavit were:

1. That another suit was pending in the Court of Common Pleas of Green County, Pennsylvania, between the same parties for the same identical cause of action.

2. That the original of the note in suit was discounted and taken by the bank on the 27th of June, 1871; that the money advanced thereon at the time was only $8,434.65; that the loan was renewed by six subsequent notes, the last being the note in suit; that upon such loan and each of the renewals the bank "knowingly took, received, reserved, and charged" usurious interest, amounting in the aggregate to $3,736.50; that the defendant is only surety for Israel Stephens, the maker of the note; and that the defendant is entitled to set off the amount of the "interest so knowingly taken, received, reserved, and charged by the bank" "against the money loaned on the original of the note in suit."

3. That the bank had "knowingly taken, received, reserved,

and charged at various times discount and interest, in excess of the amount permitted by its fundamental law, on other loans to the principal debtor, amounting in the aggregate to $6,773.10, which was a proper set off against the claim in the suit.

4. That the paper on which the note sued on was written was signed in blank by the parties thereto when it was taken to the bank for the purpose of renewal; that no one had authority to fill the blanks for anything else than the exact amount due on the original note, after deducting all payments, and that it was filled by an officer of the bank for the sum of $9,500, when, in view of the usury taken, less than $6,000 was due.

Mr. P. A. Knox and *Mr. C. E. Boyle* for plaintiff in error.

Mr. George Shiras, Jr., for defendant in error.

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

As to the first of these defences, it is sufficient to say that the plea of another action pending is a plea in abatement, Bac. Abr. Abatement M; Com. Dig. Abatement H, 24; 1 Chitty's Pl. 10, Am. Ed. 453; 3 id. 903, note *y*; and by § 1011 of the Rev. Stat. which is a re-enactment of a similar provision in the Judiciary Act of Sept. 24, 1789, c. 20, sec. 22, 1 Stat. 84, 85, it is expressly provided that there shall be no reversal in this court or the Circuit Court for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court. Under this statute, it was held in *Piquignot* v. *The Pennsylvania Railroad Company*, 16 How. 104, which came from the same district as this case, that the judgment of the Circuit Court, on precisely such a plea as that contemplated by this affidavit of defence, was "not subject to our revision on a writ of error." The defence is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, either as to his right to sue in the Circuit Court of the United States, or as to the merits of the matter in dispute.

All the other defences are covered by the decision of this court in *Barnet* v. *National Bank*, 98 U. S. 555. The only

difference between that case and this is that there the defendant was the maker of the note who actually paid the usurious interest, and here the defendant is the surety of the maker. It is difficult to see how the surety stands, as to the question now presented, in any better position than his principal. The ground of that decision was, that as without the statute there could be no recovery from the bank for usurious interest actually paid, and as the statute which created the right to such a recovery also prescribed the remedy, that remedy was exclusive of all others for the enforcement of that right. *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29. The surety has not any more than his principal the right to recover back the interest without the aid of a statute. Consequently, if his principal could not make this defence, he cannot. The forfeiture and the remedy are creatures of the same statute, and must stand or fall together.

The defence, as stated in the affidavit, is not that interest stipulated for has been included in the note, but that interest actually paid at the time of the discount and the several renewals should be applied to the discharge of the principal. In this particular, the case presents the same facts substantially as *Driesbach* v. *National Bank*, 104 U. S. 52. To entitle the defendant to such relief as was given in *Farmers' & Mechanics' Bank* v. *Dearing*, cited above, it should be made to appear by distinct averment that the note sued on includes interest stipulated for and not paid, as well as principal. That has not been done is this case.

Judgment affirmed.

CHOUTEAU & Another *v.* GIBSON.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

Submitted March 10th, 1884.—Decided March 31st, 1884.

Jurisdiction.

In order to give this court jurisdiction in error of a State court it must appear affirmatively on the face of the record, not only that the federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.

This was a motion to dismiss for want of jurisdiction.

Mr. John W. Noble and *Mr. C. Gibson* for appellee in support of the motion.

Mr. Thomas T. Gantt for Julia Maffitt, appellant, opposing.

Mr. S. T. Glover and *Mr. J. R. Shepley* for Charles P. Chouteau, appellant, opposing.

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

From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. *Murdock* v. *Memphis*, 20 Wall. 590, 636.

The present record shows that Chouteau and Maffit began this suit against Gibson in the Circuit Court of St. Louis County, Missouri, to obtain a conveyance of certain lands, which they claimed that he held in trust for them. Among other defences, Gibson set up a judgment in his favor in a suit brought by him against Chouteau and Maffit to recover the possession of the lands, in which, as he alleged, the identical matters presented in this case were directly passed upon and adjudicated between the parties. It is conceded that the State Supreme Court in deciding the case sustained this defence, and rendered

the decree now here for review in favor of Gibson on that ground alone, without considering any of the other questions involved. *Chouteau* v. *Gibson*, 76 Missouri, 38.

Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the State court is not reviewable here. The federal questions, if any there were in the case, lay behind this defence, and could not be reached until it was out of the way. The question presented by the defence was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties. Whether an equitable title could be set up in bar of the action at law brought by Gibson, the holder of the legal title, to recover possession, is a question of State law upon which the judgment of the State court is conclusive. The same is true of the question whether the pleadings in the former action were such as to present the equitable defence in proper form for final adjudication. The court below has decided that the pleadings were sufficient; that the equitable defence could be made, and that the judgment in that action in favor of Gibson was, in its legal effect, a judgment that Chouteau and Maffit had no title to the land in controversy. Consequently that judgment was a bar to this action, and precluded the court below as well as this court from reopening the original litigation and considering again the questions that were put at rest between the parties by the decision in their former suit. It is apparent, therefore, that no federal question which there may have been in the case was decided by the State court, and that the decision of such a question was not necessary to the final decree rendered. Without determining whether, if the former judgment had not been a bar to the action, there were questions in the case that might have given us jurisdiction, we grant the motion to dismiss. *Dismissed.*

ASTOR *v.* MERRITT, Collector.

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

Argued March 21st, 24th, 1884.—Decided April 7th, 1884.

Customs Duties—Wearing Apparel.

A citizen of the United States, arriving home from a visit to Europe, with his family, in the end of September, by a vessel, brought with him wearing apparel, bought there for his and their use, to be worn here during the season then approaching, "not excessive in quantity for persons of their means, habits and station in life," and their ordinary outfit for the winter. A part of the articles had not been worn, and duties were exacted by the collector on all those articles: *Held*, That, under § 2505 of the Revised Statutes (now § 2503, by virtue of § 6 of the act of March 3d, 1883, chap. 121, 22 Stat. 521), exempting from duty "wearing apparel in actual use and other personal effects (not merchandise), . . . of persons arriving in the United States," the proper rule to be applied was to exempt from duty such of the articles as fulfilled the following conditions: (1) Wearing apparel owned by the passenger, and in a condition to be worn at once without further manufacture; (2) brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; (3) suitable for the season of the year which was immediately approaching at the time of arrival; (4) not exceeding in quantity or quality or value what the passenger was in the habit of ordinarily providing for himself and his family at that time, and keeping on hand for his and their reasonable wants, in view of their means and habits in life, even though such articles had not been actually worn.

This was a suit to recover back duties alleged to have been illegally exacted on the wearing apparel of a passenger entering at the port of New York. The facts which make up the case are stated at length in the opinion of the court. The plaintiff in error was plaintiff below.

Mr. George De Forest Lord for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was brought by William Astor, in a court of the State of New York, and removed into the Circuit Court of the

United States for the Southern District of New York, to recover the sum of $1,880 paid to the defendant, as collector of the port of New York, by the plaintiff, for customs duties, on the 22d of September, 1878, on certain goods brought by the plaintiff with him from Liverpool, as a passenger in a vessel. The goods and the duties exacted were as follows, the items of the goods not being more particularly set forth in the record: 45 lbs. wool and worsted wearing apparel, at 50 cents per pound, $22.50, and 40 *per cent.* on its value at $990, $396, amounting to $418.50; cotton wearing apparel, 35 *per cent.* on its value at $150, amounting to $52.50; leather gloves, 50 *per cent.* on their value at $250, amounting to $125; and silk wearing apparel, 60 *per cent.* on its value at $2,240, amounting to $1,284; being a total of $1,880. The plaintiff recovered a verdict for $737, with interest from September 22d, 1878, on which he had a judgment. He has brought a writ of error, claiming that he was entitled to recover the entire $1,880, on the ground that the goods were exempt from duty under § 2505 of the Revised Statutes, p. 489, 2d ed., which provides that the importation of the following articles shall be exempt from duty: "Wearing apparel in actual use and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation, or employment, of persons arriving in the United States. But this exemption shall not be construed to include machinery, or other articles imported for use in any manufacturing establishment, or for sale."

At the trial, in October, 1880, the plaintiff testified in his own behalf, that, in the summer of 1878, he, a citizen of the United States, was travelling in Europe with his wife, three daughters and son, also citizens of the United States, and returned to this country with them, arriving in New York, by a steamer, on September 22d, 1878; that he had in his personal baggage certain articles of wearing apparel, being the goods above mentioned, belonging to himself and other members of his family, purchased in Europe during that summer, on which the duties above mentioned were exacted, and that they were paid in order to get possession of the wearing apparel; that

the articles belonged to him and were intended for the personal use of himself and his said family; that the articles for his own and his son's use were such articles of wearing apparel as they ordinarily wore at that season of the year; that they were principally intended for use in the winter, and were in no sense imported by him as merchandise; that some of his own and his son's wearing apparel had been actually worn by them personally, and he explained that fact to the custom-house authorities at the time of the exaction of the duties; that the articles of wearing apparel of himself and his son were purchased by him with the intention of using them wherever he and his family might be; that he did not know, when he purchased them, how long he was going to remain abroad; that, when they were purchased at Paris and sent home, they were placed in with their other wearing apparel, so as to form part of their ordinary wardrobes; that, if they had been detained in Europe, the garments were such as they would have required the moment the weather grew cool; and that the articles were bought for use whenever the weather should make it proper to use them, and without reference to where he and his son should be at the time they encountered cold weather.

Mrs. Astor testified that the garments of ladies' wear contained in the baggage were generally dresses and cloaks of woolen, worsted and silk, and linens, intended entirely for her own and her daughters' use, and which had been purchased under her supervision in Paris; that such garments were intended for the separate and individual use of herself and daughters as soon as it was cold enough to wear them for the approaching season; that some were adapted for ordinary wear and some for balls and entertainments, and all were made upon measure; that the aggregate quantity of wearing apparel which formed part of the baggage of herself and daughters rather fell short of their usual supply of such articles for that season of the year; that she was obliged, after she arrived in this country, to have some dresses made; that none of the articles were purchased for sale or exchange, but only for the special use of the persons for whom they were made; that, when they were purchased and sent home from the persons

who made them, they were placed indiscriminately in with the wardrobe of the particular person for whom they were intended, so to form part of the personal wardrobe of such person at the time; that a great part of them had been worn before she returned to this country, but some few had not been worn, because there was no special occasion to wear them; that, if the party had been detained in Paris, and cold weather had suddenly come on, the articles were such as she and her daughters would have required for immediate use; that, if they had remained for the winter, or a month longer, they would have worn the dresses intended for entertainments; that, from the time when these articles were purchased, there was nothing to prevent their being put on and worn the moment a proper occasion for wearing them arrived; that the articles lasted during the fall and winter, until spring, and had been entirely consumed by use; that she thought there were four dresses that had not been worn, because there had been no occasion to wear them; that the party had intended, at the time the articles were purchased, to spend the winter in America, but, if their plans had been changed at all, they would have remained in Europe and worn the articles there; that they went to Europe in May or June, 1878, travelled through England and to Paris, then through the Continent and back to Paris; that most of the articles were ordered upon their first arrival in Paris, before travelling through the Continent, and were paid for on coming back; and that most of them (about half, perhaps) were ordered and worn before travelling through the Continent, because they were then needed.

It appeared in evidence that the examiner who appraised the dutiable articles in the plaintiff's baggage went upon the principle of including as dutiable articles those which seemed not to have been worn.

The plaintiff's counsel requested the court to charge the jury as follows: "1. The general purpose of the statute being to impose duties upon the importation of merchandise, the exemption of the wearing apparel of passengers is in accordance with that purpose, and the language providing for such exemption should have a wide and liberal interpretation. 2. The general pur-

pose of exempting passengers' baggage being as much in harmony with the statute as the general purpose of imposing duties on merchandise, all language which seems to bring such baggage within the same category with merchandise should be strictly construed against the government, and all language tending to keep up the distinction should be liberally construed in favor of the citizen. 3. The words 'not merchandise,' in the clause of the statute now in question, relate to the words 'wearing apparel in actual use,' as well as to the words 'personal effects,' and the clause might properly be paraphrased as if it read 'wearing apparel in actual use (not merchandise), and personal effects (not merchandise.)' 4. The words 'not merchandise,' thus used, may properly be regarded as explaining and defining the words 'in actual use,' and the clause may be rightly construed as if those were synonymous or correlative terms. 5. If, therefore, this wearing apparel was 'not merchandise,' it was 'in actual use,' within the statutory meaning of that term, and was, therefore, exempt. 6. The words 'in actual use,' not being scientific or technical words, should be applied in the common and ordinary sense in which they would be generally employed. If, therefore, this wearing apparel, under the circumstances disclosed in the testimony, would be generally and ordinarily described as being in actual use of the plaintiff and his family, then it should have been admitted duty free. 7. The words 'in actual use' do not mean 'in actual, immediate, personal use' at the moment, but must have a meaning somewhat more extended than that. The statute clearly shows that some wearing apparel intended for and awaiting use in a passenger's trunks, as well as that upon his person at the time, is to be admitted free. 8. If the words 'in actual use' were intended (as they clearly were) to embrace some wearing apparel which was only intended for, and awaiting, use, in the passenger's trunks, there is nothing in the statute which shows an intention to exclude any wearing apparel so situated, and, consequently, all such wearing apparel should be admitted free, provided the other requirements of the statute are fulfilled, viz., that it is 'not merchandise,' and belongs to the passenger. 9. Wearing apparel is properly and

strictly 'in actual use' from the time when its use by its owner begins until it is finally consumed or worn out. 10. The use of wearing apparel which is purchased for the immediate personal comfort of the owner may be properly said to begin from the time when it is sent home from the maker and takes its place, ready for wear, in the owner's wardrobe. If these articles were in that condition, they were 'in actual use,' within the statute, and should have been admitted free. 11. There is nothing in the statute to indicate that 'wearing apparel' must be worn once or twenty times before it can be said to be 'in actual use,' and the jury is not bound by any such test, in determining whether these articles were 'in actual use' when the plaintiff arrived here, in September, 1878. 12. Wearing apparel suitable for the season of the year which is approaching at the time, not exceeding in quantity what the owner would ordinarily provide for himself and keep on hand for his reasonable wants, and purchased for his own use, as occasion may require, may be properly said to be 'in actual use,' within the meaning of the statute, from the time when they come into the owner's hands and are placed in his wardrobe, to be worn whenever the proper occasion arrives, and, if these articles come within that test, they should have been admitted free. 13. The terms 'in actual use,' as employed in the statute, are substantially equivalent to the words 'in present use,' including, in their meaning, not merely a reference to the actual present, but to so much of the immediate future as a person would ordinarily provide for in his every-day wardrobe, and if, in this sense, these articles were 'in actual use,' they were exempt from duty. 14. All the necessities of modern civilization require that every person should continually renew his wardrobe, as articles are worn out. Whatever is purchased for that purpose passes into 'actual use' the moment it is sent home and placed by the owner among the other articles which form his present wardrobe; and if these articles were in that category, they were exempt from duty." The court refused to charge in accordance with any of these requests, and the plaintiff excepted to each and every such refusal.

The court then charged the jury as follows, and the plaintiff

excepted to the parts which are in brackets: "Certain facts are admitted or have been proved: (1.) There was no evasion or concealment of the amount, or value, or character, and use or no use, of the goods by the plaintiff, and there is no complaint of any departure from courteous treatment by the defendant's officers. (2.) There is no dispute in regard to the value of the articles. (3.) It is not denied that the clothing was to be used by the defendant's family, in this country, during the season then approaching, and was not excessive in quantity for persons of their means, habits and station in life, and was their ordinary outfit for the winter. (4.) That a part of the articles had not been worn, and that all were bought for use, and to be worn in this country, if the plaintiff's plans for a speedy return should be carried into effect. The main question in the case, and to obtain an answer to which this suit was brought, is whether, under the foregoing facts, the unworn articles were legally free from duty, as wearing apparel 'in actual use;' in other words, to ascertain the proper definition of the phrase or term 'in actual use.' The plaintiff insists that wearing apparel, suitable for the season of the year just approaching at the time, not exceeding in quantity what the owner would ordinarily provide for himself and keep on hand for his reasonable wants, and purchased for his own use, as occasion might require, may be properly said to be in 'actual use,' within the meaning of the statute, from the time when they come into the owner's hands, and are placed in his wardrobe, to be worn whenever the proper occasion arrives. It is our duty to ascertain, if possible, the intention of the legislature, from the language which is used, and ordinarily to give to the language its natural signification. In my opinion, by limiting the exemption from duty of travellers' wearing apparel to that 'in actual use,' Congress meant to say, that new and unused wearing apparel purchased in a foreign country, not for present use, but for prospective use in this country, though that prospective use might be in the near future, should pay duty; and that it is not the right of travellers to have new and unused wearing apparel which has been purchased abroad, not for use abroad, but for use upon their return to this country, admitted free of duty.

I, therefore, limit the exemption, in general, [to wearing apparel which had been actually used, as such, before the arrival of the owner in this country], and define ['wearing apparel, actually in use (not merchandise),' to mean wearing apparel bought for personal use and not for sale, which has been really subjected to use in the way in which that particular wearing apparel is ordinarily used]. Apparel bought in a foreign country not for present use, but for the purpose of anticipated use in this country, and not actually subjected to use in a foreign country, for the purpose for which it was procured, but put upon the person as a colorable device to escape duties, is not within the exemption of the statute. Some exceptional cases have been cited by the learned counsel for the plaintiff; and, in view of such cases, I may also say, that the term also includes wearing apparel which has been purchased for the purpose and with the *bona fide* and not colorable intent of an actual, present, personal wear and subjected to use in a foreign country or in transit, and not merely for prospective use in this country, although said apparel may not actually have been used abroad. The last clause of the definition is not pertinent, as I understand the testimony, to the case on trial. Under this construction of the statute, [the unworn goods of the plaintiff were not exempt]. The apparel which had been worn, it not having been claimed that such wearing was colorable or took place in any other than the ordinary way in which clothing is subjected to use, was exempt. And this brings me to the question of fact, which is for the determination of the jury, whether any part of the assessed goods, and, if so, how much, had been worn."

The court then commented on the testimony as to what articles had been worn and what had not been worn, and added: "Your duty is to examine the testimony on both sides and ascertain whether the plaintiff has proved that any, and, if so, how many, of his worn articles were assessed for duty. The amount, if anything, which he has overpaid is the measure of the defendant's liability." "I suppose it is conceded that some were not worn. The amount, if anything, which he has overpaid, that is, the amount, if anything, which he has paid

upon worn goods, is the measure of the defendant's liability."

The parts of the charge excepted to were these: (1.) That, although the clothing in question was confessedly not excessive in quantity for persons of the means, habits, and station in life of the plaintiff and his family, and was their ordinary outfit for the winter, the exemption of wearing apparel from the payment of duty was limited "to wearing apparel which had been actually used as such before the arrival of the owner in this country." (2.) That the terms "wearing apparel in actual use, (not merchandise)," as contained in the statute, "meant wearing apparel bought for personal use, and not for sale, which has been really subjected to use in the way in which that particular wearing apparel is ordinarily used." (3.) That "the unworn goods of the plaintiff" in this case were not exempt.

By § 46 of the act of March 2d, 1799, chap. 22, 1 Stat. 661, it was provided, that "the wearing apparel, and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States, shall be free and exempted from duty;" and a separate entry of such articles was required, with an oath that the packages contained no goods other than "the wearing apparel and other personal baggage" and tools, and were not directly or indirectly imported for any other person or intended for sale.

By § 2 of the act of April 27th, 1816, chap. 107, 3 Stat. 313, it was declared that the following articles should be imported into the United States free of duties, that is to say, "wearing apparel and other personal baggage in actual use, and the implements or tools of trade of persons arriving in the United States."

This continued to be the language in § 1 of the act of September 11th, 1841, chap. 24, 5 Stat. 463, and until § 9 of the act of August 30th, 1842, chap. 270, id. 560, was enacted, which introduced the language now found in the first clause of the paragraph above cited from § 2505 of the Revised Statutes, which language was repeated in Schedule 1 of § 2 of the act of July 30th, 1846, chap. 75, 9 Stat. 49, with the addition of what is now found in the second clause of said paragraph; and

the whole appears again in § 3 of the act of March 3d, 1857, chap. 98, 11 Stat. 193, and in § 23 of the act of March 2d, 1861, chap. 68, 12 Stat. 193, from which it was transferred to the Revised Statutes. Although the description of what is so exempt is thus changed from what it was in § 46 of the Act of 1799, the Revised Statutes require, in § 2799, the same oath on entry which was so required by the act of 1799, and state that it is required "in order to ascertain what articles ought to be exempted as the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States."

The course of legislation is thus seen to have been, to exempt from duty, in 1799, "wearing apparel and other personal baggage;" in 1816, "wearing apparel and other personal baggage in actual use;" "in 1842, wearing apparel in actual use and other personal effects (not merchandise);" and in 1846, and thenceforward, the same articles as in 1842, with the limitation as to excluding from the exemption articles imported for sale. The enactment in question is repeated in the statute now in force, as § 2503 of the Revised Statutes, by virtue of § 6 of the act of March 3d, 1883, chap. 121, 22 Stat. 521. The question raised is, therefore, one of continuing importance and interest, under the customs laws.

It is quite apparent that the Circuit Court finally applied to the plaintiff's wearing apparel the test of whether the given article had been bought for personal use and not for sale and had also been worn, and subjected it to duty unless it had been actually worn. The court refused to give the 12th instruction, which it stated to be, that the articles of apparel suitable for the season of the year just approaching at the time, not exceeding in quantity what the owner would ordinarily provide for himself and keep on hand for his reasonable wants, and purchased for his own use as occasion might require, may be properly said to be "in actual use," within the meaning of the statute, from the time when they come into the owner's hands and are placed in his wardrobe, to be worn whenever the proper occasion arrives, and, if the articles in question came within that test, they should have been admitted free. The court very properly

said, that putting upon the person an article of apparel as a colorable device to escape duties, was not wearing it or an actual use of it, in the sense of the statute. It further said, that the term "in actual use" also includes wearing apparel which has been purchased for the purpose and with the *bona fide* and not colorable intent of an actual, present, personal wear and subjected (subjection?) to use in a foreign country or in transit, and not merely for prospective use in this country, although said apparel may not actually have been used abroad. But it added, that this last clause of the definition was not pertinent, as it understood the testimony, to the case on trial. The court, however, in all it said, limited the exemption from duty as not including new and unused wearing apparel purchased abroad not for present use but for prospective use in this country in the near future. While it said that the exemption might include what had been bought for the purpose and with the *bona fide* and not colorable intent of actual present wear abroad or in transit, and not merely for prospective use here, although not actually used abroad, it said that the latter clause did not apply to this case, because the wearing apparel in question was bought to be worn here, as an outfit for the winter.

It is contended here, for the defendant, that unworn wearing apparel, purchased for an approaching season, cannot be exempt from duty, as "in actual use," before that season has arrived, while wearing apparel proper for the season of arrival from abroad may, unless there is a want of good faith, be considered as "in actual use," whether it has been already used or not.

We are of opinion that the court should have given a different construction from that which it gave to the statute, as applicable to the facts of this case. If the articles in question fulfilled the following conditions, and were (1) wearing apparel owned by the plaintiff and in a condition to be worn at once without further manufacture; (2) brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; (3) suitable for the season of the year which was immediately approaching at the time of arrival; (4) not exceeding in quan-

tity or quality or value what the plaintiff was in the habit of ordinarily providing for himself and his family at that time, and keeping on hand for his and their reasonable wants, in view of their means and habits in life; they were to be regarded as "wearing apparel in actual use," of a person arriving in the United States, even though they had not been actually worn.

If a person residing in the United States should purchase wearing apparel here, in a condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year, and not exceeding in quantity, quality or value the limit above mentioned, no one would hesitate to say that such wearing apparel was "in actual use" by such person, even though some of it might not have been actually put on or applied to its proper personal use. The word "actual," in the lexicon, has as a meaning "real," as opposed to "nominal," as well as the meaning of "present." "In use" is defined to be "in employment;" "out of use" to be "not in employment;" "to make use of, to put to use" to be "to employ, to derive service from." These definitions aid in showing that it is too narrow a construction of the words "in actual use," as applied to this case, to say that they require that the wearing apparel should have been actually worn.

It is manifest, that, by the words "in actual use," Congress did not intend that those words should be limited to wearing apparel on the person at the time. They must have a more extended meaning. The test of having worn the article, as a criterion whether it is "in actual use," is arbitrary, and without support in the statute. An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards. The test of wearing must, therefore, be rejected. What test shall be adopted? We are aided by the other language of the statute, in saying, that the articles must be "personal effects," and must not be "merchandise," and must not be "for sale." These words of limita-

tion, on the one hand, serve to indicate that, on the other, if the articles, being wearing apparel of the arriving passenger, are fairly personal effects of his, and not merchandise, and not for sale, a construction of the words "in actual use" is to be sought for which will carry out the spirit and intent of the entire provision of the statute, and, while it comports with the ordinary habits of passengers and travellers, will not open the door for fraud. Such a construction we believe that one to be which we have laid down for a case like the present. As regards citizens of the United States returning from abroad, and foreigners visiting this country, it cannot be supposed that Congress intended they should have worn all the wearing apparel they bring, or else pay duty on it; or that they shall not bring with them, free of duty, wearing apparel, not worn, bought in good faith for personal use in the immediately coming season, and not unsuitable in quantity or quality or value. "Persons arriving in the United States" are citizens returning or foreigners visiting or emigrating. The statute applies to all equally. If, as the result of our construction of the law, it shall happen that citizens returning from abroad may obtain, as to their personal wardrobes, a pecuniary advantage over citizens who remain at home, that is but an incidental advantage attendant on the opportunity to go abroad. If foreigners visiting or emigrating are not compelled to pay duties on their unworn wearing apparel, it is merely exempting them from a tax the imposing of which has a tendency to induce them to remain abroad. The words "in actual use" require no such construction, and, under the guarded rule we have laid down, the government will, on the one hand, not lose any revenue which the statute intends to give it and does give it, and persons arriving from abroad will be enabled to bring with them their usual and reasonable wearing apparel in actual use, without being required to have worn it before landing.

As appears by the record in this case, the Treasury Department, in heretofore making regulations for the conduct of the officers of the customs, as to the exemption of wearing apparel, promulgated the following, which were in force from 1857 to 1875: "Such exemption of wearing apparel cannot be

without limit as to the character and quantity of the articles which are to be admitted to free entry; and it is for the department or its officers to determine whether articles for which exemption is claimed are entitled thereto under a reasonable construction of the law. The rule by which the department usually determines the dutiable or free character of wearing apparel in such cases is as follows: 1st. Did the owner visit the foreign country for the purpose or with the direct intention of purchasing the article or articles? 2d. Were the articles intended for the sole use of the person purchasing the same? 3d. Was such purchase actually necessary for the health or comfort of the person or persons purchasing the same? These questions must be answered under oath." On the 23d of February, 1875, as we learn from public documents, other regulations were prescribed, which were in force at the time of the present transaction, as follows: "So far as wearing apparel is concerned, only those articles which have been in actual use are exempted from duty, although in many cases this exemption has been applied to all articles of wearing apparel belonging to and contained in the baggage of the owner, whether new or old. New articles of clothing, which have not been in actual use abroad, and not necessary for the present comfort or convenience of the owner, are chargeable with duty; and the fact that they are intended for the future use of the person who brings them, or of another person, and are not for sale, does not exempt them from duty." It is, doubtless, impossible, under the statute, to formulate a general rule which will apply to every case. The law must have a reasonable construction in reference to cases as they arise.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with direction to award a new trial.

Statement of Facts.

BURLEY, Receiver, *v.* GERMAN-AMERICAN BANK.

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

Argued March 28th, 1884.—Decided April 7th, 1884.

Evidence—New York Code—Pleading—Res Gestæ.

In New York, under § 500 of the Code of Civil Procedure, an answer which makes certain statements, and then denies every allegation of the complaint, "except as hereinafter stated or admitted," amounts to a sufficient general denial of all allegations of the complaint not admitted, to authorize evidence to be given to show any of such allegations to be untrue.

An objection that such denial is indefinite or uncertain must be taken by a motion made, before trial, to make the answer definite and certain, by amendment, and cannot be availed of by excluding evidence at the trial.

If it is intended to raise, on a writ of error, the point that a cross-examination was not responsive to anything elicited on the direct, an objection must have been taken on that ground at the trial.

Entries in the books of one party to a transaction, not contemporaneous, or made in the due course of the business, as a part of the *res gestæ*, but made after the rights of the other party had become fixed, are not competent evidence.

Where the issue was as to whether A or B owned a note, and A, having testified that he owned it, afterwards testified that B owned it, and gave as a reason that he had never directed the proceeds of the note to be applied to any purpose, it is competent to prove by C that A gave directions to C as to how to apply such proceeds.

This was a suit brought in a court of the State of New York, in June, 1877, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, after answer. The plaintiff is the receiver of the Cook County National Bank, of Chicago, Illinois, and the defendant is a corporation of New York. The complaint alleged that, on the 20th February, 1875, the defendant held three promissory notes, maturing on that day, for $10,000 each, made by the Charter Oak Life Insurance Company, as collateral security for a loan of $25,000; that the notes were paid to the defendant at maturity, and there was a surplus, beyond what was due to it on the loan, of $5,000; that the notes were at the time the property of the plaintiff, as receiver; that the defendant received notice of such ownership prior to the payment;

and that the plaintiff is entitled to a judgment for such surplus, with interest.

The answer averred that, on October 20th, 1874, one Bowen borrowed of the defendant $25,000, and delivered the three notes to it as collateral security; that they were negotiable and not due, and were duly transferred by Bowen to the defendant, he then having the legal title to them, and then claiming, and the defendant believing him, to be their owner; that the notes were paid February 20th, 1875, when due, and the proceeds were applied to pay the loan, leaving in the hands of the defendant a surplus, due to Bowen; that, on April 14th following, the defendant, then believing, with good reason, that that surplus belonged to Bowen, applied it, on his direction, towards paying other notes then held by the defendant, indorsed by Bowen, which notes it gave up, on such payment. The answer then said: "Except as hereinbefore stated or admitted, these defendants, on information and belief, deny each and every allegation in the said complaint contained."

The answer then set up, as a second defence, that, in August, 1871, Bowen agreed in writing with the defendant, that all securities which he might thereafter deposit with it should be regarded as security for any money it might loan to him; that, when the three notes were so deposited, the agreement was a continuing one, under which it received and held the notes as security not only for the loan of $25,000, but for indebtedness which thereafter arose from Bowen to it, as indorser on notes, and existed on February 20th, 1875, to a larger amount than said surplus; that, on the direction of Bowen, it applied that surplus towards paying the last mentioned liability of Bowen; and that at all times it believed, with good reason, and without notice to the contrary from the plaintiff, that the three notes were the property of Bowen and that he had good right to dispose of them and of their proceeds. The answer then said: "And, as a part of this second and separate defence, these defendants, on information and belief, reiterate their denials, hereinbefore contained, of each and every allegation in said complaint, not herein stated or admitted."

The case was tried by a jury. The proof at the trial

showed that the surplus was applied on a note made by one Benjamin F. Allen and indorsed by Bowen. Bowen was a director in the Cook County Bank, and its agent, and the agent of Allen, in New York, and also a director in the defendant bank. Allen was president of the Cook County Bank, and with one Stephens and one Blennerhasset composed the firm of Allen, Stephens & Co., of New York. He was also a private banker in Iowa. In October, 1874, Allen, Stephens & Co. had the three notes, which they had received from the makers in part payment of a debt. They put the notes into the hands of Bowen, and he pledged them to the defendant as security for a loan of $25,000, and placed the proceeds of the loan to the credit of the Cook County Bank, in a bank in New York city. On the day the three notes matured, and before they were paid, Allen, Stephens & Co. notified the defendant that Bowen never owned the notes, and that the surplus, after paying the loan, should be credited to the Cook County Bank. The plaintiff had been appointed receiver of that bank on February 1st, 1875.

The main question in dispute at the trial was as to whether the notes belonged to the Cook County Bank, having been advanced by Allen, Stephens & Co. to that bank and delivered to Bowen to raise money on; or whether they belonged to Allen individually, and the proceeds of the loan were placed to the credit of the Cook County Bank, in accordance with a custom of Bowen to place to the credit of that bank all moneys belonging to Allen individually. The case went to the jury on the single question of fact as to whether the three notes belonged to the Cook County Bank or to Allen individually. There was no exception to the charge of the court, but the plaintiff took exceptions to the admission of evidence.

In the course of the trial the defendant offered evidence to show that Allen owned the notes. The plaintiff objected to such evidence, on the ground that, under the answer, the defendant could only prove that Bowen owned them. The defendant contended that, under the general denial in the answer, it could prove ownership of the notes in Allen or in any one else, because the answer raised the issue of title in the plaintiff. The court admitted the evidence and the plaintiff excepted.

The verdict and judgment were for the defendant. The plaintiff brought this writ of error.

Mr. Henry Decker for plaintiff in error.

Mr. Edward Saloman for defendant in error.

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

The admissibility of the evidence must be tested by the rules established in the courts of the State of New York. The Code of Civil Procedure of New York (§ 500) provides as follows: "The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language, without repetition." The contention on the part of the plaintiff is, that if an answer alleges new facts as an affirmative defence, it must be a confession and avoidance, and it cannot at the same time be a denial; that this answer does not deny generally the material facts set forth in the complaint, nor state matters that are properly in confession and avoidance; that a general denial would have raised an issue of fact as to title; that this answer is not a general denial of title in the Cook County Bank; that a denial, general or special, cannot contain any affirmative allegation of facts, as a defence, by way of confession and avoidance; that, although the answer was to be accepted at the trial at its value, it amounted, at most, to a special traverse of the allegation of title in the Cook County Bank; and that the testimony for the defendant should have been restrained within the limits of the allegations in such special traverse.

The counsel for the plaintiff is mistaken in treating the two branches of § 500 as in the alternative. A defendant is not limited to the one or the other. He may in his answer embody both a denial, general or special, and a statement of new matter constituting a defence. Such is the express language of the statute.

The complaint in this case avers that the three notes were, at the date when they were paid, the property of the plaintiff. This was a fact which, on a general denial, it was necessary for the plaintiff to prove. The answer does not aver that Bowen owned the notes, but only that he borrowed the money and transferred the notes to the defendant, he then having the legal title to them, and claiming, and the defendant believing him, to be the owner; and that the defendant received the surplus money, and, believing it to belong to Bowen, applied it in the manner stated. There is no statement of ownership in Bowen, or in any other person, at any time, and no admission of ownership in the plaintiff when the notes were paid, which is the only allegation as to ownership in the complaint. Therefore, when the answer then goes on to deny each and every allegation in the complaint except as before in the answer stated or admitted, it necessarily denies the allegation of the complaint as to ownership in the plaintiff. The same thing is true as to the averments in the second defence. They conclude by saying, not that at all times Bowen was the owner, but that the defendant at all times believed him to be the owner; and then a like denial is made as to the second defence. There was no ambiguity about this, and there could be no doubt or surprise. The averment of the complaint as to the plaintiff's ownership was thereby denied, the issue as to that was made, and the defendant had a right to prove anything which went to contradict such ownership, by showing ownership in Bowen or Allen or any one else.

It is provided by § 519 of the Code of Civil Procedure, that the allegations of a pleading must be liberally construed, with a view to substantial justice between the parties; and § 546 provides that where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain, by amendment. The remedy is by motion, *The People* v. *Ryder*, 12 N. Y. 433; and it must be made before trial, in a case like the present, where the objection is that a denial is indefinite or uncertain, and the remedy is not by excluding

evidence at the trial. *Greenfield* v. *Massachusetts Mutual Life Insurance Company*, 47 N. Y. 430, 437.

But, it is well settled, in New York, that a denial in the form here in question is proper. The form is, that every allegation is denied "except as hereinbefore stated or admitted." In *Youngs* v. *Kent*, 46 N. Y. 672, material allegations in a complaint, which, if controverted, presented an issue of fact for trial, were not expressly admitted, and were not alluded to in the statement of special facts alleged in the answer, and it was held that they were to be regarded as controverted under a denial of each and every allegation of the complaint not "herein admitted or stated." In *Allis* v. *Leonard*, 46 N. Y. 688, fully reported in 22 Albany Law Journal, 28, the same principle was applied to an answer which admitted certain allegations in a complaint and denied all except those expressly admitted. We regard it as the rule in New York, that a denial such as is found in the answer in this case, in connection with the rest of the answer, is a sufficient denial to raise an issue as to the plaintiff's ownership of the notes and to warrant evidence to show any other ownership. Under such a denial a defendant has a right to prove anything that will show the allegation covered by the denial to be untrue. *Wheeler* v. *Billings*, 38 N. Y. 263; *Hier* v. *Grant*, 47 Id. 278; *Greenfield* v. *Massachusetts Mutual Life Insurance Company*, Id. 430, 437; *Weaver* v. *Barden*, 49 Id. 286.

The plaintiff also objects that certain testimony brought out on the cross-examination of the witness Blennerhasset was not responsive to anything elicited on his direct examination. But no objection was taken at the trial on that ground. The objection taken was that the testimony was irrelevant, meaning that it was not admissible under the answer, because it tended to prove that Allen owned the notes.

Under the objection of the defendant, the court, at the trial, excluded entries made in the books of the Cook County Bank in June, 1875, after the plaintiff was appointed receiver, and after the notes were paid and after the surplus was appropriated. The exclusion of these entries was proper. The rights of the defendant could not be varied by entries thus

made, because they were not contemporaneous entries, made in the due course of the business, as a part of the *res gestæ*, but were made by one of the parties after the rights of the other party had become fixed.

There is but one more point for consideration. The plaintiff introduced in evidence a deposition of Allen, taken in February, 1879, to the effect that he for himself individually had procured Bowen to obtain the loan from the defendant, and that he used the money, although he did not provide the collaterals, and that he gave no instructions to transfer the three notes or their proceeds to any other account. The plaintiff also put in a second deposition of Allen, taken in December, 1879, in which he stated that these notes belonged to the Cook County Bank when the loan was obtained; that it was obtained for the use of that bank; that he was mistaken in his first deposition, because he had not then carefully considered the matter and was without books and papers to refresh his memory; that the proceeds of the loan went to the credit and benefit of the Cook County Bank; that the surplus of the notes belonged to that bank; and that the reason he believed so was that he never used or attempted to use the surplus, and never gave any direction for its application to any purpose. Afterwards, Bowen, on his examination, was asked by the defendant to state whether Allen gave him any direction as to the use of such surplus. The plaintiff objected generally to the evidence, and the court allowed it as competent in contradiction of the testimony of Allen on the subject. Bowen then testified that Allen told him to appropriate the surplus on the note of Allen indorsed by Bowen, on which it was applied. It is plain that this evidence was competent. It was not offered in impeachment of Allen, as going to show that on some occasion he had told Bowen that he had given instructions to appropriate the surplus of the notes. In such a case it would have been necessary to ask Allen in advance whether he had not told Bowen that he had given such instructions, in order to direct his attention to the specific person to whom it was alleged that he had made a statement that he had given such instructions, when he was now testifying that he had not given such instructions. But

the evidence offered was not of that character. The issue on trial was, whether the notes belonged to Allen or the Cook County Bank. To prove they did not belong to Allen, the plaintiff had procured Allen to testify that the reason he believed that the surplus of the notes belonged to the Cook County Bank was because he had never given any directions to apply the surplus to any purpose. The answer stated that the defendant had applied the surplus by direction of Bowen. Then, when Bowen was afterwards examined by the defendant to show that Allen owned the three notes, he testified that Allen told him to apply the surplus on a note of his, indorsed by Bowen, which the defendant had. This was direct proof on a direct issue in the case, and not proof on a collateral matter.

The judgment of the Circuit Court is affirmed.

DRURY *v.* HAYDEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted March 25th, 1884.—Decided April 7th, 1884.

Mistake—Mortgage.

Where in a recorded deed of land subject to a mortgage, an agreement of the grantee to assume and pay it is inserted by mistake of the scrivener and against the intention of the parties, and on the discovery of the mistake the grantor releases the grantee from all liability under the agreement, a court of equity will not enforce the agreement at the suit of one who, in ignorance of the agreement, and before the execution of the release, purchases the notes secured by the mortgage; although the grantee, after the deed of conveyance to him, paid interest accruing on the notes.

This was an appeal from a decree in equity, in favor of the holder of promissory notes secured by a mortgage of land in Chicago, for the payment by the appellant personally of the sum due on those notes. The material facts appearing by the pleadings and proofs were as follows:

On July 28th, 1875, Solomon Snow, owning the land, made

two mortgages thereof, in the form of trust deeds, with power of sale in case of default in payment of the principal or interest of certain promissory notes of the same date, made by him to Joseph E. Lockwood; the first mortgage to Edwin C. Larned as trustee, to secure the payment of a note for $28,000, payable in five years, and the second mortgage to Roswell B. Bacon as trustee, to secure the payment of two notes for $6,000 each, payable in two and three years respectively; and on December 14th, 1875, conveyed the land by warranty deed to William C. Snow, subject to the two mortgages, which the latter assumed and agreed to pay and save him harmless from. On January 28th, 1876, William C. Snow conveyed the land by warranty deed to Isaac M. Daggett, subject to the two mortgages, but without any stipulation that Daggett should assume and pay them. On April 12th, 1876, Daggett conveyed the land by warranty deed to William Drury, subject to the two mortgages, "both of which said encumbrances the party of the second part herein assumes and agrees to pay." Each of the mortgages and deeds was duly recorded within a few days after its date. Drury, after receiving the conveyance to him, paid interest accruing on the notes secured by each mortgage.

The testimony of Daggett, of Drury, and of the broker who negotiated the sale between them, conclusively showed that the clause in this last deed, by which Daggett agreed to assume and pay the encumbrances, was inserted by mistake of the scrivener, without the knowledge and contrary to the intention and agreement of the parties. On July 12th, 1877, as soon as the mistake was discovered, Daggett executed a deed of release to Drury, reciting the mistake, and therefore releasing him from all liability, demand, or right of action, arising from or out of that agreement. This release was recorded on July 18th, 1877.

About November 1st, 1876, Annie E. Hayden, the appellee, purchased from Lockwood, for a valuable consideration, the two notes held by him and secured by the second mortgage. But she did not allege, or offer any evidence tending to prove, that at the time of purchasing the notes she knew of or relied upon the clause in the deed of April 12th, 1876. Her original bill in this case was filed on January 26th, 1878,

against the mortgagor, the trustees named in each mortgage, and the successive purchasers of the equity of redemption, for a foreclosure of the second mortgage and a sale of the land, by reason of default in the payment of interest on her notes, and for a personal decree against Drury for the amount of any deficiency, in the proceeds of the sale, to pay her debt. After answer and replication, the case was referred to a master, who on February 6th, 1880, reported that the sum due to her was $15,194.21. It was alleged in a supplemental bill filed on February 13th, 1880, and was admitted in the answer thereto, that pending this suit the holder of the first mortgage had filed a bill and obtained a decree of foreclosure, under which the land had been sold and conveyed to the purchaser, and that the mortgagor was insolvent. The Circuit Court entered a final decree, in accordance with the prayer of Hayden's supplemental bill, for the payment by Drury of the sum reported by the master. See *Hayden* v. *Snow*, 9 Bissell, 511. From that decree this appeal was taken.

Mr. J. M. H. Burgett for appellant.

Mr. Roswell B. Bacon for appellee.—I. The effect, construction, and interpretation of the assumption clause in the deed from Daggett to Drury, the appellant, is governed and controlled by the law of the State of Illinois, where it was made and was to be performed, and such law, whether embraced in the statutes of said State or in the decisions of its courts, is binding upon this court. *McGoon* v. *Scales*, 9 Wall. 27; *Brine* v. *Insurance Company*, 96 U. S. 627; *Jackson* v. *Chew*, 12 Wheat. 153; *Orvis* v. *Powell*, 98 U. S. 176.—II. The appellant became liable to pay the mortgage indebtedness by virtue of the assumption clause contained in the deed from his grantor, Daggett, to him and accepted by him, and such liability inured to the benefit of the appellee as the owner of the mortgage indebtedness; and it is immaterial whether his grantor, Daggett, was personally liable for the mortgage debt or not. *Hand* v. *Kennedy*, 83 N. Y. 149; *Ross* v. *Kenison*, 38 Iowa, 396; *Comstock* v. *Hitt*, 37 Ill. 542; *Fitzgerald* v. *Barker*, 70

Mo. 685; *Heim* v. *Vogel*, 69 Mo. 529; *Bassett* v. *Hughes*, 43 Wis. 319; *Urquhart* v. *Brayton*, 12 R. I. 169; *Merriam* v. *Moore*, 90 Penn. St. 78; *Brewer* v. *Maurer*, 38 Ohio St. 543; *Rogers* v. *Herron*, 92 Ill. 583; *Twichell* v. *Mears*, 8 Bissell, 211; *Flagg* v. *Geltmacher*, 98 Ill. 293; Jones on Mortgages, 3d Ed. § 758.—III. The release from Daggett was inoperative to divest appellee's rights as a *bona fide* purchaser for value, and before maturity and without notice of the mortgage notes, while said assumption clause stood upon the record unreleased. *Campbell* v. *Smith*, 71 N. Y. 26; *Douglass* v. *Wells*, 18 Hun (N. Y.) 88; *Judson* v. *Dada*, 79 N. Y. 373; *Freeman's National Bank* v. *Savery*, 127 Mass. 75; *Coolidge* v. *Smith*, 129 Mass. 554; *Muhlig* v. *Fiske*, 131 Mass. 110; *Rogers* v. *Gosnell*, 58 Mo. 589; *Crawford* v. *Edwards*, 33 Mich. 354; *Miller* v. *Thompson*, 34 Mich. 10; *Bassett* v. *Hughes*, 43 Wis. 319; *Betts' Trustee, &c.*, v. *Drew et al.*, United States Circuit Court, Northern District of Illinois, Chicago Legal News, November 8th, 1879; Jones on Mortgages, 3d Ed. §§ 763 and 764; *Parkinson* v. *Sherman*, 74 N. Y. 88; *Swift* v. *Smith*, 102 U. S. 442–449. —IV. The alleged mistake of the scrivener who drew the deed cannot be set up by the appellant as against the appellee, a *bona fide* purchaser for value and without notice. *Sickmon* v. *Wood*, 69 Ill. 329; *Emery* v. *Mohler*, 69 Ill. 221; *Bowen* v. *Galloway*, 98 Ill. 41–46; Kerr on Fraud and Mistake, page 346; Story's Eq. Jur. § 165; *New Orleans, &c., Company* v. *Montgomery*, 95 U. S. 16.—V. The citizenship of the parties gave the court jurisdiction of both the parties and the subject matter, and it was competent for it to grant final relief and, under the 92d rule in equity of the United States courts to render a personal decree against the appellant for a deficiency, in accordance with the prayer of the bill. The decree is sustained by the law and evidence in this case and should be affirmed. *Betts' Trustee* v. *Drew*, United States Circuit Court, Northern District Illinois, Chicago Legal News, November 8th, 1879.

Mr. Justice Gray delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

Opinion of the Court.

The case presented by the pleadings and proofs appears to us a plain one.

It is unnecessary, for the purpose of deciding it, to consider any of those questions, suggested at the argument, upon which there have been varying decisions in different States; such as, whether an agreement of the grantee, in a deed poll of land, to assume and pay an existing mortgage, is in the nature of an assumpsit, implied from the acceptance of the deed, or is in the nature of a covenant, being in an instrument sealed by the other party; whether a suit upon such an agreement must be brought by the grantor, from whom alone the consideration moves, or may be brought by the mortgagee, as a person to whose benefit the agreement inures; how far the mortgagee is entitled, by way of subrogation, to avail himself in equity of the rights of the grantor; and whether or not the mortgagee has any rights under such an agreement in a deed from one who is not himself personally liable to pay the mortgage debt.

The appellee, by her purchase of the notes secured by the second mortgage, doubtless acquired all the rights of the mortgagee. *New Orleans Canal Company* v. *Montgomery*, 95 U. S. 16; *Swift* v. *Smith*, 102 U. S. 442. But having purchased in ignorance of the supposed agreement of Drury in the deed of conveyance from Daggett to him, and having done nothing upon the faith of that agreement, she has no greater right by estoppel against Drury than the mortgagee had. The mortgagee had no part in obtaining, and paid no consideration for, that agreement, and, upon the most favorable construction, had no greater right under it than Daggett, with whom it purported to have been made.

On the facts of this case, Daggett, in a court of equity at least, never had any right to enforce that agreement against Drury. The payment of interest on the mortgage notes would naturally be made by Drury to prevent a foreclosure of the mortgage on his land, and cannot be held to be an affirmance of an agreement of which he had no actual knowledge. The clause containing the agreement being conclusively proved to have been inserted in the deed by mistake of the scrivener, without the knowledge and against the intention of the parties,

a court of equity, upon a bill filed by Drury for the purpose, would have decreed a reformation of the deed by striking out that clause. *Elliott* v. *Sackett*, 108 U. S. 133. The release executed by Daggett to Drury has the same effect, and no more.

It follows that the appellee has no equity against the appellant, and

The decree of the Circuit Court must be reversed, and the case remanded with directions to dismiss the bill.

HAYES, by his next Friend, *v.* MICHIGAN CENTRAL RAILROAD COMPANY.

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

Argued March 19th, 1884.—Decided April 7th, 1884.

Railroad—Municipal Corporations.

A statute authorizing a municipal corporation to require railroad companies to provide protection against injury to persons and property confers plenary power in those respects over the railroads within the corporate limits.

When the line of a railroad runs parallel with and adjacent to a public park which is used as a place of recreation and amusement by the inhabitants of a municipal corporation, and the corporation requests the company to erect a fence between the railroad and the park, it is within the design of a statute conferring power upon the municipal corporation to require railroad companies to protect against injuries to persons.

A grant of a right of way over a tract of land to a railroad company by a municipal corporation by an ordinance which provides that the company shall erect suitable fences on the line of the road and maintain gates at street crossings is not a mere contract, but is an exercise of the right of municipal legislation, and has the force of law within the corporate limits.

If a railroad company, which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate limits, for the purpose of protecting against injury to persons, fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company and recover, if he establishes that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence.

Statement of Facts.

This action was brought by the plaintiff in error to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in error. After the evidence in the cause had been closed, the court directed the jury to return a verdict for the defendant. A bill of exceptions to that ruling embodied all the circumstances material to the case, and presented the question, upon this writ of error, whether there was sufficient evidence to entitle the plaintiff below to have the issues submitted to the determination of the jury.

The defendant in running its trains into Chicago, used the tracks of the Illinois Central Railroad Company, under an arrangement between them; and no question was made but that the defendant is to be treated, for the purposes of this case, as the owner as well as occupier of the tracks.

The tracks in question were situated for a considerable distance in Chicago, including the place where the injury complained of was received, on the lake shore. They were built in fact, at first, in the water on piles; a breakwater, constructed in the lake, protecting them from winds and waves, and on the west or land side, the space being filled in with earth, a width of about 280 feet, to Michigan avenue, running parallel with the railroad. This space between Michigan avenue and the railroad tracks was public ground, called Lake Park, on the south end of which was Park Row, a street perpendicular to Michigan avenue and leading to and across the railroad tracks to the water's edge. Numerous streets, from Twelfth street north to Randolph street, intersected Michigan avenue at right angles, about 400 feet apart, and opened upon the park, but did not cross it. Nothing divided Michigan avenue from the park, and the two together formed one open space to the railroad.

The right of way for these tracks was granted to the company by the city of Chicago over public grounds by an ordinance of the common council, dated June 14th, 1852, the 6th section of which was as follows:

"SEC. 6. The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls,

fences, or other sufficient works as will prevent animals from straying upon or obstructing its tracks and secure persons and property from danger, said structure to be of suitable materials and sightly appearance, and of such height as the common council may direct, and no change therein shall be made except by mutual consent; provided, however, that the company shall construct such suitable gates at proper places, at the ends of the streets which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake; and provided, also, that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them."

It was also provided in the ordinance, that it should be accepted by the railroad company within ninety days from its passage, and that thereupon a contract under seal should be formally executed on both parts, embodying the provisions of the ordinance and stipulating that the permission, rights, and privileges thereby conferred upon the company should depend upon their performance of its requirements. This contract was duly executed and delivered March 28th, 1853.

The work of filling in the open space between the railroad tracks and the natural shore line was done gradually, more rapidly after the great fire of October 9th, 1871, when the space was used for the deposit of the debris and ruins of buildings, and the work was completed substantially in the winter of 1877–8.

In the mean time several railroad tracks had been constructed by the railroad company on its right of way, used by itself and four other companies for five years prior to the time of the injury complained of, and trains and locomotives were passing very frequently, almost constantly.

The railroad company had also partially filled with stones and earth the space east of its tracks, to the breakwater, sufficiently so in some places to enable people to get out to it. This they were accustomed to do, for the purpose of fishing and other amusements, crossing the tracks for that purpose. At one point there was a roadway across the park and the

tracks, used by wagons for hauling materials for filling up the space, and a flagman was stationed there. At this point great numbers of people crossed to the breakwater; from two streets, the public were also accustomed to cross over the tracks from the park to ferry-boats.

From Park Row, at the south end of the park, running north a short distance, the railroad company, in 1872, had erected on the west line of its right of way a five-board fence, the north end of which at the time of the injury to the plaintiff was broken down. The rest of it was in good order.

The park was public ground, free to all, and frequented by children and others as a place of resort for recreation, especially on Sundays. Not far from the south end, and about opposite the end of the fence, was a band-house for free open-air concerts.

The plaintiff was a boy between eight and nine years of age, bright and well grown, but deaf and dumb. His parents were laboring people, living, at the time of the accident, about four blocks west of Lake Park. Across the street from where they lived was a vacant lot where children in the neighborhood frequently played. On Sunday afternoon, March 17th, 1878, St. Patrick's day, the plaintiff, in charge of a brother about two years older, went to this vacant lot, with the permission of his father, to play; while playing there a procession celebrating the day passed by, and the plaintiff, with other boys, but without the observation of his brother, followed the procession to Michigan avenue at Twelfth street, just south of Lake Park; he and his companions then returned north to the park, in which they stopped to play; a witness, going north along and on the west side of the tracks, when at a point a considerable distance north of the end of the broken fence, saw a freight train of the defendant coming north; turning round toward it he saw the plaintiff on the track south of him, but north of the end of the fence; he also saw a colored boy on the ladder on the side of one of the cars of the train motioning as if he wanted the plaintiff to come along; the plaintiff started to run north beside the train, and as he did so, turned and fell, one or more wheels of the car passing over his arm. There were four

tracks at this point, and the train was on the third track from the park. The plaintiff had his hands reached out towards the car, as he ran, as if he was reaching after it, and seemed to the witness to be drawn around by the draft of the train, and fall on his back. Amputation of the left arm at the shoulder was rendered necessary, and constituted the injury for which damages were claimed in this suit.

After the evidence in the case had been closed, the court instructed the jury to find a verdict for the defendant, to which ruling the plaintiff excepted. Judgment was entered on the verdict and the plaintiff sued out this writ of error.

Mr. A. D. Rich, *Mr. George C. Fry*, and *Mr. J. W. Merriam* for plaintiff in error submitted on their brief.

Mr. Ashley Pond for defendant in error.—There is no statute of the State of Illinois under which it was the duty of the Illinois Central or Michigan Central to fence the right of way at the place of the accident. It is not so claimed by the plaintiff. It is alleged that the duty exists (1) at common law, (2) by force of the ordinance of the city of Chicago granting the right of way to the Illinois Central, and not otherwise.—I. The defendant is not liable at common law for failure to fence the right of way. *Vandergrift* v. *Delaware Railroad Company*, 2 Houston (Del.) 287; *Alton, &c., Railroad Company* v. *Baugh*, 14 Ill. 211; *Boston & Albany Railroad Company* v. *Briggs*, 132 Mass. 24; *Richmond* v. *Sacramento, &c., Railroad Company*, 18 Cal. 351; *Macon, &c., Railroad Company* v. *Baker*, 42 Geo. 300; *Illinois Central Railroad Company* v. *Reedy*, 17 Ill. 580; *Williams* v. *New Albany, &c., Railroad Company*, 5 Ind. 111; *Henry* v. *Dubuque Railroad Company*, 2 Iowa, 288; *Louisville, &c., Railroad Company* v. *Milton*, 14 B. Mon. 75; *Louisville Railroad Company* v. *Ballard*, 2 Met. (Ky.) 165; *Knight* v. *Opelousas, &c., Railroad Company*, 15 La. Ann. 105; *Perkins* v. *Eastern, &c., Railroad Company*, 29 Maine, 307; *Stearns* v. *Old Colony Railroad Company*, 1 Allen, 493; *Williams* v. *Michigan Central Railroad Company*, 2 Mich. 259; *Locke* v. *First Div., &c., Railroad Company*, 15 Minn.

350; *New Orleans, &c., Company* v. *Field*, 46 Miss. 573; *Memphis, &c., Company* v. *Orr*, 43 Miss. 279; *Gorman* v. *Pacific Railroad*, 26 Mo. 441; *Vandergrift* v. *Rediker*, 2 Zabriskie (N. J. L.) 185; *Woolson* v. *Northern Railroad Company*, 19 N. H. 267; *Chapin* v. *Sullivan Railroad Company*, 39 N. H. 53; *Tonawanda Railroad Company* v. *Munger*, 5 Den. 255; *S. C.* aff. 4 N. Y. 345; *Corwin* v. *New York, &c., Company*, 13 N. Y. 42; *Kerwhacker* v. *C. C., &c., Company*, 3 Ohio, 185; *Railroad Company* v. *Riblet*, 66 Penn. St. 164; *Railroad Company* v. *Skinner*, 19 Penn. St. 287; *Tower* v. *Providence, &c., Company* 2 R. I. 404; *Hurd* v. *Rutland, &c., Railroad Company*, 25 Vt. 116; *Stucke* v. *Milwaukee, &c., Company*, 9 Wis. 202. *In re Rensselaer, &c., Railroad Company*, 4 Paige, 553, *contra*, has been disregarded and practically overruled by the subsequent decisions in New York cited above. *Quimby* v. *Vermont Central Railroad Company*, 23 Vt. 387, also *contra*, is followed as to the corporation involved in *Trow* v. *Railroad Company*, 24 Vt., but the doctrine above set forth is fully recognized in the *Hurd* case, 25 Vt. 487, cited above, where the company's liability is put wholly upon the ground of the statutory provision.—II. The defendant is not liable under the ordinance referred to in the declaration. (1.) The ordinance and agreement between the city and the railroad company created no liability other than in covenant. The railroad company may be liable for a breach, but the ordinance and agreement cannot be made the basis of liability to a citizen. *Atkinson* v. *Newcastle Water Works Company*, 2 Exch. Div. 441. (2.) No default is shown in the performance of the conditions of the ordinance and agreement. Some direction from the council as to the character of the structure was a condition precedent to the obligation of the company to erect it. *Lent* v. *Padelford*, 2 Am. L. C. 57, citing *Watson* v. *Walker*, 23 N. H. 471; *Bashford* v. *Shaw*, 4 Ohio St. 263; *Walker* v. *Forbes*, 25 Ala. 139; *Vyse* v. *Wakefield*, 6 M. & N. 442; *S. C.* 7 M. & N. 126; see also *West* v. *Newton*, 1 Duer, 277; *Coombe* v. *Greene*, 11 M. & N. 480; *Brooklyn* v. *Brooklyn City Railroad*, 47 N. Y. 475. (3.) A failure to perform the terms of the ordinance and agreement between the city and the railroad company,

would give no rights except *inter partes*. *Lowery* v. *Brooklyn City Railroad*, 76 N. Y. 28. (4.) The ordinance imposed no duties towards intruders on the track. (5.) The requirements of the ordinance had no reference to the place of the accident. (6.) The ordinance, dissociated from the agreement between the city and the company, cannot create a civil liability enforceable at common law. The power of the legislature is plenary to compel action on the part of the citizen; but a municipality cannot by ordinance create a civil duty. *Van Dyke* v. *Cincinnati*, 1 Disney (O.) 532; *Philadelphia & Reading Railroad*, v. *Erwin*, 89 Penn. St. 71; *Heeney* v. *Sprague*, 11 R. I. 456; *Flynn* v. *Canton Company*, 40 Maryland, 312.—III. There is no evidence that the alleged failure to fence was the proximate cause of the injury.

Mr. Justice Matthews delivered the opinion of the court. He stated the facts in the foregoing language and continued:

The question of contributory negligence does not appear to us to arise upon this record. It is not contended by the counsel for the defendant in error, that, if there was evidence tending to prove negligence on its part, the case could properly have been withdrawn from the jury on the ground that it appeared as matter of law that the plaintiff was not entitled to recover by reason of his own contributory negligence. The single question, therefore, for present decision is whether there was evidence of negligence on the part of the defendant which should have been submitted to the jury.

The particular negligence charged in the declaration and relied on in argument, is the omission of the railroad company to build a fence on the west line of its right of way, dividing it from Lake Park; a duty, it is alleged, imposed upon it by the ordinance of June 14th, 1852, a breach of which resulting in his injury, confers on the plaintiff a right of action for damages.

It is not claimed on the part of the plaintiff in error that the railroad company was under an obligation, at common law, to fence its tracks generally, but that, at common law, the question is always whether, under the circumstances of the particular case, the railroad has been constructed or operated with

such reasonable precautions for the safety of others, not in fault, as is required by the maxim *sic utere tuo ut non alienum lædas;* that, consequently, in circumstances where the public safety requires such a precaution as a fence, to prevent danger from the ordinary operations of the railroad, to strangers not themselves in fault, the omission of it is negligence; and that it is a question of fact for a jury, whether the circumstances exist which create such a duty.

This principle has been recognized and applied in cases of collisions at crossings of railroads and public highways, when injuries have occurred to persons necessarily passing upon and across railroad tracks in the use of an ordinary highway. "These cases," said the Supreme Court of Massachusetts in *Eaton* v. *Fitchburg Railroad Company*, 129 Mass. 364, "all rest on the common-law rule that when there are different public easements to be enjoyed by two parties at the same time and in the same place, each must use his privilege with due care, so as not to injure the other. The rule applies to grade crossings, because the traveller and the railroad each has common rights in the highway at those points. The fact that the legislature has seen fit, for the additional safety of travellers, imperatively to require the corporation to give certain warnings at such crossings, does not relieve it from the duty of doing whatever else may be reasonably necessary." It was accordingly held in that case, that the jury might properly consider, whether, under all the circumstances, the defendant was guilty of negligence in not having a gate or a flagman at the crossing, although not expressly required to do so by any statute or public authority invested with discretionary powers to establish such regulations.

And the same principle has been applied in other cases than those of the actual coincidence, at crossings, of public highways. In *Barnes* v. *Ward*, 9 C. B. 392, it was decided, after much consideration, that the proprietor and occupier of land making an excavation on his own land, but adjoining a public highway, rendering the way unsafe to those who used it with ordinary care, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road,

and liable to an action for damages to one injured by reason thereof; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway. This doctrine has always since been recognized in England. *Hardcastle* v. *South Yorkshire Ry. Co.* 4 Hurl. & Nor. 67; *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; *Binks* v. *South Yorkshire Ry. Co.*, 3 B. & S. 244.

It has also been generally adopted in this country. *Norwich* v. *Breed*, 30 Conn. 535; *Beck* v. *Carter*, 68 N. Y. 283; *Homan* v. *Stanley*, 66 Penn. St. 464; *B. & O. R. R. Co.* v. *Boteler*, 38 Md. 568; *Stratton* v. *Staples*, 59 Me. 94; *Young* v. *Harvey*, 16 Ind. 314; *Coggswell* v. *Inhabitants of Lexington*, 4 Cush. 307; although *Howland* v. *Vincent*, 10 Metc. 371, is an exception.

The enforcement of this rule in regard to excavations made by proprietors of lots adjacent to streets and public grounds in cities and towns, in the prosecution of building enterprises, and in the construction of permanent areas for cellar ways, is universally recognized as an obvious and salutary exercise of the common police powers of municipal government; and the omission to provide barriers and signals, prescribed by ordinance in such cases for the safety of individuals in the use of thoroughfares, is a failure of duty, charged with all the consequences of negligence, including that of liability for personal injuries of which it is the responsible cause. The true test is, as said by Hoar, J., in *Alger* v. *City of Lowell*, 3 Allen, 402, "not whether the dangerous place is outside of the way, or whether some small slip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveller, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

As the ground of liability in these cases is that of a public nuisance, causing special injury, the rule, of course, does not apply where the structure complained of on the defendant's property, and the mode of its use, are authorized by law; and,

consequently, what has been said is not supposed to bear directly and strictly on the question in the present case, but rather as inducement, showing the ground of legislative authority implied in the ordinance, the breach of which is imputed to the defendant as negligence towards the plaintiff, and as serving to interpret the meaning and application of its provisions.

The ordinance cannot, we think, be treated as a mere contract between the city, as proprietor of the land over which the right of way is granted, and the railroad company, to which no one else is privy, and under which no third person can derive immediately any private right, prescribing conditions of the grant, to be enforced only by the city itself. Although it takes the form of a contract, provides for its acceptance and contemplates a written agreement in execution of it, it is also and primarily a municipal regulation, and as such, being duly authorized by the legislative power of the State, has the force of law within the limits of the city. *Mason* v. *Shawneetown*, 77 Ill. 533.

Neither can the ordinance be limited by construction to the mere purpose of preventing animals from straying upon or obstructing the railroad tracks; because, in addition to that, it expressly declares that the walls, fences, or other works required shall be suitable and sufficient to secure persons and property from danger. This cannot refer to persons and property in course of transportation and already in care of the railroad company as common carrier, for the duty to carry and deliver them safely was already and otherwise provided for by law; nor, can it be supposed, from the nature of the case, that the stipulation was intended as security for any corporate interest of the city. The proviso in the 6th section, that the company shall construct such suitable gates at crossings as thereafter might be required by the common council to afford safe access to the lake, clearly designates the inhabitants of the city as at least within the scope of this foresight and care, the safety of whose persons and property was in contemplation.

The prevention of animals from straying upon the tracks, and the security of persons and property from danger, are two

distinct objects, for both which the requirement is made of suitable walls, fences, or other protections; and the ordinance, in these two particulars, is to be referred to distinct legislative grants of power to the municipal body. The general act to provide for the incorporation of cities and villages, which constitutes the charter of the city of Chicago, confers upon its city council power: "Twenty-sixth. To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle guards, crossings of streets, and public roads, and keep the same in repair within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic animal may sustain, by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this State, relative to the fencing of railroads." Cothran's Rev. Stat. Ill. 1884, 227. By the general law of the State, requiring railroads to be fenced, except within the limits of municipal corporations, the company omitting performance of the duty is liable to the owner for all damages to animals, irrespective of the question of negligence. Cothran's Rev. Stat. Ill. 1884, 1151.

Whether this provision is limited to the protection of animals, and covers only the case of damage done to them, or whether a failure to comply with the ordinance authorized thereby might be considered as evidence of negligence, in case of injury to person or property, in any other case, it is not necessary for us now to decide; for in the same section of the statute there is this additional power conferred upon the city council:

"Twenty-seventh. To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads," &c.

The latter clause of this provision is general and unrestricted. It confers plenary power over railroads within the corporate limits, in order that by such requirements as in its discretion it may prescribe, and as are within the just limits of police regulation, the municipal authority may provide protection against

injury to persons and property likely to arise from the use of railroads. And as we have shown by reference to analogous cases, the erection of a barrier between the railroad tracks and the public highways and grounds, particularly such a resort as the Lake Park is shown to be, in the present case, is a reasonable provision, clearly within the limits of such authority. To leave the space between the park and the breakwater, traversed by the numerous tracks of the railroad company, open and free, under the circumstances in proof, was a constant invitation to crowds of men, women and children frequenting the park to push across the tracks at all points to the breakwater, for recreation and amusement, at the risk of being run down by constantly passing trains. A fence upon the line between them might have served, at least, as notice and signal of danger, if not as an obstacle and prevention. For young children, for whose health and recreation the park is presumably in part intended, and as irresponsible in many cases as the dumb cattle, for whom a fence is admitted to be some protection, such an impediment to straying might prove of value and importance. The object to be attained—the security of the persons of the people of the city—was, we think, clearly within the design of the statute and the ordinance; and the means required by the latter to be adopted by the railroad company was appropriate and legitimate. *Mayor, &c., of New York* v. *Williams*, 15 N. Y. 502.

It is said, however, that it does not follow that whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of *Atkinson* v. *Newcastle Water Works Co.*, L. R. 2 Exch. Div. 441, as authority for that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in *Couch* v. *Steel*, 3 E. & B. 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the "purview of the legislature in the particular statute, and the language which they have there employed," we think the right to sue, under

the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. "The nature of the duty," said Judge Cooley in *Taylor* v. *L. S. & M. S. R. Company*, 45 Mich. 74, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." See, also, *Railroad Company* v. *Terhune*, 50 Ill. 151; *Schmidt* v. *The Milwaukee & St. Paul Railway Company*, 23 Wisc. 186; *Siemers* v. *Eisen*, 54 Cal. 418; *Galena & Chicago Union Railroad Company* v. *Loomis*, 13 Ill. 548; *O. & M. Railroad Company* v. *McClelland*, 25 Ill. 140; *St. L. V. & T. H. Railroad Company* v. *Dunn*, 78 Ill. 197; *Massoth* v. *Delaware & Hudson Canal Company*, 64 N. Y. 521; *B. & O. Railroad Company* v. *State*, 29 Md. 252; *Pollock* v. *Eastern Railroad Company*, 124 Mass. 158; Cooley on Torts, 657.

It is said, however, that, in the present case, the failure or omission to construct a fence or wall cannot be alleged as negligence against the company, because, as the structure was to be, as described in the ordinance, of suitable materials and sightly appearance, and of such height as the common council might direct, no duty could arise until after the council had directed the character of the work to be constructed, of which no proof was offered. But the obligation of the company was not conditioned on any previous directions to be given by the city council. It was absolute, to build a suitable wall, fence, or other sufficient work as would prevent animals from straying

upon the tracks and secure persons and property from danger. The right of the council was to give specific directions if it saw proper, and to supervise the work when done, if necessary; but it was matter of discretion, and they were not required to act in the first instance, nor at all, if they were satisfied with the work as executed by the railroad company. *Tallman* v. *Syracuse, Binghamton & N. Y. Railroad Company*, 4 Keyes, 128; *Brooklyn* v. *Brooklyn City Railroad Company*, 47 N. Y. 475.

It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*, a cause which if it had not existed, the injury would not have taken place, an occasional cause? and that is a question of fact, unless the causal connection is evidently not proximate. *Milwaukee & St. Paul Railroad Company* v. *Kellogg*, 94 U. S. 469. The rule laid down by Willes J., in *Daniel* v. *Metropolitan Railway Company*, L. R. 3 C. P. 216, 222, and approved by the Exchequer Chamber, L. R. 3 C. P. 591, and by the House of Lords, L. R. 5 H. L. 45, was this: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to;" and in the case of *Williams* v. *Great Western Railway Company*, L. R. 9 Exchcq. 157, where that rule was applied to a case similar to the present, it was said (p. 162): "There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required, is to warn people of what is before them and to make them pause before reaching a dangerous place like a railroad."

The evidence of the circumstances showing negligence on the

part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in *Railroad Company* v. *Stout*, 17 Wall. 657, and *Randall* v. *B. & O. Railroad Company*, 109 U. S. 478, should have been submitted to the jury; and for the error of the Circuit Court in directing a verdict for the defendant,

The judgment is reversed and a new trial awarded.

TEAL *v.* WALKER.

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

Argued March 25th, 26th, 1884.—Decided April 7th, 1884.

Mortgage—Pleading.

When a demurrer to a complaint for failure to state a cause of action is overruled, the defendant, by answering, does not lose his right to have the judgment on the verdict reviewed for error in overruling the demurrer.

A conveyance to a trustee, absolute on its face, but with an instrument of defeasance showing that it is to secure payment of a debt due to a third party, is a mortgage, and is subject to the rule that a mortgagee is not entitled to the rents and profits until he acquires actual possession.

The rule that the mortgagee is not entitled to the rents and profits before actual possession, applies even when the mortgagor covenants in the mortgage to surrender the mortgaged property on default in payment of the debt, and nevertheless refuses to deliver it after default, and drives the trustee to his action to enforce the trust.

The statute of Oregon which provides that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law," establishes absolutely the rule that a mortgagee is not entitled to the rents and profits before foreclosure.

This was an action at law brought by Walker, the defendant in error, against Teal, the plaintiff in error. The record disclosed the following facts: On August 19th, 1874, Bernard Goldsmith borrowed of James D. Walker the sum of $100,000, and gave to the latter his note, dated Portland, Oregon,

Statement of Facts.

August 19th, 1874, for the payment to Walker or his order, two years after date, of the sum borrowed, with interest payable monthly at the rate of one per cent. per month from date until paid. Goldsmith, at the time the note was executed, was the owner in fee of certain lands in the State of Oregon and in the Territory of Washington, and he and Joseph Teal were the joint owners and tenants in common of certain other lands in Oregon. On August 19th, 1874, Goldsmith conveyed to one Henry Hewett, by four several deeds, absolute on their face, the lands in Oregon and in Washington Territory of which he was the sole owner, and on the same day he and Teal executed and delivered, to the same grantee, three several deeds, absolute on their face, for the lands which they jointly owned as tenants in common, one being for lands in Linn County, another for contiguous lands in Polk and Benton Counties, and the third for lands in Clackamas County, all in the State of Oregon. These deeds were intended as a security for the above-mentioned note, as appeared by a defeasance in writing, executed on the same day as the note by Goldsmith, Teal, Hewett and Walker. This instrument, after reciting the execution of the note above mentioned, declared that Hewett held the legal title to the lands conveyed to him as aforesaid, in trust and for the uses therein described. It then declared as follows: "Subject to the legal title of Hewett, Teal, and Goldsmith, or Goldsmith alone shall (1) retain possession of the lands, and take and have, without account, the issues and profits thereof—they paying all taxes and public charges imposed thereon—until said note should become due and remain unpaid thirty days; (2) that if such default is made in the payment of said note, Goldsmith and Teal 'will and shall, on demand, peacefully surrender to Hewett' the possession of said property, who 'may and shall proceed and take possession' of the same, 'and on thirty days' notice in writing to Teal and Goldsmith . . . requiring them to pay said debt, . . . and on their failure so to pay, shall sell the same at public auction on not more than thirty days' notice,' or sufficient thereof to pay the debt and charges."

The instrument further declared "that if the above recited

promissory note, and the interest thereon, and all the taxes, charges, and assessments on said land be duly paid by said Goldsmith, or for him, then the deeds aforesaid shall be void, and said Hewett, or his representatives or successors in trust, shall reconvey all said lands and every part thereof to said Teal and Goldsmith, or said Goldsmith, or their representatives entitled thereto."

On October 18th, 1876, there was due and unpaid upon the note made by and delivered by Goldsmith to Walker the sum of $96,750. To secure an extension of time of one year from that date for the payment of the note, Goldsmith and Teal agreed to give further security for its payment.

Thereupon Goldsmith conveyed by a deed, absolute on its face, to Hewett certain lots in the city of Portland, of which he was the owner, and Goldsmith and Teal by a like deed conveyed to Hewett certain other lots in Portland and certain lands in Linn County, Oregon, of which they were joint owners and tenants in common. On the same day, October 18th, 1876, Walker, Hewett, Goldsmith, and Teal executed another defeasance, in which, after reciting the conveyances by Goldsmith, and Goldsmith and Teal, above mentioned, declared that Hewett held the legal title to lands so conveyed in trust, and to the same uses and purposes for which he held the lands mentioned in the defeasance of August 19th, 1874. By this instrument Goldsmith and Teal undertook and agreed that Goldsmith should pay promptly one-twelfth of ten per cent. per annum of the interest of the note every month, and should pay the principal and the residue of the interest at the end of the year. It was further stipulated between the parties that if default was made in the payment of the monthly instalments of interest, the principal should immediately become due, and all the property, both that conveyed August 19th, 1874, and that conveyed October 18th, 1876, should be sold for the payment thereof, as by law and the agreement of August 19th, 1874, was provided. The instrument of October 18th, 1876, further provided as follows: "The agreement of August 19th, 1874, is not annulled, vacated, or set aside by the execution of this agreement, excepting in so far as the same may conflict

with this agreement; in all other respects the two instruments are to be taken and construed together."

Interest was paid on the note made by Goldsmith to the plaintiff up to January 21st, 1877, but none after that date. In April, 1877, Goldsmith conveyed to Teal all his estate in the lands which he had conveyed in trust to Hewett by the deeds of August 19th, 1874, and October 18th, 1878, and put Teal in possession thereof.

On July 6th, 1877, the interest on the note being in arrear since January 21st preceding, Hewett demanded of Teal the possession of all the property conveyed by said deeds. He refused to yield possession, and held the lots in the city of Portland until November 30th, 1878, and the farm lands until some time in the same month and year.

Walker, by reason of Hewett's refusal to surrender possession of the property conveyed in trust to Hewett, was compelled to and did bring suit to enforce the sale of the property. All the property was sold, either in accordance with the terms of the defeasances above mentioned or by order of court, and the proceeds of the sale fell far short of paying the note, leaving a balance due thereon of more than $50,000, which Goldsmith had no means to pay.

This action was brought by Walker, the payee of the note, against Teal, to recover the damages which he claimed he had sustained by the refusal of Teal to surrender possession of the property of which Goldsmith had been the owner, or which he had owned jointly with Teal, and which had been conveyed to Hewett in trust as aforesaid. The complaint recited the facts above stated, and averred that by reason of the refusal of Teal to surrender possession of the property to Hewett, Walker had been damaged in the sum of $16,000, for which sum the complainants demanded judgment.

Teal filed a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, with leave to Teal to answer. He answered, and among other things, denied that Walker had been damaged, by the refusal of Teal to deliver possession of the property, in the sum of $16,000 or any other sum.

Opinion of the Court.

The case, having been put at issue by the filing of a replication, was tried by a jury, which returned a verdict for the plaintiff for $5,345.88, on which the court rendered judgment. To reverse that judgment Teal prosecuted this writ of error.

Mr. John H. Mitchell for plaintiff in error.

Mr. A. H. Garland for defendant in error.

Mr. Justice Woods delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The writ of error is not taken to reverse the judgment of the court upon the demurrer to the complaint, for that was not a final judgment, but to reverse the judgment rendered upon the verdict of the jury. The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The question, therefore, whether the complaint in this case states facts sufficient to constitute a case of action, is open for consideration.

The plaintiff in error insists that Goldsmith, having conveyed to him all his estate in the lands described in the deed to Hewett, the latter cannot recover of him damages, that is to say, the rents and profits, because he refused to deliver to him the premises. We are of opinion that this contention is well founded, and that neither Goldsmith nor the plaintiff in error was liable to account to Hewett or Walker for the rents and profits of the premises.

A deed absolute upon its face, but intended as a security for the payment of money, is a mortgage, even at law, if accompanied by a separate contemporaneous agreement in writing to reconvey upon the payment of the debt. *Nugent* v. *Riley*, 1 Met. 117; *Wilson* v. *Shoenberger*, 31 Penn. St. 295; *Dow* v.

Chamberlain, 5 McLean, 281; *Bayley* v. *Bailey*, 5 Gray, 505; *Lane* v. *Shears*, 1 Wend. 433; *Friedley* v. *Hamilton*, 17 S. & R. 70; *Shaw* v. *Erskine*, 43 Me. 371.

It is clear, upon these authorities, that the three deeds executed by Goldsmith and Teal jointly, and the several deeds executed by Goldsmith alone, to Hewett on August 19th, 1874, and the defeasance executed on that day by Hewett and Walker, are to be construed together, and so construed they constitute a mortgage given to secure a debt. The lands owned by Goldsmith were conveyed by several deeds, evidently for convenience in registration, as the lands lay in several counties of Oregon and some of them in the Territory of Washington. The lands owned by Goldsmith and Teal jointly, also lay in several counties, and were conveyed by separate deeds for the same reason. The execution of all the deeds, and the execution of the defeasance which applied to all the deeds, occurred on the same day, and was clearly one transaction, the object of which was to secure the note for $100,000 made and delivered by Goldsmith to Walker. The same remarks apply to the second set of deeds executed by Goldsmith, and Goldsmith and Teal, on October 18th, 1876, and the defeasance executed by Hewett and Walker on the same day. In fact, all the deeds and the two defeasances might, without violence, be regarded in equity as two mortgages executed at different times with one and the same defeasance; for the defeasance last executed provides that it shall not have the effect to annul, vacate, or set aside the first except in so far as the two conflict; in all other respects the two were to be taken and construed together. We are, therefore, to apply the same rules to the questions arising in this case as if we had to deal with mortgages executed in the ordinary form.

The decision of the question raised by the demurrer to the complaint is not affected by the stipulation contained in the defeasance of August 19th, 1874, that Goldsmith and Teal should, on default made in the payment of the principal of Goldsmith's note, and on the demand of Hewett, surrender the mortgaged premises to him. If this was a valid and binding undertaking, it did not change the rights of the parties. Without any

such stipulation, Hewett, unless it was otherwise provided by statute, was entitled, at least on default in the payment of the note of Goldsmith, to the possession of the mortgaged premises. *Keech* v. *Hall*, 1 Doug. 21; *Rockwell* v. *Bradley*, 2 Conn. 1; *Smith* v. *Johns*, 3 Gray, 517; *Jackson* v. *Dubois*, 4 Johns. 216; *Furbush* v. *Goodwin*, 29 N. H. 321; *Howard* v. *Houghton*, 64 Me. 445; *Den ex dem. Hart* v. *Stockton*, 7 Halst. 322; *Ely* v. *M'Guire*, 2 Ohio, 223. Vol. 1 and 2, 2d Ed. 372. The rights of the parties are, therefore, the same as if the defeasance contained no contract for the delivery of the possession.

We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. In the case of *Moss* v. *Gallimore*, 1 Doug. 279, Lord Mansfield held that a mortgagee, after giving notice of his mortgage to a tenant in possession holding under a lease older than the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards. This ruling has been justified on the ground that the mortgagor, having conveyed his estate to the mortgagee, the tenants of the former became the tenants of the latter, which enabled him, by giving notice to them of his mortgage, to place himself to every intent in the same situation towards them as the mortgagor previously occupied. *Rawson* v. *Eicke*, 7 Ad. & El. 451; *Burrowes* v. *Gradin*, 1 Dowl. & Lowndes, 213.

Where, however, the lease is subsequent to the mortgage, the rule is well settled in this country, that, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he cannot proceed, either by distress or action, for the recovery of the rent. *Mayo* v. *Shattuck*, 14 Pick. 533; *Watts* v. *Coffin*, 11 Johns. 495; *McKircher* v. *Hawley*, 16 Id. 289; *Sanderson* v. *Price*, 1 Zabr. 637; *Price* v. *Smith*, 1 Green's Ch. (N. J.) 516.

The case of *Moss* v. *Gallimore* has never been held to apply to a mortgagor or the vendee of his equity of redemption. Lord Mansfield himself, in the case of *Chinnery* v. *Blackman*,

3 Doug. 391, held that until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made.

The rule on this subject is thus stated in Bacon's Abridgement, Title Mortgage C: "Although the mortgagee may assume possession by ejectment at his pleasure, and, according to the case of *Moss* v. *Gallimore*, Doug. 279, may give notice to the tenants to pay him the rent due at the time of the notice, yet, if he suffers the mortgagor to remain in possession or in receipt of the rents, it is a privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient."

So, in *Higgins* v. *York Buildings Company*, 2 Atk. 107, it was said by Lord Hardwicke: "In case of a mortgagee, where a mortgagor is left in possession, upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor," and the same judge said in the case of *Mead* v. *Lord Orrery*, 3 Atk. 244: "As to the mortgagor, I do not know of any instance where he keeps in possession that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession."

In *Wilson*, *ex parte*, 2 Ves. & B. 252, Lord Eldon said: "Admitting the decision in *Moss* v. *Gallimore* to be sound law, I have been often surprised by the statement that a mortgagor was receiving the rents for the mortgagee. . . In the instance of a bill filed to put a term out of the way, which may be represented as in the nature of an equitable ejectment, the court will, in some cases, give an account of the past rents. There is not an instance that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rents for the mortgagee." See, also, *Coleman* v. *Duke of St. Albans*, 3 Ves. Jr. 25; *Gresley* v. *Adderly*, 1 Swanst. 573.

The American cases sustain the rule that so long as the

mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession. *Wilder* v. *Houghton*, 1 Pick. 87; *Boston Bank* v. *Reed*, 8 Pick. 459; *Noyes* v. *Rich*, 52 Me. 115.

In *Hughes* v. *Edwards*, 9 Wheat. 500, it was held that a mortgagor was not accountable to the mortgagee for the rents and profits received by him during his possession, even after default, and even though the land, when sold, should be insufficient to pay the debt, and that the purchaser of the equity redemption was not accountable for any part of the debt beyond the amount for which the land was sold.

In the case of *Gilman* v. *Illinois & Mississippi Telegraph Company*, 91 U. S. 603, it was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchises, "together with the tolls, rents, and profits to be had, gained, or levied thereupon," to secure the payment of bonds issued by it, the trustees, in behalf of the creditors, were not entitled to the tolls and profits of the road, even after condition broken, and the filing of a bill to foreclose the mortgage, they not having taken possession or had a receiver appointed. The court said, in delivering judgment in this case: "A mortgagor of real estate is not liable for rent while in possession. He contracts to pay interest not rent." So in *Kountze* v. *Omaha Hotel Company*, 107 U. S. 378, it was said by the court, speaking of the rights of a mortgagee: "But in the case of a mortgage, the land is in the nature of a pledge: it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or third person claims under him. . . The plaintiff in this case was not entitled to the possession, nor the rents and profits." See also *Hutchins* v. *King*, 1 Wall. 53, 57–58.

Chancellor Kent states the modern doctrine in the following language: "The mortgagor has a right to lease, sell and in

every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him, takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover the possession by regular entry by suit before he can treat the mortgagor, or the person holding under him, as a trespasser." 4 Kent Com. 157. See also *American Bridge Company* v. *Heidelbach*, 94 U. S. 798; *Clarke* v. *Curtis*, 1 Grattan, 289; *Bank of Ogdensburg* v. *Arnold*, 5 Paige Ch. 38; *Hunter* v. *Hays*, 7 Biss. 362; *Souter* v. *La Crosse Railway*, Woolworth C. C. 80, 85; *Foster* v. *Rhodes*, 10 Bank. Reg. 523. The authorities cited show that, as the defendant in error took no effectual steps to gain possession of the mortgaged premises, he is not entitled to the rents and profits while they were occupied by the owner of the equity of redemption.

The case against the right of the defendant in error to recover in this case the rents and profits received by the owner of the equity of redemption is strengthened by section 323, chapter 4, title 1, General Laws of Oregon, 1843–1872, which declares that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

This provision of the statute cuts up by the roots the doctrine of *Moss* v. *Gallimore*, *ubi supra*, and gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance, and the mortgagee is not entitled to possession, his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that State. In *Besser* v. *Hawthorn*, 3 Oregon, 129 at 133, it was declared: "Our system has so changed this class of contracts that the mortgagor retains the right of possession and the legal title." See, also, *Anderson* v. *Baxter*, 4 Oregon, 105; *Roberts* v. *Sutherlin*, Id. 219.

The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19th, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and, although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the State, it cannot be enforced. *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174; *Marshall* v. *Baltimore & Ohio Railroad Company*, 16 How. 314; *Meguire* v. *Corwine*, 101 U. S. 108.

In any view of the case, we are of opinion that the defendant in error was not entitled to receive the rents sued for in this action. As this conclusion takes away the foundation of the suit, it is unnecessary to notice other assignments of error.

The judgment of the Circuit Court is reversed, and the cause remanded to that court for further proceedings in conformity with this opinion.

BÖRS *v.* PRESTON.

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

Argued January 4th, 1884.—Decided April 7th, 1884.

Consul—Constitutional Law—Evidence.

In cases coming from the Circuit Courts, this court will determine from its own inspection of the record, whether they are of the class excluded by statute from the cognizance of those courts; this, although the question of jurisdiction is not raised by the parties.

The constitutional grant of original jurisdiction to this court of all cases affecting consuls, does not prevent Congress from conferring original jurisdiction, in such cases, also, upon the subordinate courts of the Union.

The jurisdiction of the Circuit Courts of the United States of suits by citizens

Statement of Facts.

against aliens, is not defeated by the fact that the defendant is the consul of a foreign government.

The alienage of a defendant is not to be presumed from the mere fact that he is the consul, in this country, of a foreign government.

This action was brought in the Circuit Court of the United States for the Southern District of New York. The plaintiff below, Preston, was a citizen of that State, while the defendant was the consul at the port of New York, for the Kingdoms of Norway and Sweden.

The object of the action was to recover damages for the alleged unlawful conversion by defendant, to his own use, of certain articles of merchandise. The answer denied the material allegations of the complaint, and, in addition, by way of counterclaim asked judgment against the plaintiff for certain sums. To the counterclaim a replication was filed, and a trial had before a jury, which resulted in a verdict in favor of plaintiff for $7,313.10. For that amount judgment was entered against the defendant. The defendant sued out this writ of error. The errors assigned with which the opinion of the court deals were the following:

"1st Assignment of error. That the plaintiff in error being before, at the time of the commencement of this suit, and ever since Consul of the Kingdoms of Norway and Sweden, he ought not, according to the Constitution and laws of the United States, to have been impleaded in the Circuit Court, but in the District Court of the United States, for the Southern District of New York, or in some of the District Courts, and that the Circuit Court had not jurisdiction of this cause, and should have directed a verdict for said defendant.

"2d Assignment of error. That judgment was given for the defendant in error against the plaintiff in error, when by the laws of the United States, the judgment ought to have been given for the plaintiff in error against the defendant in error, it being admitted that the plaintiff in error was, at the time of the transaction on the 8th of April, and continued to the trial, the Consul for Sweden and Norway, at the port of New York, whereby the Circuit Court had no jurisdiction of the cause."

Argument for Defendant in Error.

Mr. George H. Forster for plaintiff in error.

Mr. B. F. Tracey for defendant in error.—I. The Circuit Court has jurisdiction in cases of foreign consuls. *Bixby* v. *Jansen*, 6 Blatchford, 315; *Graham* v. *Stucken*, 4 Blatchford, 50; *St. Luke's Hospital* v. *Barclay*, 3 Blatchford, 259.—II. The Circuit Court acquired jurisdiction against plaintiff in error as an alien, by virtue of the undisputed allegation in the complaint, which sets forth that the defendant in error is a citizen of the State of New York, and that the plaintiff in error is consul for the Kingdom of Norway and Sweden residing in New York. A consul for a foreign country, discharging his duties in an American seaport is, in the absence of any contrary evidence, to be presumed in law to be an alien and a citizen or subject of the country which he represents. Vattell, lib. 2, c. 2, § 34; Kent, 7th ed. 49.—III. Where it is alleged by the plaintiff in his complaint as the only matter giving jurisdiction to the Circuit Court that the defendant is a foreign consul, and the defendant answers and goes to trial and raises no objection or question as to the jurisdiction of the court until after he is defeated, and the cause has been brought into this court, it will be presumed in the absence of any testimony in the record to the contrary, that the defendant was an alien; because the natural presumption of his alienage is established by his failure to assert the contrary when such an assertion would have deprived the court of jurisdiction and relieved him from the trouble and expense of litigation. *Express Company* v. *Kountze Bro.* 8 Wall. 342, at 351; *Marshall* v. *Baltimore & Ohio Railroad Company*, 16 How. 314, 329; *Gassies* v. *Ballon*, 6 Pet. 761; *Robertson* v. *Cease*, 97 U. S. 646; *Brown* v. *Keene*, 8 Pet. 115; *Grace* v. *American Insurance Company*, 109 U. S. 278.—IV. The assignments of error in the record do not contain any mention of a want of jurisdiction in the Circuit Court, and it may not therefore be now considered.—V. If it should be held by this court that the Circuit Court had not jurisdiction, then as this court possesses, itself, original jurisdiction in the case by virtue of an express provision in the Constitution of the United States and in the Judiciary Act, this court will, in fur-

therance of justice, issue a *venire de novo* and try the cause now and here. Or, as in *Robertson* v. *Cease*, *supra*, leave to amend will be accorded the defendant in error, that he may distinctly set out the alienage of the plaintiff in error at the time of the commencement of the action, *nunc pro tunc*, and irrespective of any statute of limitations. Other points taken by the counsel related to the merits of the case.

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

The assignments of error question the jurisdiction of the Circuit Court, under the Constitution and the laws of the United States, to hear and determine any suit whatever brought against the consul of a foreign government.

Some reference was made in argument to the fact that the defendant did not in the court below plead exemption, by virtue of his official character, from suit in a Circuit Court of the United States. To this it is sufficient to reply that this court must, from its own inspection of the record, determine whether a suit against a person holding the position of consul of a foreign government is excluded from the jurisdiction of the Circuit Courts. In cases of which the Circuit Courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption, in every stage of the cause, is, that it is without their jurisdiction unless the contrary appears from the record. *Grace* v. *American Insurance Company*, 109 U. S. 278, 283; *Robertson* v. *Cease*, 97 U. S. 646.

Much more, therefore, will we refuse to determine on the merits, and will reverse on the point of jurisdiction, cases where the record shows affirmatively that they are of a class which the statute excludes altogether from the cognizance of Circuit Courts. If this were not so it would be in the power of the parties by negligence or design to invest those courts with

a jurisdiction expressly denied to them. To these considerations it may be added, that the exemption of the consul of a foreign government from suit in particular courts, is the privilege, not of the person who happens to fill that office, but of the State or government he represents. It was so decided in *Davis* v. *Packard*, 7 Pet. 276, 284. While practically it may be of no consequence whether original jurisdiction of suits against consuls of foreign governments is conferred upon one court of the United States rather than another, it is sufficient that the legislative branch of the government has invested particular courts with jurisdiction in the premises.

We proceed then to inquire whether, under the Constitution and laws of the United States, a Circuit Court may, under any circumstances, hear and determine a suit against the consul of a foreign government; in other words, whether other courts have been invested with exclusive jurisdiction of such suits.

The Constitution declares that "the judicial power of the United States shall extend . . . to all cases affecting ambassadors or other public ministers and consuls;" "to controversies between citizens of a State and foreign citizens or subjects;" that "in all cases affecting ambassadors, other public ministers and consuls, . . . the Supreme Court shall have original jurisdiction;" and that in all other cases previously mentioned in the same clause "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The Judiciary Act of 1789 invested the District Courts of the United States with "jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls," except for offences of a certain character; this court with "original, but not exclusive, jurisdiction of all suits . . . in which a consul or vice-consul shall be a party;" and the Circuit Courts with jurisdiction of civil suits in which an alien is a party. 1 Stat. 76–80. In this act we have an affirmance, by the first Congress—many of whose members participated in the convention which adopted the Constitution, and were, therefore, conversant with the purposes of its framers—of the principle that the original jurisdiction of this court of cases in

which a consul or vice-consul is a party, is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments. On a question of constitutional construction, this fact is entitled to great weight.

Very early after the passage of that act, the case of *United States* v. *Ravara*, 2 Dall. 297, was tried in the Circuit Court of the United States for the District of Pennsylvania, before Justices Wilson and Iredell of this court, and the district judge. It was an indictment against a consul for a misdemeanor, of which, it was claimed, the Circuit Court had jurisdiction under the eleventh section of the Judiciary Act, giving Circuit Courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States," except where that act "otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein." In behalf of the accused it was contended that this court, in virtue of the constitutional grant to it of original jurisdiction in all cases affecting consuls, had exclusive jurisdiction of the prosecution against him. Mr. Justice Wilson and the district judge concurred in overruling this objection. They were of opinion that although the Constitution invested this court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction, in those cases, upon such inferior courts as might, by law, be established. Mr. Justice Iredell dissented, upon the ground that the word original, in the clause of the Constitution under examination, meant exclusive. The indictment was sustained, and the defendant upon the final trial, at which Chief Justice Jay presided, was found guilty. He was subsequently pardoned on condition that he would surrender his commission and *exequatur*.

In *United States* v. *Ortega*, 11 Wheat. 467—which was a criminal prosecution, in a Circuit Court of the United States, for the offence of offering personal violence to a public minister, contrary to the law of nations and the act of Congress—one of the questions certified for decision was whether the jurisdic-

tion conferred by the Constitution upon this court, in cases affecting ambassadors or other public ministers and consuls, was not only original but exclusive of the Circuit Courts. But its decision was waived and the case determined upon another ground. Of that case it was remarked by Chief Justice Taney, in *Gittings* v. *Crawford*, Taney's Dec. 1, 5, that an expression of opinion upon that question would not have been waived had the court regarded it as settled by previous decisions.

In *Davis* v. *Packard*, *ubi supra*, upon error to the Court for the Correction of Errors of the State of New York, the precise question presented was whether, under the Constitution and laws of the United States, a State court could take jurisdiction of civil suits against foreign consuls. It was determined in the negative, upon the ground that by the ninth section of the act of 1789, jurisdiction was given to the District Courts of the United States, exclusively of the courts of the several States, of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The jurisdiction of the State courts was denied because—and no other reason was assigned—jurisdiction had been given to the District Courts of the United States exclusively of the former courts; a reason which probably would not have been given had the court, as then organized, supposed that the constitutional grant of original jurisdiction to this court, in all cases affecting consuls, deprived Congress of power to confer concurrent original jurisdiction, in such cases, upon the subordinate courts of the Union. It is not to be supposed that the clause of the Constitution giving original jurisdiction to this court, in cases affecting consuls, was overlooked, and, therefore, the decision, in that case, may be regarded as an affirmance of the constitutionality of the act of 1789, giving original jurisdiction in such cases, also, to District Courts of the United States. And it is a significant fact, that in the decision in *Davis* v. *Packard*, Chief Justice Marshall concurred, although he had delivered the judgments in *Marbury* v. *Madison*, 1 Cranch, 137; *Cohens* v. *Virginia*, 6 Wheat. 264, and *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 821, some of the general expressions in which are not infrequently cited in support of the broad proposition that the

jurisdiction of this court is made by the Constitution exclusive of every other court, in all cases of which by that instrument it is given original jurisdiction. It may also be observed that of the seven justices who concurred in the judgment in *Davis* v. *Packard*, five participated in the decision of *Osborn* v. *Bank of the United States*.

In *St. Luke's Hospital* v. *Barclay*, 3 Blatchford, 259, which was a suit in equity in the Circuit Court of the United States for the Southern District of New York, the question was distinctly raised whether the consular character of the alien defendant exempted him from the jurisdiction of the Circuit Courts. The jurisdiction of the Circuit Court was maintained, the opinion of the court being that the jurisdiction of the District Courts was made by statute exclusive only of the State courts, and that under the 11th section of the act of 1789, the defendant being an alien—no exception being made therein as to those who were consuls—was amenable to a suit in the Circuit Court brought by a citizen. Subsequently the question was reargued before Mr. Justice Nelson and the district judge, and the proposition was pressed that the defendants could not be sued except in this court or in some District Court. But the former ruling was sustained.

In *Graham* v. *Stucken*, 4 Blatchford, 50, the same question was carefully considered by Mr. Justice Nelson, who again held that the constitutional grant of original jurisdiction to this court in cases affecting consuls; the legislative grant in the act of 1789 to this court of original but not exclusive jurisdiction of suits in which a consul or vice-consul is a party; and the legislative grant of jurisdiction to the District Courts, exclusive of the State courts, of suits against consuls or vice-consuls, did not prevent the Circuit Courts, which had jurisdiction of suits to which an alien was a party, from taking cognizance of a suit brought by a citizen against an alien, albeit the latter was, at the time, the consul of a foreign government.

In *Gittings* v. *Crawford*, Taney's Dec. 1, which was a suit upon a promissory note brought in the District Court of the United States for Maryland, by a citizen of that State against a consul of Great Britain, the point was made in the Circuit

Court on writ of error that by the Constitution of the United States this court had exclusive jurisdiction of such cases.

The former adjudications of this and other courts of the Union were there examined, and the conclusion reached—and in that conclusion we concur—that, as Congress was not expressly prohibited from giving original jurisdiction in cases affecting consuls to the inferior judicial tribunals of the United States, neither public policy nor convenience would justify the court in implying such prohibition, and, upon such implication, pronounce the act of 1789 to be unconstitutional and void. Said Chief Justice Taney: "If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the Supreme Court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of Congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter." Taney's Dec. 9. After alluding to the fact that the position of consul of a foreign government is sometimes filled by one of our own citizens, he observes: "It could hardly have been the intention of the statesmen who framed our Constitution to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the Supreme Court to have a jury summoned in order to enable him to recover it; nor could it have been intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul in any part of the United States; that consul, too, being often one of our own citizens."

Such was the state of the law when the Revised Statutes of the United States went into operation. By section 563 it is provided that "the District Courts shall have jurisdiction . . . of all suits against consuls or vice-consuls," except for certain offences; by section 629, that "the Circuit Courts shall have original jurisdiction" of certain classes of cases, among which are civil suits in which an alien is a party; by section 687, that this court shall have "original but not exclusive jurisdiction of all suits . . . in which a consul or vice-consul is a party;" and by section 711, that the jurisdiction vested in the courts of the United States in the cases and proceedings there mentioned—among which (par. 8) are "suits against ambassadors or other public ministers or their domestics, or domestic servants, or against consuls or vice-consuls"—shall be exclusive of the courts of the several States. But by the act of February 18th, 1875, that part of section 711 last quoted was repealed, 18 Stat. 318; so that, by the existing law, there is no statutory provision which, in terms, makes the jurisdiction of the courts of the United States exclusive of the State courts in suits against consuls or vice-consuls.

It is thus seen that neither the Constitution nor any act of Congress defining the powers of the courts of the United States has made the jurisdiction of this court, or of the District Courts, exclusive of the Circuit Courts in suits brought against persons who hold the position of consul, or in suits or proceedings in which a consul is a party. The jurisdiction of the latter courts, conferred without qualification, of a controversy between a citizen and an alien, is not defeated by the fact that the alien happens to be the consul of a foreign government. Consequently, the jurisdiction of the court below cannot be questioned upon the ground simply that the defendant is the consul of the Kingdom of Norway and Sweden.

But as this court and the District Courts are the only courts of the Union which, under the Constitution or the existing statutes, are invested with jurisdiction, without reference to the citizenship of the parties, of suits against consuls, or in which consuls are parties, and since the Circuit Court was without jurisdiction, unless the defendant is an alien or a citizen of some

State other than New York, it remains to consider whether the record shows him to be either such citizen or an alien. There is neither averment nor evidence as to his citizenship, unless the conceded fact that he is the consul of a foreign government is to be taken as adequate proof that he is a citizen or subject of that government. His counsel insist that the consul of a foreign country, discharging his duties in this country, is, in the absence of any contrary evidence, to be presumed in law to be a citizen or subject of the country he represents. This presumption, it is claimed, arises from the nature of his office and the character of the duties he is called upon to discharge. But, in our opinion, the practice of the different nations does not justify such presumption. "Though the functions of consul," says Kent, "would seem to require that he should not be a subject of the State in which he resides, yet the practice of the maritime powers is quite lax on this point, and it is usual, and thought most convenient, to appoint subjects of the foreign country to be consuls at its ports." 1 Kent, 44. In *Gittings* v. *Crawford*, *ubi supra*, it was said by Chief Justice Taney that, "in this country, as well as others, it often happens that the consular office is conferred by a foreign government on one of our own citizens." It is because of this practice that the question has frequently arisen as to the extent to which citizens of a country, exercising the functions of foreign consuls, are exempt from the political and municipal duties which are imposed upon their fellow citizens. 1 Halleck's International Law, London Ed., vol. 1, ch. 11, § 10, *et seq.* In an elaborate opinion by Attorney-General Cushing, addressed to Secretary Marcy, the question was considered whether citizens of the United States, discharging consular functions here by appointment of foreign governments, were subject to service in the militia or as jurors. 8 Opin. Attys-Genl. 169. It was, perhaps, because of the difficulties arising in determining questions of this character that many of the treaties between the United States and other countries define with precision the privileges and exemptions given to consuls of the respective nations—exemptions from public service being accorded, as a general rule, only to a consul who is a citizen or subject of the country

he represents. Rev. Stat. of Dist. Col., Public Treaties, Index, title "Consuls."

But it seems unnecessary to pursue the subject further. When the jurisdiction of the Circuit Court depends upon the alienage of one of the parties, the fact of alienage must appear affirmatively either in the pleadings or elsewhere in the record. *Brown* v. *Keene*, 8 Pet. 115; *Bingham* v. *Cabot*, 3 Dall. 382; *Capron* v. *Van Noorden*, 2 Cranch, 126; *Robertson* v. *Cease*, *supra*. It cannot be inferred, argumentatively, from the single circumstance that such person holds and exercises the office of consul of a foreign government. Neither the adjudged cases nor the practice of this government prevent an American citizen—not holding an office of profit or trust under the United States—from exercising in this country the office of consul of a foreign government.

Our conclusion is that, as it does not appear from the record that the defendant is an alien, and since it is consistent with the record that the defendant was and is a citizen of the same State with the plaintiff, the record, as it now is, does not present a case which the Circuit Court had authority to determine. Without, therefore, considering the merits of this cause,

The judgment must be reversed, and the cause remanded for such further proceedings as may be consistent with this opinion. It is so ordered.

Mr. Justice Gray.—Mr. Justice Miller and myself concur in the judgment of reversal, on the ground that the Circuit Court had no jurisdiction of the case, because the record does not show that the defendant was an alien, or a citizen of a different State from that of which the plaintiff was a citizen. We express no opinion upon the question whether, if the record had shown that state of facts, as well as that the defendant was a consul, the Circuit Court would have had jurisdiction.

Statement of Facts.

LOVELL & Another *v.* ST. LOUIS MUTUAL LIFE INSURANCE COMPANY & Others.

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

Submitted March 14th, 1884.—Decided April 7th, 1884.

Contract—Damages—Insurance.

A policy of life insurance containing a provision that a default in payment of premiums shall not work a forfeiture, but that the sum insured shall then be reduced and commuted to the annual premiums paid, confers the right on the assured to convert the policy at any time, by notice to the insurer, into a paid-up policy for the amount of premiums paid.

The neglect to pay a premium on a policy of life insurance will not work a forfeiture of the policy if the neglect was caused by a representation made in good faith but without authority by an agent of the insurer that it would be converted by his principal into a paid-up policy on the basis of the premiums already paid in.

On the termination of its business by a life insurance company, and the transfer of its assets and policies to another company, each policy holder may, if he desires, terminate his policy and maintain an action to recover from the assets such sum as he may be equitably entitled to.

In such case the measure of damages will be the amount of premiums paid less the value of the insurance of which he enjoyed the benefit.

When one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damages he has sustained thereby. *United States* v. *Behan*, 110 U. S. 339, cited and affirmed.

This case was commenced by a bill in chancery filed by the appellants, Lovell and wife, citizens of Tennessee, against the St. Louis Mutual Life Insurance Company and the St. Louis Life Insurance Company, for relief in relation to a certain policy of insurance issued by the former company through an agent at Nashville, Tennessee, to Lovell on his own life for the sum of $5,000, for the benefit of his wife, and to be paid to her on his death. The policy was dated the 24th of April, 1868, and stipulated for the payment of an annual premium of $162.14, payable (in the words of the instrument) as follows: "An annual premium note of $53, and a semi-annual cash premium of $54.57 on the 24th days of April and October, the

first one of said notes, and the first semi-annual cash premium, commencing with the date of this policy." There was a condition in the policy that if, after the payment of the first three annual premiums, a default should be made in the payment of the annual premiums thereafter to become due, then (in the words of the condition) "such default shall not work a forfeiture of this policy, but the sum of $5,000, the amount insured, shall be then commuted or reduced to the sum of the annual premiums paid." After setting out the policy the bill stated the following facts. The premiums called for by the policy were all paid down to and including the 24th of April, 1873; a new premium note being given at the end of each year, and any dividends due to the insured being credited thereon, the company being a mutual one. At, or shortly after, the last payment (which was made to one Foote, agent of the company at Louisville, Kentucky, the agency at Nashville having been discontinued), Lovell made known to Foote his desire to receive a paid-up policy for what he was entitled to, and a return of his premium note; he and the agent agreeing, as had also been represented by the agent at Nashville, on the issuing of the policy, that all the money he had paid by way of premiums (amounting to $822 less the amount of his outstanding note) would be credited to him, and that he could have a paid-up policy for such amount as that money under the regulations of the company would entitle him to if he had paid it all at once for a paid-up policy. With this view and understanding he surrendered his policy to the agent, to be transmitted to the home office at St. Louis and exchanged for a paid up policy in its stead. Lovell being engaged in steamboating on the Mississippi, gave the matter no further thought, supposing that it would be all right. But after some time, he was surprised at receiving notice to pay the interest on his note, and on going to his home he found that instead of a paid-up policy, the original policy had been returned with an indorsement on the margin in the words and figures following:

"In default of payment of renewal premium due 24th October, 1873, this policy is commuted and reduced to eight hundred and

twenty-two dollars on condition that the interest on outstanding premium notes is paid annually in advance.

"M. A. CAMPBELL, *Assignee.*"

The complainant, Lovell, went to the agent at Louisville and protested against the course of the company, and insisted that he was to have received a paid-up policy, and a return of his note; but the agent told him that since the agreement made with him for a paid-up policy the St. Louis Mutual Life Insurance Company had sold out to the Mound City Life Insurance Company (whose name was afterwards changed to the St. Louis Life Insurance Company), and that such a thing as issuing to him a paid-up policy, or even restoring or reinstating his policy, was wholly outside of the contract with the Mound City Company, and that the policy was now forfeited.

The bill charged that after the original policy was surrendered for exchange as aforesaid, without the knowledge or consent of complainant, the St. Louis Mutual Life Insurance Company sold and transferred its entire assets, name, good will, &c., to the Mound City Life Insurance Company, before any interest had accrued on his premium note. The complainant insisted that he had been guilty of no default that ought to work a forfeiture of his policy; and that the money paid by him on his policy should be refunded to him with interest, and that his outstanding note should be delivered up to be cancelled. The bill further stated that there was in the hands of William Morrow, treasurer of the State of Tennessee, $20,000 of State bonds, held as the property of the insurance company, under the laws of Tennessee, as indemnity against loss to citizens of Tennessee on life policies such as that of complainant; he therefore prayed for an attachment and an injunction to hold said fund subject to the orders of the court, until the claim of the complainant should be satisfied. The bill concluded with a prayer for general relief.

An attachment and injunction were issued as prayed, and the defendants appeared and answered the bill.

The answer did not question the material averments of the bill, and admitted that the affairs of the St. Louis Mutual Life

Statement of Facts.

Insurance Company having become greatly embarrassed, on the 7th of October, 1873, the superintendent of the Insurance Department of the State of Missouri filed in the Circuit Court of St. Louis County a petition setting forth that the company was insolvent and praying for an injunction against its carrying on the business further, and that such an injunction was issued; and that, in due course, the court pronounced the company insolvent and restrained it from reinsuring its risks without the order and consent of the court. What further took place in reference to the affairs of the company is shown by the following extracts from the joint answer of the two companies; that is to say:

"In the progress of said matter said Frank P. Blair, superintendent as aforesaid, on December 13th, 1873, filed his motion in said cause, praying said court to order said company to reinsure all the risks held by it in the Mound City Life Insurance Company upon the terms set forth in said motion, and allow him to dismiss his suit as aforesaid. Said terms were that said St. Louis Mutual Life Insurance Company should transfer to said Mound City Life Insurance Company all of its assets, real, personal, or mixed, wheresoever situated, and that in consideration of said transfer said Mound City Life Insurance Company, whose name was afterward changed to the St. Louis Life Insurance Company, should reinsure all risks of said St. Louis Mutual Life Insurance Company, and assume all its liabilities, and should for these purposes increase its capital stock to the sum of $1,000,000, such increase to be secured and paid according to the laws of the State of Missouri, and to the satisfaction of said superintendent. Said motion was duly considered by said court, and was ultimately granted. . . .

"No policy holder of said St. Louis Mutual Life Insurance Company, and no stockholder therein, appeared in opposition thereto, or made any objections, and said arrangement was accordingly fully consummated and carried out according to the terms of said motion.

"And said St. Louis Life Insurance Company in good faith undertook, and is now undertaking, so to carry out said arrangement, and to perform all the terms and conditions, covenants,

promises, and agreements thereof. All the stockholders of the said St. Louis Mutual Life Insurance Company have, in good faith, accepted the said transfer and reinsurance under the order of said court, and a very large majority of its policy holders, to wit, more than 8,000, have surrendered their policies in it, and accepted policies in lieu from the St. Louis Life Insurance Company, which is, moreover, by the terms of its contract with the St. Louis Mutual Life Insurance Company, so approved as aforesaid, directly liable on any and all policies issued by said last mentioned company to the same extent as itself would have been. . . .

"Said contract was made and said transfer and assumption of liabilities executed, and said increase of capital stock made on or before January 17th, 1874."

Lovell, being sworn as a witness in the cause, fully verified all the allegations of the bill, and there was no conflicting evidence. He showed that when he surrendered his policy to be exchanged for a paid-up policy, in April, 1873, it was with the distinct understanding, both of himself and the agent of the company, that he was entitled to, and would receive, a paid-up policy for an amount which the aggregate sum of premiums paid, less the premium note, would purchase if paid as a single premium, and would also receive his premium note; and that the company kept his policy from the time of its surrender in April until after October, and after the company had become insolvent and had been put under injunction, without giving him any notice that he would not receive what he supposed himself entitled to.

The cause came on to be heard before the circuit judge and district judge, holding the Circuit Court of the United States for the Middle District of Tennessee, and the judges differing in opinion upon the questions arising in the case, in accordance with the opinion of the circuit judge, the bill of complaint was dismissed; and the following questions were certified for the opinion of this court, to wit:

"1st. Whether during the lifetime of complainant, James W.

Lovell, any suit is maintainable upon the policy of life insurance set forth in the record in this case.

"2d. Whether the insolvency of the St. Louis Mutual Life Insurance Company and its contract of reinsurance of December, 1873, with the Mound City Life Insurance Company, accompanied by the transfer of the assets of the former to the latter company, as set forth in the record of this case, operated to confer upon complainants, or either of them, any right of action or suit against the St. Louis Mutual Life Insurance Company, or against the St. Louis Life Insurance Company.

"3d. Whether, if so, complainants can maintain this suit upon this record apart from the other policy holders of said St. Louis Mutual Life Insurance Company, whose policies were in force at the time of said reinsurance transaction, and who, equally with complainants, dissented therefrom."

Mr. Andrew McClain for appellants.

Mr. R. McP. Smith for appellees.

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

The first and main question is, whether, under all the circumstances, including the insolvency of the company and the transfer of its business to another company, the complainants are entitled to any relief. What they ask is a return of the money actually paid on the policy, with interest, and a surrender of the premium note; but, if not entitled to this relief, are they entitled, under the general prayer, to relief in any form?

We are satisfied that when Lovell surrendered his policy in April, 1873, for the purpose of having it exchanged for a paid-up policy, he exercised a right which the condition of the policy gave him. It is true the precise terms of the condition are, that the policy shall be commuted in case *default* is made in the payment of any premium; but as the making of a default is entirely optional with the insured, it follows that the conversion of the policy from an annual-premium policy to a paid-up policy, is at the option of the insured, at any time after

the payment of the first three annual premiums. Though in no default, he may elect to pay no more premiums, and may give notice to the company to that effect; for it is the exercise of his option against his own interest; since it would be his interest to hold the policy for its whole amount until the maturity of the next premium, and then to make default. But the greater always includes the less. The right to have the policy commuted and reduced to a paid-up policy, by making a default in the payment of a premium, in legal effect includes the right to have it so commuted and reduced by electing at any time to make such default and giving due notice to the company of such election.

At all events, neither the agent of the company, nor the company itself, made any objection to the surrender of the policy at the time when it was actually surrendered for the purpose of exchange.

But it is clear that both Lovell and the agent of the company labored under a mutual mistake as to the amount of the paid-up policy to which Lovell was entitled. They supposed that he was entitled to a paid-up policy for such amount as the sum of the premiums paid (less the premium note) would purchase, if paid as a single premium; whereas the actual stipulation, or condition, was that the sum insured should be commuted or reduced to the amount of the premiums themselves, not the amount of insurance that they would purchase.

Now whilst it is true that the mutual mistake of Lovell and the company's agent could not change the written stipulation, nor bind the company to give Lovell a paid-up policy for a greater amount than the sum of the premiums paid, yet as the mistake was in fact made, and as Lovell surrendered his policy under the influence of that mistake, and, as he testifies, with the distinct understanding that he was to receive a new policy corresponding to such mistaken view, and also to receive his premium note for cancellation, it was the duty of the company, either to have returned him his policy unchanged, or at least to have given him notice of the mistake, so that he might have had an opportunity of determining whether he would still have his policy commuted or not. Good faith required this much

from the company. For, it must be presumed that their agent, in transmitting the policy to the home office for the purpose of being commuted and exchanged, communicated what had passed between him and Lovell on the subject; and, at all events, the communications made by Lovell to the agent were notice to the company.

But nothing of the kind was done. The company neither returned the policy, nor gave Lovell any notice that it would not be commuted for the amount which he supposed and expected it would be; and, of course, he was led to suppose that everything was right, and that he would receive his paid-up policy and note in due time. On the contrary, the company kept the original policy for more than six months—from April until October—until after they had gone or were forced into a process of liquidation, and then some person, designating himself as assignee, made the indorsement on the policy which has been referred to, declaring that, in default of payment of renewal premium due 24th October, 1873, the policy was commuted and reduced to $822, on condition that the interest on outstanding premium notes should be paid annually in advance; and because the interest was not paid on the premium note in April, 1874, the parties having possession of the note, and who had assumed the obligations of the company, declared the policy altogether forfeited, and the complainant entitled to nothing whatever.

It seems to us that the mere statement of the case is enough to show the want of equity in the transaction on the part of the companies, and the right of the complainants to some relief at the hands of the court.

The sum of the matter is this: the complainant surrendered his policy, as he had a right to do, for the purpose of having it commuted to a paid-up policy; but he did so with the understanding between him and the agent of the company that the paid-up policy was to be for such amount as the premiums paid would purchase, and that his premium note should be returned to him. So far as the amount of the paid-up policy was concerned, the complainant and the agent acted under a mutual mistake; but the company kept the policy for six months

without giving the complainant any notice of the mistake, and then, by indorsement on the policy, attempted to reduce it to a different amount, subject to the payment of interest on the premium note, and kept the note instead of delivering it up for cancellation. In the mean time the company conveyed all its assets to another company, and transferred to such other company all its business, and all interest in its outstanding policies, and completely and utterly put it out of its own power to fulfil any of its obligations, and virtually went out of existence.

Under these circumstances we hold, first, that the complainant Lovell, was in no default, and that he did not forfeit his rights under his policy; secondly, that he was under no obligation to continue his insurance, either under his original policy, or under a paid-up policy, with the new company to which the St. Louis Mutual Life Insurance Company transferred its business; thirdly, that since the latter company totally abandoned the performance of the contract made with the complainant, and transferred all its assets and business to another company, and since the contract is executory and continuous in its nature, the complainant had a right to consider the contract as at an end, and to demand what was justly due to him by reason of its abandonment by the company.

Our first conclusion, that the complainant was not in default, and therefore that he forfeited no rights under his policy, is based on the fact that when he elected to have his original policy commuted to a paid-up policy, and surrendered it to the company for that purpose without objection on its part, he had no further duty to perform, and no further premium or interest to pay; and, therefore, he could not make any default. He became entitled to a paid-up policy of some amount or other. If a difference arose between him and the company as to what the amount was, he would have been entitled to change his mind, and take back his original policy. The company being presumably informed, through its agent, of the amount which the complainant considered himself entitled to, should have given him notice, if they did not agree to that amount. They gave him no notice, but assumed to reduce his policy to an amount different from that which he deemed his due, and

retained his note, which he expected to be delivered up to be cancelled; and no notice of this procedure was communicated to the complainant until after the company had been declared insolvent, and had placed all of its assets and business out of its hands. We think it clear that the complainant was in no default whatever.

Our second conclusion, that the complainant was under no obligation to continue his insurance in the new company, we think is equally clear. He had nothing to do with that company; it was a stranger to him. It is true that it received all the old company's assets, and assumed all its obligations on policies and otherwise; and the complainant was relegated to the new company for the obtainment of his rights, whatever they were. But that was a transaction between the companies themselves, with which he had nothing to do; and under such a total change of relations and parties, it would be most unreasonable that he should be compelled, against his will, or with the alternative of abandoning all his rights, to continue all his life to fulfil an executory contract by the payment of premiums to a company to which he was a total stranger, and in which, perhaps, he reposed no confidence whatever, or to take a paid-up policy in such company.

Still the complainant might be without other remedy than that of accepting insurance in the new company, or of prosecuting the old and virtually defunct company, if it were not for the fund deposited with the treasurer of Tennessee as indemnity to the citizens of that State holding policies in the company. The assignment of all its assets by the old company to the new one upon the consideration of its obligations being assumed by the new company, is somewhat analogous to an assignment of property by a debtor for the benefit of his creditors, in which only those creditors who are preferred, or those who choose to come in and participate in the fund assigned, receive any benefit, whilst those who refuse to come in take no benefit, preferring to retain their claim against the debtor. So here, if the complainant does not choose to continue his insurance with the new company, he would have no remedy except against the old company (which is totally unable to

respond) were it not for the fund which has been attached in the hands of the State treasurer of Tennessee. To this fund the complainant, being a citizen of Tennessee, had a right to resort. The object of the laws of Tennessee in requiring the fund to be placed on deposit with the treasurer was to protect and indemnify its own citizens in their dealings with the company. The assignment to the new company in Missouri could not deprive them of the right to this indemnity.

Our third conclusion is, that as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of *United States* v. *Behan*, 110 U. S. 339, to which we refer. It is unnecessary to discuss it further here.

The question remains as to what is justly due to the complainant in this case, by reason of the contract being terminated by the act of the company. He demands a return of all the premiums paid by him, with interest, less the amount of his premium note; and that said note shall be delivered up to be cancelled. But we do not think that he is entitled to a return of the full amount of his premiums paid. He had the benefit of insurance upon his life for five years, and the value of that insurance should be deducted from the aggregate amount of his payments. In other words, the amount to which the complainant is entitled is, what is called and known in the life insurance business as the value of his policy at the time it was surrendered, with interest, less the amount of his premium note, which should be surrendered and cancelled. The balance due him will be small, but it will be something; and whatever it is, he is entitled to it, as well as to a surrender of his premium

note; and his bill ought not to have been dismissed. The amount due the complainant can easily be ascertained by the court by calling in the aid of an expert, without the trouble and expense of a reference to a master. The equitable value of a policy, according to the age of the insured life at the time it was issued, and the number of years it has run, is shown by the ordinary tables used by every life insurance company, and there can be no difficulty in ascertaining the amount in this case. The point of time for calculating the value will be immediately after the payment of the premium due on the 24th of April, 1873, five years having fully expired, and the first payment being made on the sixth year.

The question has been raised whether the complainant can maintain this suit alone, without bringing in all the other policy holders. We see no reason why not. It does not appear that there are any other policy holders who have not accepted the terms of the arrangement between the two companies, and continued their policies in the new company. Nor does it appear but that the fund now in court is abundantly sufficient to meet all demands upon it in favor of those for whose indemnity it was deposited in the treasurer's office, without any abatement, or the necessity of a pro rata distribution.

Of course, the St. Louis Life Insurance Company is a proper party to this suit, by reason of its claiming the fund attached therein, as part of the assets of the St. Louis Mutual Life Insurance Company assigned to it.

In conclusion, our opinion is, that the following answers should be returned to the questions certified by the judges of the Circuit Court, that is to say:

To the first: That during the lifetime of the complainant, James W. Lovell, a suit is maintainable upon the policy of life insurance set forth in the record, under the circumstances and for the cause stated in this opinion.

To the second: That the insolvency of the St. Louis Mutual Life Insurance Company, and its contract of reinsurance with the Mound City Life Insurance Company, accompanied by the transfer of all its assets to the latter company, as set forth in the record, did operate to confer upon the complainants a

right of action against the said companies as stated in this opinion.

To the third: That this suit may be maintained upon the record presented therein, apart from the other policy holders of the St. Louis Mutual Life Insurance Company.

It follows that

The decree of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

RECTOR *v.* GIBBON & Another.

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

Argued March 19th, 1884.—Decided April 7th, 1884.

Hot Springs Reservation—Public Lands—Estoppel.

The powers conferred upon the commissioners appointed under the "Act in relation to the Hot Springs Reservation in the State of Arkansas" passed March 3d, 1877, 19 Stat. 377, were analogous to those conferred upon the Receiver and Register of the Land Office in cases of conflicting claims to pre-emption.

The aim of Congress in statutes relieving parties from the consequences of defects in title has been to protect *bona fide* settlers, and not intruders upon the original settlers, seeking by violence, or fraud, or breach of contract to appropriate the benefit of their labor. The legislation in this respect and the decisions of this court upon it reviewed.

The provision in § 5 of the act of March 3d, 1877, that the commissioners shall "finally determine the right of each claimant or occupant," relates to the legal title which under the act is to pass from the United States; but it does not preclude a court of equity, after issue of a patent in accordance with the determination of the commissioners, from inquiring whether the legal title from the United States is not equitably subject to a trust in favor of other parties. *Johnson* v. *Towsley*, 13 Wall. 72, cited and followed.

After the passage of the act of June 11th, 1870, 16 Stat. 149, referring the title in the Hot Springs Reservation to the Court of Claims, but before the adjudications under it, A, who had been in possession of a tract in the reservation for nearly forty years, leased it to B, with a covenant from B to surrender at the expiration of the term. In the proceedings under that act A's title was adjudged invalid. *Hot Springs Cases*, 92 U. S. 698. Under the

Statement of Facts.

act of March 3d, 1877, 19 Stat. 377, A and one claiming by assignment from B appeared before the commissioners, each claiming the right to receive the certificate for the leased tract. The commissioners adjudged it to B's assignee, and a patent issued accordingly. *Held*, That under the circumstances the assignee of B, the lessee, was estopped in equity from setting up the subsequently acquired legal title against A, the lessor.

This was a suit in equity commenced in Garland Circuit Court in Arkansas, and removed under the Removal Act to the Circuit Court of the United States for the Eastern District of Arkansas. The bill alleged that the plaintiff went into possession, in 1839, of a tract of land within the Hot Springs Reservation in Arkansas, under color of title derived from the location of a New Madrid claim, and made valuable improvements on it, and continued in possession until dispossessed in 1876 by the receiver appointed by the Court of Claims; that in 1873, a lease was made by his son, as his trustee, to Gibbon and Kirkpatrick, parties defendant, the lessees covenanting to make certain improvements thereon, which were to become the lessor's property on the expiration of the term on payment of a part of the cost, and to pay an agreed rent and to deliver up the premises on the expiration of the term; that in 1877, Gibbon and Kirkpatrick transferred the lease to one Ballantine, who died leaving his children, the other parties defendant, as heirs; that in the proceedings before the commissioners under the act of March 3d, 1877, 19 Stat. 377, the plaintiff appeared and filed a claim to purchase the tract, and the heirs of Ballantine did the same, and that the commissioners awarded the right to the heirs. There were other allegations not material in the issues decided in this case. The bill was demurred to because "plaintiff claims the property described in the complaint, on the ground that he was an occupant and owner of improvements thereon, when that question, as appears, was finally decided by the Hot Springs commissioners under the act of Congress of March 3d, 1877."

Section 5 of that act is as follows:

"SEC. 5. That it shall be the duty of said commissioners to show by metes and bounds on the map herein provided for, the parcels or tracts of lands claimed by reason of improvements made

thereon, or occupied, by each and every such claimant and occupant on said reservation; to hear any and all proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said commissioners: *Provided, however*, That such claimants and occupants shall file their claims, under the provisions of this act, before said commissioners within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever barred; and no claim shall be considered which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six."

The demurrer was sustained. The plaintiff appealed.

Mr. A. H. Garland (*Mr. U. M. Rose* and *Mr. F. W. Compton* were with him) for appellant.

Mr. Sol. F. Clark and *Mr. Samuel W. Williams* for appellees.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity, brought by the plaintiff to charge the heirs-at-law of David Ballantine, as trustees of certain real property within the Hot Springs Reservation in the State of Arkansas, and compel them to convey it to him. The question for determination is whether under the act of Congress of March 3d, 1877, providing for the sale of part of the reservation, they were entitled to purchase the property in preference to him.

From the protracted litigation to which it has given rise, the Hot Springs Reservation is famous in the history of land titles of the country. Early in the present century the medicinal qualities of those springs were discovered, and from that fact the adjacent lands had an exceptional value. They were claimed by different individuals, some portions under a New Madrid certificate, and some portions under pre-emption settlements. The plaintiff entered upon the parcels in controversy as early as 1839, under an attempted location of a New Madrid

certificate made in 1820, and he remained in their exclusive possession until April 24th, 1876. They were then taken in charge by a receiver appointed by the Court of Claims under an act passed in 1870, to enable persons claiming title, either legal or equitable, to the whole or to any part of the four sections of land constituting the reservation, to bring suit in that court for the determination of their title as against the United States. Four suits were brought, one of them by the plaintiff, and they resulted in an adjudication that the title was in the United States, and that the several claims were invalid. *Hot Springs Cases*, 92 U. S. 698. The decision against him was regarded as a special hardship, both from his long possession, and from the fact that his failure to obtain a title was occasioned by the neglect of the public officer, under whose direction the land was surveyed, to return the survey and a plat of the location to the recorder of land titles for the Territory of Missouri. Until such return the location under the New Madrid certificate was incomplete, and the lands were not appropriated so as to exclude the operation of the act of April 20th, 1832, by which the four sections were reserved for the future disposal of the United States. This court, in rejecting all the claims, observed that whatever hardship might thereby ensue would, no doubt, be taken into consideration by the legislative department in the future disposition of the lands. Accordingly, and, it is believed, upon this suggestion, Congress passed the act of March 3d, 1877. It provided for the appointment by the President, of "three discreet, competent, and disinterested persons" to constitute a board of commissioners, and imposed upon them various duties. Among other things, it required them, under the direction and subject to the approval of the Secretary of the Interior, to designate a tract sufficiently large to include all the hot or warm springs on the land, embracing what is known as the Hot Springs Mountain, which tract was declared to be reserved from sale; and to lay out the residue of the land into convenient squares, blocks, lots, avenues, streets, and alleys, the lines of which were to correspond with existing lines of occupants of the reservation as near as might be consistent with the interests of the United States. It also

provided that they should, by a map prepared for that purpose, show the metes and bounds of the parcels or tracts claimed by reason of improvements thereon, or occupied on the reservation; should hear proofs offered by claimants and occupants in respect to the lands and improvements, and "finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value fixed by the commissioners." It declared that claimants and occupants should file their claims before the commissioners within six months after the first session of the board, or that their claims should be barred; and that no claim should be considered which had accrued after the 24th of April, 1876. It also made it the duty of the commissioners to file in the office of the Secretary of the Interior the map and survey, with the boundary lines of each claim clearly marked thereon, and with each division and subdivision traced and numbered, accompanied by a schedule showing the name of the claimant of each lot or parcel of land with its appraised value; and also all the evidence taken by them "respecting the claimant's possessory right of occupation" to any portion of the reservation, and their findings in each case, with their appraisal of the value of each tract and of the improvements thereon; and to issue a certificate to each claimant setting forth the amount of land the holder was entitled to purchase, and its valuation, and also the character and valuation of the improvements. 19 Stat. 377.

The act made it the duty of the Secretary of the Interior, within thirty days after the commissioners had filed their report and map, to instruct the land officers of Little Rock land district to allow the lands to be entered, and to cause a patent to be issued therefor.

Within the required time, the plaintiff filed his claim before the commissioners, and presented proof showing his long continued occupation of the land in controversy, and the improvements he had made thereon. Whilst it was in his occupation, on the 21st of February, 1873, he, through his son, who held the property as trustee to pay certain debts, leased it to the defendants Gibbon and Kirkpatrick, for the purpose of a hotel, bath-house and out-houses, at an annual rent of $500, and

$1,500 additional for water privileges, for the term of three years and three months, beginning on that day and ending on the 21st of May, 1876. The lease provided that the hotel and other improvements should not cost more than $12,000; that at the end of the term the lessor should have the right to take the improvements by paying two-thirds of their first cost, and should take the furniture in the hotel and bath-house by paying its actual value, so that the same should not exceed $8,000; that, if he should not pay these amounts at the end of the term, the lease should be extended on the same conditions until he should make the payments, giving ninety days' notice of his intention to terminate the lease; that upon its termination as specified the lessees should deliver to him, or to his successors in office, or grantees, or to "whomsoever at that time in law may have the right to control the trust property," all the lands leased to them, "promptly without failure and free from let or hindrance of any kind whatever, together with all buildings, out-houses, and improvements" that might be erected on the premises. The terms "to whomsoever at that time in law may have the right to control the trust property" refer to persons lawfully controlling the property under authority derived from the plaintiff. The lessor then held the property as trustee, and by the covenant, when the trust should be discharged, the right of control would revert to him. They were not intended to authorize a delivery under any circumstances to parties claiming adversely.

Soon after the lease was executed the trust was discharged by the payment of the debts, and the property and possession reverted to the plaintiff. Before the lease he had made improvements of the value of at least $1,000 in excavations, grading, and building a wall to protect the land from the action of the water of the Hot Springs Creek, and had erected valuable buildings. After the lease a hotel was built on the premises, and before the end of the term the parties agreed that the lease should be continued until some time in the future, when it might be terminated by written notice as provided in the instrument.

In the year 1877 the lessees sold and transferred all their in-

terest in the premises to one David Ballantine, he knowing at the time the terms and conditions of the lease. While the lessees were in possession, and before their transfer, the plaintiff gave them notice of his desire to terminate the lease, and requested them to furnish him with a list of the furniture coming within its provisions, which they promised to do, but never did. He never could get from them the information required for settlement, and therefore none was ever made, though he was ready and willing and frequently offered to pay all the sums that might be due to them under the terms of the lease, which offer they, under various pretences, always declined. After entering upon the premises under the transfer, Ballantine died, being at the time a resident of Illinois, leaving surviving him certain of the defendants who are named in the bill of complaint as his heirs-at-law. By the survey of the commissioners a part of the premises was laid off and designated as lots five, six, seven, eight, nine, ten and eleven in block eighty-nine in the town of Hot Springs, and the residue thereof, on which the hotel and some of the out-buildings were erected, was laid off into a street. They were appraised at the value of $10,000, and condemned, and were then torn down and destroyed. A certificate of their condemnation and value was given to the heirs of Ballantine. As already mentioned, the plaintiff filed his claim to purchase the lots before the commissioners. The heirs of Ballantine also filed a like claim, and to them was awarded the right to purchase, although it was shown that their ancestor had acquired his possession under the lease made to Gibbon and Kirkpatrick. For these reasons—that the heirs never had any other right or title to the lands, or to their possession except under the lease, containing covenants to restore the property and possession to the lessor or to his successor in title on its termination—the plaintiff prays that they be adjudged to hold the lands as trustees for his use and benefit, and be decreed to convey them to him, on his paying the money advanced in the purchase, and that he be allowed reasonable rent for the occupancy of the lands.

The bill of complaint sets forth the material facts which we have stated, and a demurrer to it was sustained, the court hold-

ing that the decision of the commissioners awarding to the heirs of Ballantine the right to purchase was a final adjudication and conclusive upon the parties; and even if not conclusive was correct. The ruling in both particulars the plaintiff insists was erroneous.

It is very clear that the heirs of Ballantine are not parties for whose benefit the act of 1877 was passed. He only acquired his claim to the property during that year by transfer from the original lessees of their leasehold interest. He could not assert any independent claim acquired after April 24th, 1876. The act in terms declares that no claim to purchase any portion of the reservation accruing after that date, shall be considered by the commissioners. As already mentioned, it followed our decision that certain persons, claimants and occupants of portions of the reservation, were not entitled to the land, and was designed to confer upon them and others in like position a title to such portions as they had occupied or improved, after first setting aside and reserving from sale a tract sufficiently large to include the Hot Springs and land immediately adjacent. Those parties were not trespassers, in the offensive meaning of that term, nor intentional invaders of the rights of the United States. They entered upon the land in the confident belief that they were authorized to do so. The plaintiff relied upon a New Madrid certificate which was located upon the lands in controversy as far back as 1820, and his failure to secure the title arose, as already stated, from the omission of the public surveyor to return the survey and a plat of them to the recorder of land titles before the act of 1832 took effect and withdrew the lands from appropriation. The government did not treat him and the other claimants as wanton intruders on the public domain, for then it might have ejected them by force. Instead of that it authorized proceedings for a judicial ascertainment of the merits of their respective claims. The act of 1877 embraces, therefore, under the designation of claimants and occupants, those who had made improvements, or claimed possession under an assertion of title or a right of pre-emption by reason of their location or settlement. It was for their benefit that the act was passed, in order that

they should not entirely forfeit their claims from location or settlement, and their improvements, but should have, except as to the portions reserved, the right of purchase. Parties succeeding, by operation of law or by conveyance, to the possession of such claimants and occupants, would succeed also to their rights. But lessees under a claimant or occupant, holding the property for him, and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease implies not only a recognition of his title but a promise to surrender the possession to him on the termination of the lease. They, therefore, whilst retaining possession, are estopped to deny his rights. *Blight's Lessee* v. *Rochester*, 7 Wheat. 533.

This rule extends to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law or by purchase and assignment. The lessees in this case, and those deriving their interest under them, could, therefore, claim nothing against the plaintiff by virtue either of their possession, for it was in law his possession, or of their improvements, for they were in law his improvements, and entitled him to all the benefits they conferred, whether by pre-emption or otherwise. Whatever the lessees and those under them did by way of improvement on the leased premises inured to his benefit as absolutely and effectually as though done by himself.

Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon; and not those who by violence or fraud or breaches of contract intruded upon the possessions of original settlers and endeavored to appropriate the benefit of their labors. There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice. There was a time, in the early periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily and roughly ejected. But all this has been changed within the last half century. With the acquisition of new territory, new fields

of enterprise have been opened, population has spread over the public lands, villages and towns have sprung up on them, and all the industries and institutions of a civilized and prosperous people have been established, with the church and school-house by their side, before the surveyor with his quadrant and line appeared.

With absolute confidence these pioneers have relied upon the justice of their government, and they have never been disappointed. The most striking illustrations of this confidence, and of the just action of the government, are found in the settlement of Oregon and California. Before any laws of the United States had been extended to Oregon, enterprising men crossed the plains and took possession of its fertile fields. They organized a provisional government embracing guaranties of all private rights. They passed laws under which persons and property were protected and justice administered with as much care and wisdom as in old communities. They prescribed regulations for the possession and occupation of land among themselves, and when the laws of the United States were extended over the country those regulations were respected, and the rights acquired under them recognized and enforced.

On this subject Mr. Justice Miller, speaking for the court in *Lamb* v. *Davenport*, said of the settlement upon the land which now embraces the town of Portland: "It is sufficient here to say that several years before that [the donation] act was passed, and before any act of Congress existed by which title to the land could be acquired, settlement on and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course no legal title vested in any one by these proceedings, for that remained in the United States; all of which was well known and undisputed. But it was equally well known that those possessory rights and improvements placed on the soil were, by the policy of the government, generally protected, so far at least as to give priority of the right to purchase whenever the land was offered for sale, and when no special reason existed to the contrary. And though these

rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were all subject to bargain and sale, and as among the parties to such contracts they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but subject to these well known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases when Congress had imposed restrictions on such contracts." 18 Wall. 307, 313, 314.

So in California the discovery of the precious metals was followed, as is well known, by a large immigration to the State which increased her population in a few years to several hundred thousand. The majority of the immigrants at first found their way into the mineral regions and became seekers of gold. But still a very large number settled upon the farming lands, erected houses thereon, planted vineyards and orchards, and subjected portions to cultivation. Much of this was in advance of the public surveys, and even before the passage of an act of Congress opening the agricultural lands to settlement, and providing for the sale of the mineral lands. Yet the progress of the country was not thereby stayed. The first appropriator of mineral lands within certain limits, or the first settler on agricultural lands to the extent prescribed by the pre-emption laws in force in other States, was recognized everywhere as having a better right than others to the claim appropriated, or to the land settled upon. In all controversies, except as against the government, he was regarded as the original owner from whom title was to be traced. And when the government extended its surveys over the agricultural lands it gave the privilege of purchasing—the pre-emption right—to the first settler, requiring only that his possession should be continued, accompanied with improvement. And when it allowed the mineral lands

to be sold, it was to the original appropriator, or to those deriving their claim from him, that title was given. In no instance in the legislation of the country have the claims of an intruder upon the prior possession of others, or in disregard of their rights, been sustained. Laborers occupying mining claims, or agricultural lands, whilst working for the first appropriator or settler, acquired no pre-emptive rights over him to such claims or lands; nor did any permissive occupation under him, as tenant or otherwise, impair his rights. To construe the act of 1877 so as to give to lessees a better right than their landlord to purchase the land of which he had been in occupation more than a third of a century, would require us to attribute to Congress not only the intention to do him flagrant injustice, but to depart from its previous uniform and long settled policy to protect the pioneer and original settler upon the public domain.

In the dealing of the government with occupants of lots in towns built upon the public lands, we have a further illustration of the good faith which is exacted from parties seeking the title of the United States. The Town Site Act of Congress of May 23d, 1844, provides that whenever any portion of the surveyed public lands has been settled upon and occupied as a town site, it shall be lawful, if the town be incorporated, for the corporate authorities, and if not incorporated, for the judge of the County Court, to enter at the proper land office, and at the minimum price, such land "in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated." 5 Stat. 657. The act of Congress of March 3d, 1853, extended the provisions of this act, and, with certain exceptions, made the whole of the public lands, not being mineral, occupied as towns or villages, subject to like entry, whether settled upon before or after they were surveyed.

In *Ricks* v. *Reed*, decided in 1862, the proper construction

of the act was a question before the Supreme Court of California, and the court said: "It is true the entry of the town lands by the corporate authorities or county judge is, under the act of Congress, 'in trust for the several use and benefit of the occupants thereof, according to their respective interests;' but this provision does not establish that it was the intention of Congress to give the benefits of the entry to mere temporary occupants of particular tracts at the date of the entry, without reference to the character of their occupancy, and thereby, in many instances, deprive the original *bona fide* settlers of the premises and improvements in favor of those who had, by force or otherwise, intruded upon their settlement. Were such the effect of the provision in question, the trespasser of yesterday, or the tenant of to-day, would often be in a better position than the parties who, by their previous occupation and industry, had built up the town and made the property valuable. We do not think Congress could have contemplated that results of this nature should follow from its legislation, but, on the contrary, that it intended that the original and *bona fide* occupants should be the recipients of the benefits of the entry to the extent, at least, of their interest—that is, of their actual occupancy and improvements." 19 Cal. 551, 575.

The provision of the act that the commissioners "shall finally determine the right of each claimant or occupant" to purchase the land or a portion of it, does not necessarily withdraw that determination from the consideration of the court. It is final so far as the land department is concerned. By the general law all proceedings for the alienation of the public lands, from the incipient steps to a patent, are placed under the supervision of that department. The provision in question takes the action of the board, in the particulars mentioned, from that supervision. In effect it substitutes the board in the place of the ordinary land officers, with only a modification of duties and powers adapted to the peculiar circumstances of the case. It does not withdraw its decisions fom the correcting power of the court when the board has miscontrued the statute, and thus defeated its manifest purpose, and made its benefits inure to those who were never in the contemplation of Congress,

and therefore were not intended to be the recipients of its bounty.

The powers of the commissioners under the act of 1877 are not essentially different from those of the receiver and register of the land office in cases of conflicting claims to pre-emption. The latter officers must hear the evidence of parties, and decide as to which has the better right to the patent certificate. The judicial character of their investigation and determination is as great and important as that of the commissioners under the act of 1877. The acts done in both cases relate merely to the sale of public lands; and it is difficult to perceive any reason why, when private rights are invaded, the door should be closed against relief in the courts of the country in the one case more than in the other.

The statute, in requiring the commissioners to "finally determine the right of each claimant or occupant to purchase" parts of the reservation, recognizes the existence of rights as between different claimants, though equally without title so far as the government is concerned. But in their decision they have ignored the universally acknowedged right as between landlord and tenants, giving to the latter what could by no possibility belong to them in the relation which they occupied. Had Congress intended to invest the commissioners with absolute discretion in awarding the privilege of pre-emption of the several parcels of land, its language would have been different; it would not have required an examination of witnesses, a regard for existing boundaries, and a determination of rights. Everything in the statute, from the beginning to the end, indicates an intent that, in awarding the right of pre-emption, the commissioners should be governed, not by an arbitrary discretion, but by the existence of claims by possession, and a consideration of the mutual rights of parties as between one another. They had no right to disregard the very principle on which their appointment was based.

On matters depending upon conflicting evidence as to the extent of occupation and the value of improvements, and many other matters, the action of the commissioners is undoubtedly final; but upon the construction of the law, and particularly

as to the parties for whose benefit it is designed, it is subject, equally with all local boards of limited jurisdiction, to have its conclusions, if erroneous, reviewed and corrected by the judicial tribunals; at least the equities of third parties arising from contracts or fiduciary relations between them and the person to whom the commissioners may adjudge the right to purchase, are not concluded by their action. This question was very fully and thoughtfully considered in *Johnson* v. *Towsley*, 13 Wall. 72. In that case the direct question was as to the effect to be given to the tenth section of the act of June 12th, 1858, which declared that appeals in cases of contest between different settlers for the right of pre-emption should thereafter be decided by the Commissioner of the General Land Office, "whose decision shall be final unless appeal therefrom be taken to the Secretary of the Interior." It was held that the finality there declared had reference only to the supervisory action of the land department; that after the title had passed from the government, and the question had become one of private right, the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity had established his right to the land upon a true construction of the acts of Congress, and by an erroneous construction the patent had been issued to another, the court would correct the mistake. In the opinion Mr. Justice Miller, speaking for the court, referred to the general doctrine that when a special tribunal has authority to hear and determine certain matters arising in the course of its duties, its decision within the scope of its authority is conclusive upon all others, and said:

"That the action of the land office in issuing a patent for any of the public lands, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other

hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office."

This case is a leading one in this branch of the law, and has been uniformly followed. The decision aptly expresses the settled doctrine of this court with reference to the action of officers of the land department, that when the legal title has passed from the United States to one party, when in equity, and in good conscience, and by the laws of Congress it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title. This doctrine extends to the action of all officers having charge of proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, because of its misconstruction by those officers, be deprived of their rights. *Townsend* v. *Greeley*, 5 Wall. 326, 335; *Carpentier* v. *Montgomery*, 13 Id. 480, 496; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 530; *Quinby* v. *Conlan*, 104 U. S. 420; *Smelting Company* v. *Kemp*, Id. 636.

The bill is open to the objection that it does not allege that the heirs of Ballantine have acted upon the award, and purchased the lands in controversy; but their counsel makes no point upon this omission, and admits that they have in fact purchased.

It follows from the views expressed that

The decree of the court below must be reversed and the cause remanded with instructions to overrule the demurrer and to take further proceedings in accordance with this opinion, the plaintiff to have leave to amend his bill and the defendants to answer.

Mr. Chief Justice Waite, with whom concurred Harlan, Woods, and Blatchford, JJ., dissenting.

I am unable to agree to this judgment. In my opinion the act of March 3d, 1877, granted a new right to the occupants of the Hot Springs Reservation, and provided a special tribunal for the settlement of all controversies between conflicting claimants. The right and the remedy were created by the same statute, and, consequently, the remedy thus specially provided was exclusive of all others. No provision was made for a review of the decisions of the tribunal. Its determination, therefore, of all questions arising under the jurisdiction must necessarily be conclusive, and not open to attack collaterally. It seems to me there is a very broad distinction between this case and that of *Johnson* v. *Towsley*, 13 Wall. 72, and others of that class. Here a special tribunal has been created for a special purpose. It has been clothed with power to compel the attendance of witnesses "and to finally determine the right of each claimant or occupant to purchase" from the United States, under the provisions of the act of Congress, the ground he occupies or claims. The duties of the tribunal are judicial in their character, and their decisions evidently intended to be binding on the parties. The question now is not whether, if Rector had kept away from the tribunal and Gibbon had got a title under his occupancy, he could be charged as trustee for Rector on account of his tenancy, but whether, having appeared before the tribunal and been beaten in a contest with Gibbon,

on that identical question, Rector can in this suit correct the errors of the tribunal in its decision. I think he cannot. If he can, it is difficult to see why all the decisions of the tribunal are not open to revision by the courts.

I am authorized to say that Justices HARLAN, WOODS, and BLATCHFORD concur with me in this opinion.

COCHRANE & Others *v.* BADISCHE ANILIN & SODA FABRIK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued March 26th, 27th, 1884.—Decided April 14th, 1884.

Patent.

If the claim of reissued letters patent No. 4321, Division B, granted to Charles Graebe and Charles Liebermann, April 4th, 1871, for an "improvement in dyes or coloring matter from anthracine" (the original patent, No. 95,465, having been granted to them October 5th, 1869), namely: "Artificial alizarine, produced from anthracine or its derivatives by either of the methods herein described, or by any other method which will produce a like result," is construed so broadly as to cover a dye-stuff, imported from Europe, made by a process not shown to be the same as that described in No. 4321, and containing large proportions of coloring matters not shown to be found to any practically useful extent in the alizarine of the process of No. 4321, such as isopurpurine or anthrapurpurine, it is wider in its scope than the original actual invention of the patentees, and wider than anything indicated in the specification of the original patent. If the claim is to be construed so as to cover only the product which the process described in it will produce, it does not cover a different product, which cannot be practically produced by that process.

This was a suit in equity for the alleged infringement of a patent for improvement in dyes from anthracine. The nature of the invention, the extent of the claims, and the facts which went to show the infringement or to affect the validity of the patent are fully brought out in the opinion of the court, from the large mass of testimony in the record. Judgment below sustaining the validity of the patent, from which the alleged infringers appealed.

Mr. Edward N. Dickerson for appellants.

Mr. Benjamin F. Thurston for appellee.

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 Southern District of New York, by Badische Anilin and Soda Fabrik, a corporation organized under the laws of the Grand Duchy of Baden, in the Empire of Germany, against the appellants, for the infringement of reissued letters patent No. 4,321, granted to Charles Graebe, of Frankfort-on-the-Main, and Charles Liebermann, of Berlin, Prussia, April 4th, 1871, for an "improvement in dyes or coloring matter from anthracine." The original patent, No. 95,465, was granted to the same persons, October 5th, 1869, for an "improved process of preparing alizarine." It was reissued on two separate amended specifications, Division A and Division B. No. 4,321 is Division B.

The following is the text of the specifications of No. 4,321 and No. 95,465. Reading in it what is outside of brackets, and what is inside of the brackets, omitting what is in italics, gives the specification of No. 4,321. Reading what is outside of brackets, including what is in italics, omitting what is inside of brackets, gives the specification of the original patent:

"Be it known, that we, Charles Graebe, of Frankfort-on-the-Main, and Charles Liebermann, of Berlin, in the Kingdom of Prussia, have invented a [new and useful improvement in the manufacture of alizarine ;] *process for preparing alizarine from anthracine ;* and we do hereby declare the following to be a full, clear and exact description thereof, which will enable those skilled in the art to make and use the same. We first change the anthracine into anthrakinon (oxanthracine), a substance known to [the] chemists by the investigations of Anderson. For this purpose we take one part, by weight, of anthracine, two and half parts, by weight, of bichromate of [potash,] *potassa*, and ten or fifteen parts, by weight, of concentrated acetic acid, and we heat these substances together in a vessel, either of glass or clay, to about 100° centigrade to 120° centigrade, till nearly all of the bichro-

mate of [potash] *potassa* is dissolved and the liquid has acquired a deep green color. We then recover the acetic acid not consumed in the reaction by distillation, and treat the residuum with water to remove the chromic acetate. From the insoluble mass we obtain the anthrakinon in a pure state by distilling the whole from a retort of glass or iron. In the place of *the* acetic acid, sulphuric acid, diluted with one or two parts of water, may be employed. Instead of the method just described, we also employ the following one: We heat *the* anthracine in a vessel of glass or of clay, with ten parts of concentrated acetic acid, to about 100° centigrade, or a little higher, and we add nitric acid of about 1.3 specific gravity, in small portions, till the violent reaction ceases. After distillation of the acetic acid we purify the residuum, as before. We then convert the anthrakinon, prepared by one of the methods described, into bibromanthrakinon. For this purpose we take three parts of anthrakinon, five parts of bromine, and we heat these substances for ten or twelve hours, or until nearly the whole of the bromine has disappeared, to a temperature, by preference, of about 100° centigrade, in a suitable close vessel, either of glass or enameled or glazed iron, which is capable of sustaining the pressure [which is] generated by the reaction. The apparatus is then allowed to cool. It is opened in order to permit the escape of [bromic] *hydrobromic* acid, which can be recovered by absorption either in water or in *an* alkaline solution. We purify the bibromanthrakinon remaining in the vessel, as a solid substance, by crystallization from benzole. Instead of the method above described for preparing bibromanthrakinon, we also employ the following: We convert first the anthracine, into a bromine derivative, into the tetrabromanthracine, known to chemists by the investigations of Anderson. We take one part of this tetrabromanthracine, and we heat it in a retort of glass or clay with about five parts of nitric acid of about 1.3 specific gravity to 100° centigrade, as long as vapors of bromine are evolved. We distil off the greater portion of the nitric acid, wash the residuum with water, and purify it by crystallization from benzole. We thus receive the bibromanthrakinon as before, in *the form of* a yellow, solid mass. We then convert the bibromanthrakinon into alizarine. For this purpose we take one part of bibromanthrakinon, two to three parts of caustic potash or soda, and so much water as is necessary to dissolve the alkali, and

we heat the whole in an open vessel of glass, glazed or enameled iron, or silver, to about 180° to 260° centigrade for one hour, or [till] *until* the mass has acquired a deep blue color. We then dissolve it in water and filter the violet solution, from which we precipitate the alizarine by *an* inorganic *or organic* acid. We collect the yellow flocks of alizarine thus obtained on a filter and wash them with water. By these methods we receive the alizarine in a form in which it can be employed in the same manner as the different preparations from madder. In the place of bromine, chlorine [also] may *also* be employed, but not so conveniently, as the reactions above described are more difficult to accomplish with chlorine than with bromine. *Having thus described the nature of our invention and the manner of performing and carrying out the same, we would have it understood that we do not confine ourselves to the exact details hereinbefore given.*"

The claim of No. 4,321 is as follows: "Artificial alizarine, produced from anthracine or its derivatives by either of the methods herein described, or by any other method which will produce a like result." The claim of the original patent was in these words: "The within described process for the production of alizarine, by first preparing bibromanthrakinon or bichloranthrakinon, and then converting these substances into alizarine, substantially as above set forth."

The bill of complaint alleges that No. 4,321 was issued "for a distinct and separate part of the same invention, on a corrected specification," on the surrender of No. 95,465; and No. 4,321 states, on its face, that, on such surrender, new letters were ordered to issue "on two separate amended specifications." But Division A, No. 4,320, is not in the record before us. The bill alleges the infringement to have been committed by making, selling, or using the invention or dyes containing it. The answer denies the manufacture of alizarine, but avers that the defendants have sold in the United States alizarine lawfully made in Germany, and imported as an article of commerce, which was not made by the process described in No. 4,321, or any process substantially the same, but was made according to processes which were invented subsequently to the date of No. 95,465, and are the subject of different and independent letters

patent. The answer also avers "that alizarine is a natural product, having a well-known definite constitution; that it is not a composition of matter, within the meaning of the statute, but has been well known in the arts, from time immemorial, for the purpose of dyeing, and has generally been extracted from 'madder root,' and from other analogous products, by various processes suitable for that purpose; that, therefore, there can be no valid patent granted for alizarine; and that No. 4,321 is void." The answer refers to "Watts' Chemical Dictionary, published before 1869, under the title *Alizarine*, to show that alizarine was well known long before the said patent;" and also sets up that the patent had expired because prior patents granted to the patentees in foreign countries, for the same invention, had expired.

Proofs were taken, and, on final hearing, the Circuit Court decreed that No. 4,321 was valid, and had been infringed, and ordered a reference as to profits and damages, and a perpetual injunction against the making, using, or selling of the article designated in No. 4,321 "artificial alizarine," or dyes containing the invention described in and secured by No. 4,321. Afterwards, there was a final decree against the defendants for $13,326.65 and costs, of which $12,871.86 was for profits made by the defendants, "by the sale of artificial alizarine, in infringement" of No. 4,321. From this decree the defendants have appealed.

This reissued patent No. 4,321 has been adjudicated in the Circuit Courts in several cases. It was before the Circuit Court in Massachusetts, in February, 1878, and the decision of Judge Shepley is in *Badische Anilin and Soda Fabrik* v. *Hamilton Manufacturing Company*, 3 Banning & Arden, 235, and 13 Off. Gaz. 273. It was also before the Circuit Court for the Southern District of New York, in September, 1878, and the decision of Judge Wheeler is in *Badische Anilin and Soda Fabrik* v. *Higgin*, 15 Blatchford, 290, and 3 Banning & Arden, 462, and 14 Off. Gaz. 414. The decision of Judge Wheeler in the present case, in April, 1879, is in 16 Blatchford, 155, and in 4 Banning & Arden, 215. The patent was also before the Circuit Court in Massachusetts, in September, 1879, and the decision of Judge

Lowell is in *Badische Anilin and Soda Fabrik* v. *Cummins*, 4 Banning & Arden, 489. In all of these cases the validity of No. 4,321 was sustained.

In the case before Judge Shepley, it was held that No. 4,321 was a valid patent for a manufacture and composition of matter, an artificial dye-stuff, called artificial alizarine, being a new product, produced by a new process, not a chemically pure alizarine, but having combined with the alizarine in it anthrapurpurine, isopurpurine and other bodies, not known to have existed before they were produced by Graebe and Liebermann, the presence of some of which bodies appeared to much enhance the value of the dye-stuff. It was decided that the defendants had used that article.

In the case against Higgin, it was held that the product of the process described in No. 4,321 contains isopurpurine, anthrapurpurine, monoxanthraquinone and other ingredients which were not only not ingredients in pure alizarine or madder alizarine, but did not exist in any dye-stuff with chemically pure alizarine, $C_{14}H_8O_4$, before that of Graebe and Liebermann, and are useful coloring agents, so that the product invented is a new composition of matter. It was decided that the defendants had used or sold dye-stuffs substantially the same, though claimed to be the product of a different process.

In the present case, it was insisted in the Circuit Court by the defendants, that the patented product was the same thing as the natural dye-stuff, alizarine, found in the root of the madder plant and chemically known by the formula $C_{14}H_8O_4$ and not patentable. But it was decided that the article which Graebe and Liebermann had made synthetically from anthracine, though having the same chemical formula as madder alizarine, was essentially different, in capabilities and properties, from chemically pure alizarine, madder alizarine, or any coloring matter before known; that the article dealt in by the defendants was produced by the process of United States letters patent No. 154,536, granted July 28th, 1874, to Heinrich Caro, Charles Graebe and Charles Liebermann; that the use of sulphuric acid, in the process of the latter patent, performs the same office, in the same way, as the

bromine in the process of No. 4,321; and that the products of the two processes are identical.

In the case before Judge Lowell, he held that what Graebe and Liebermann sought to discover, and supposed they had discovered, was the alizarine which is the dye-stuff of madder; that which is called "artificial alizarine" contains important dyeing substances not found in madder, namely, anthrapurpurine and isopurpurine (accordingly as these may be two substances or one and the same substance) and flavopurpurine, which substances produce valuable effects not produced by any extracts from madder; that, although the defendant insisted that those new purpurines were not found in the artificial alizarine made by the bromine process of No. 4,321, and were found only in artificial alizarine made by methods invented since Graebe and Liebermann invented that process, and the evidence on that point was in much conflict, yet it was shown that pure alizarine, pure isopurpurine and pure flavopurpurine were all contained in the patented article; that the artificial alizarine of No. 4,321 is different in some important respects from any article known before; that the new article of manufacture claimed in No. 4,321 was new in fact; and that the infringement was made out.

In Watts' Dictionary of Chemistry, volume 1, page 113, published in 1866, *Alizarin* is stated to be a red coloring matter obtained from madder, first prepared by Robiquet and Colin. This was in 1826. The correct formula of alizarine, C_{14} H_8 O_4, was first arrived at by Strecker, in 1866. It means that there are 14 atoms of carbon, 8 atoms of hydrogen, and 4 atoms of oxygen, in each molecule. At this stage Graebe and Liebermann took up the subject, and treated madder alizarine with the view of determining what was its mother substance. They tell the story themselves, in a paper in the record, entitled "Artificial Alizarine," which is a translation from the original, prepared in German by them, contained in the Official Report of the Vienna Exhibition of 1873, and also published separately in 1876. They heated madder alizarine with zinc dust, and made the alizarine give up its 4 atoms of oxygen, and take up 2 atoms more of hydrogen. They thus obtained a hydrocarbon, identical with that found in coal-tar, called anthracine,

and having the formula $C_{14}H_{10}$. They then conceived the idea of converting anthracine into alizarine. Anthracine was difficult to obtain, and the experiment was conducted on a small scale. But it resulted in the process described in No. 4,321, of converting anthracine into anthrakinon, the formula of which was $C_{14}H_8O_2$, and then heating the anthrakinon with bromine and obtaining bibromanthrakinon, and heating that with caustic potash or soda and obtaining alizarine. Graebe and Liebermann thus solved the problem of the synthesis of alizarine. It was a matter of great scientific interest, and gave them much reputation. The paper states that the first method described in No. 4,321 for preparing the bibromanthrakinon was so laborious that they devised the other method described, of first converting anthracine into tetrabromanthracine, and then treating that with nitric acid to obtain bibromanthrakinon. "This method," they state, "made it possible to obtain the alizarine more readily, and aroused hopes of its technical execution," although it involved two more reactions than the first method.

In regard to the alizarine thus obtained, the same paper says: "The artificial alizarine, besides having the same composition, had also the same properties as vegetable alizarine. In hydrated alkalies it is soluble, with a blue violet to purple color. The solutions of the alkali salts give, with lime, baryta, lead, iron, alumina and tin salts, lakes corresponding to the madder lakes. Cloth printed with mordants dye exactly alike with both coloring matters. From these salt-like compounds yellow flocculent alizarine is set free by the addition of a mineral acid. The artificial coloring matter shows the same solubilities, and the solutions of the alkaline salts the same absorption spectra, which are known of the natural coloring matter. The free coloring matter sublimes in beautiful yellow to red needles, which cluster together like feathers. On oxidizing with nitric acid, phthalic acid and oxalic acid are formed. Heated with zinc dust, the artificial alizarine is again converted into anthracine."

The paper then proceeds: "The above methods, which now, from a technical point of view, have only a historic interest,

and are therefore described without further detail, make up the subject of the patents taken out in England on the 18th of December, 1868, and then also in France, Prussia, most German States, Austria, Russia and America." The provisional specification deposited in the English Patent Office, December 18th, 1868, which was the date of the patent, gives a short description of the process and says: "The alizarine prepared in this artificial way is perfectly pure, and can be employed in all the applications for which the different preparations of madder are used." The full specification, filed June 17th, 1869, is substantially identical with the specification of No. 95,465, and claims "the artificial production of alizarine, by first preparing bibromanthrakinon or bichloranthrakinon, and then converting these substances into alizarine, as herein described."

In further pursuing the history of the matter the same paper proceeds: "The discoverers of the synthesis of alizarine soon found it necessary to enter into connection with some large dye factory. This was necessary in order that the raw material could be more easily obtained, and that the experiments could be made on a large scale and further developed. This could be done best with an establishment already in existence, where the doubtful question, whether this might be the basis of an industry, with hopes of success, could be solved. One of the chief difficulties experienced was the fact that the raw material was not only unknown in commerce, but also in the tar industry, and it was difficult to say whether it could ever be obtained in sufficient quantity. It was also doubtful whether the artificial alizarine could compete with the natural. Furthermore, there was much difficulty in transferring the above methods to a large scale. Graebe and Liebermann, therefore, entered into connection with the Baden Anilin and Soda Works, in Ludwigshafen, on the Rhine, the largest works of the kind in Germany, even on the Continent. [Originally, the experiments were limited to the purification of the anthracine and the manufacture of anthrakinon by the second mentioned bromine method, because this, notwithstanding its difficulties, showed some hopes of success.]" The passage above in brackets by

another translation, reads thus: "The first trials principally embraced the purification of anthracine, the manufacture of anthrakinon, and the practical application of the second above mentioned bromine method, as the same, notwithstanding the great difficulties, still gave assurance that it could be used practically."

The paper then goes on: "The latter" (meaning the second mentioned bromine method) "was dropped as soon as the observation was made that the alizarine could be made more simply by means of anthrakinon sulpho-acids. Graebe and Liebermann had originally attempted to obtain anthrakinon sulpho-acids, by acting on anthrakinon with sulphuric acid. But they made the mistake of using too low heats. The temperatures they employed were not high enough, being not greater than those generally employed in the preparation of sulpho-acids. They had also been misled by the observation that anthrakinon could be sublimed unchanged from strongly-heated sulphuric acid. Therefore they hoped little from sulpho-acids, and gave all their attention to improving the above methods. This mistake was avoided, and the modification of the synthesis of alizarine which forms the basis of the industry of to-day, was discovered first by Heinrich Caro, who, as an officer at the Baden Anilin and Soda Works, made it his task to give, in combination with Graebe and Liebermann, life to the alizarine industry. Caro first noticed that anthrakinon, if heated with sulphuric acid to above 200°, would give sulpho-acids, which, on fusing with hydrate of potash, formed alizarine, the same as the bromine compound. Perkin noticed the same fact shortly after or at about the same time. This method was further developed by Caro and the original discoverers, and the English patent was taken on June 25th, 1869 (Caro, Graebe and Liebermann, English patent, 1869, No. 1,936). The patent of Perkin is dated June 26th (Perkin, English patent, 1869, No. 1,948). Two methods were discovered, analogous to the two bromine methods. In the first and most important, the anthracine is oxidized to anthrakinon; this is converted into sulpho-acids by heating with sulphuric acid to 200° to 260°; and these, by the beautiful method of Kekulé, Wurtz,

and Dusart, by fusing with caustic potash or soda, are converted into alizarine. The first process is, therefore, identical with the first bromine method given above. In the second method, the sulphuric acid acts on the anthrakinon in such a manner that, besides the anthrakinon monosulpho-acid, as principal product, a small amount of anthrakinon bisulpho-acid is also formed. This was subsequently determined analytically by Graebe and Liebermann. In the patent only the anthrakinon sulpho-acids are mentioned. From analogy, Perkin, in his paper (Jour. Chem. Soc. (2) viii., 133, and Ann. Chem. Pharm. clviii., 335), considered the bisulpho-acid only. It is also formed in larger quantity by the excess of acid he employs in his method, than it is by the method of Caro, Graebe, and Liebermann."

The reactions in the second method are then given by formulas, in reference to anthrakinon monosulpho-acid and anthrakinon bisulpho-acid, and it is then said: "On fusing the two sulpho-acids, they give alizarine, exactly like the monobrom- and bibrom-anthrakinon. The anthrakinon bisulpho-acid behaves, for the greater part, if not altogether, like the monosulpho-acid, and furnishes, instead of the corresponding bioxyanthrakinon" (which is the alizarine of the process of No. 4,321), "essentially trioxyanthrakinon, the isopurpurin." They then give the two sets of chemical equations, one producing alizarine and the other producing isopurpurin. Further on, in the same paper, they say: "As far as has been observed, it seems that only the anthrakinon monosulpho-acid will produce alizarine, while the anthrakinon bisulpho-acid produces isopurpurin."

In an article by Graebe in the New Handbook of Chemistry, published in 1871, he had said: "Alizarine, lizaric acid, madder red, matière colorante rouge, first prepared from madder by Robiquet and Colin, 1826; artificially by Graebe and Liebermann, 1868, from anthracine; formula, $C_{14}H_8O_4$; is derived from anthracine, and is to be considered as bioxyanthrakinon, $C_{14}H_6(O_2)''(OH)_8$."

In another publication by Graebe and Liebermann, in 1868, they had said: "By treating alizarine with zinc dust, a hydro-

carbon was produced, having the composition $C_{14} H_{10}$, and coinciding exactly in its properties with anthracine. . . . According to our experiments, alizarine, which is hence a derivative of anthracine, must have the formula $C_{14} H_8 O_4$."

In another publication by them, in 1869, they had said: "We have produced from anthracine artificial alizarine. The properties of the product obtained by us, as well as the colors which we have produced with the same on mordanted cotton, exhibit perfectly the identity of the artificial alizarine with that obtained from madder root. . . . The methods which have led to the above results, and which we shall describe later, confirm the accuracy of the rational formula for alizarine, recently advanced by us." Again, in a further publication in 1869, they had said: "In our first notice we have already hinted that we have detected no difference between the natural and artificial alizarine, and that the very characteristic colors which both possess, when fixed on cotton mordanted with alumina and iron, are perfectly identical. We believe, therefore, that it is with one and the same chemical individual we have to deal, and not with isomerous compounds, of which an extraordinarily great number is conceivable, and of which an example already exists, as we have hinted, in chrysophanic acid. In conclusion, we will call attention to the fact that our production of alizarine is the first example of the artificial formation of a coloring matter occurring in plants."

The various papers thus referred to are, it is understood, put in evidence, by stipulation, with like effect as if the authors of them had testified to the facts stated in them.

In Prussia, a patent for five years was granted to Graebe and Liebermann, March 23d, 1869, for their bromine process, on condition that it should be put into practical operation in 12 months within the kingdom. On the 7th of July, 1870, after several notices to them, the patent was declared extinct, because proof had not been produced of the carrying out of the patented methods. In view of what Graebe and Liebermann themselves state, in the publication before cited, it is manifest that the Prussian patent was revoked because the process described was not a practical one. There was nothing

practical until the sulpho-acid discoveries were made. In regard to this the paper first cited says: "The patent of Caro, Graebe and Liebermann is dated one day earlier than that of Perkin. If any value at all is to be placed in the date, then Caro must certainly be mentioned first, since the application for a patent by the German chemist was delayed by an error. The signing took place at the patent agent's in Berlin. In reference to the above two English patents, Perkin and the Baden Anilin and Soda Works, proprietors of Caro and Graebe and Liebermann's patent, made an agreement in consequence of which the patents became common property. By the publication of these patents, the sulpho-acid methods of preparing alizarine became known, and a series of works were erected in States which gave no, or insufficient, protection to the patentees." This shows that the only methods practised commercially were the sulpho-acid methods. The English patent for the bromine methods expired December 18th, 1871, for the want of payment of a further fee.

The statement of Graebe and Liebermann is, that Caro discovered that, by using anthrakinon with sulphuric acid, he could obtain sulpho-acids, and then, with hydrate of potash, procure alizarine, "the same as the bromine compound," that is, the alizarine of the process of No. 4,321; but that the bisulpho-acid process, developed by Perkin, produces not the alizarine of the process of No. 4,321, which is bioxyanthrakinon, but trioxyanthrakinon or isopurpurine. The article sold by the defendants is this last substance, made by the bisulpho-acid process carried on abroad at the present day, and containing large proportions of coloring matters not shown to be found to any practically useful extent in the alizarine of the process of No. 4,321, such as isopurpurine or anthrapurpurine, one or both—two articles, if they are different, or one, if they are the same, as seems to be shown. No. 4,321 furnishes no test by which to identify the product it covers, except that such product is to be the result of the process it describes. The process by which the defendants' article is made is not shown to be the same process as that described in No. 4,321. Graebe and Liebermann, as appears from their own statement, experi-

mented with sulphuric acid and failed. It was not obvious that sulphuric acid would accomplish any result, nor was it obvious how to employ it. Their experiments with it led them to hope little from it, and to withdraw their attention from it and devote themselves to improving the bromine and chlorine methods. They state that Caro avoided their mistakes, and was the first to discover the modification which led to success, and that Perkin was an independent discoverer of it about the same time. It is, therefore, impossible to say that the sulphuric acid process was a known equivalent process at the time. It is easy now, after the event, for scientific men to say, with the knowledge of to-day, that the thing was obvious. But the crucial facts contradict the assumption.

It does not satisfactorily appear that the process of No. 4,321 will produce the defendants' article to any useful extent, if at all. The process of No. 4,321 never was, and is not now, practically carried on anywhere. The article of No. 4,321 was called "artificial alizarine," and the article now in the market is called by the same name, but the identity, in the sense of the patent law, between them and between the processes for producing them, is not shown.

The English patent to Caro and Graebe and Liebermann having been granted June 25th, 1869, and the full specification filed January 13th, 1870, an application for a patent in the United States for producing artificial alizarine by the sulpho-acid processes, was filed by them January 26th, 1870. It was granted as No. 154,536, July 28th, 1874. The full specification of the English patent and that of No. 154,536 are identical. The specifications state that the invention relates to improvements on the invention described in the English patent to Graebe and Liebermann, of December 18th, 1868, and in No. 95,465, "in which the preparation of artificial alizarine is based upon the action of caustic alkalies upon bibromanthrakinon or bichloranthrakinon." They then proceed: "We have now discovered that a similar result may be obtained by substituting sulphuric acid for bromine or chlorine in the above process. We thus obtain the sulpho-acids of anthrakinon, which, by being dissolved in and heated with an excess of caustic alkali,

are converted into alizarine. This invention relates to improvements in the production of coloring matters, and more especially to improvements in the method of producing what is known as artificial alizarine, from anthracine, a method of producing which was described in" the English patent of December 18th, 1868, and in No. 95,465, "and consisted in the production of artificial alizarine by converting anthracine into either bibromanthrakinon or bichloranthrakinon, and then acting upon the same by means of an alkali, and precipitating the alizarine contained in the alkaline solution by means of an acid. In the complete specification of the aforesaid letters patent granted to Charles Liebermann and Charles Graebe, two different series of processes are described for obtaining the brominated or chlorinated derivatives of anthrakinon. In the first of these processes, the anthracine is submitted to the action of oxidizing agents, as is well understood, and the oxidized anthracine or anthrakinon is then treated with bromine or chlorine. In the second of these processes, the anthracine is first treated with bromine or chlorine, and subsequently submitted to an oxidizing process, in order that the desired compounds, videlicet, bibromanthrakinon or bichloranthrakinon, may be obtained. In an analogous manner, we now employ sulphuric acid as a substitute for the bromine or chlorine employed in the processes above referred to, and we thus obtain the sulphuric acid derivatives of anthrakinon, which we call the sulpho-acids of anthrakinon." The specifications then go on to describe the two new processes. The first is, to alter the anthrakinon by heating it with sulphuric acid. The product is then put in solution and treated with carbonate of lime, and then with carbonate of potash or of soda, and potash or soda salts of the sulpho-acids of anthrakinon are produced. These are treated with caustic soda or potash, under heat, and the artificial alizarine is precipitated by an acid. In the second process, anthracine is heated with sulphuric acid, the product is put in solution, and treated with peroxide of manganese, under heat. Caustic lime is then added in excess, till there is an alkaline reaction, the mixture is then filtered and carbonate of potash or soda is added to it, and the potash or soda salts of the sulpho-acids of anthrakinon are pro-

duced. These are treated with caustic potash or soda, under heat, the product is put in solution, and the artifical alizarine is precipated by an acid. It is stated, in regard to this substance, made by either of these two processes, that it "may be employed for the purposes of dyeing and printing, either in the same way as preparations of madder are now used or otherwise." In each of the two specifications there are two claims, in these words:

"1. The manufacture of coloring matters by submitting anthrakinon to the action of sulphuric acid, so as to obtain soluble compounds, which we have called sulpho-acids of anthrakinon, treating the products of such operation with an alkali, and precipitating the coloring matters therefrom by means of an acid, as herein described. 2. The manufacture of coloring matters by submitting anthracine to the action of sulphuric acid, oxidizing the product thereby obtained, heating such oxidized product with an alkali, and subsequently precipitating the coloring matters therefrom by means of an acid, as herein described."

After the granting of the English patent for the sulpho-acid process, on June 25th, 1869, to Graebe and Liebermann, and their application for the United States patent on January 26th, 1870, it became apparent that the sulpho-acid processes and products were to be commercially valuable. Then, during the interval of the four years and a half delay in the issuing of No. 154,536, No. 95,465 was surrendered and reissued in two parts, April 4th, 1871, one for the process and the other for the product, the claim in the latter, No. 4,321, being so worded as to cover "artificial alizarine, produced from anthracine or its derivatives, by either of the methods herein described, or by any other method which will produce a like result." Afterwards, Graebe and Liebermann assigned the two reissued patents of April 4th, 1871, to the plaintiff, on March 1st, 1872.

It is very plain that the specification of the original patent, No. 95,465, states the invention to be a process for preparing alizarine, not as a new substance prepared for the first time, but as the substance already known as alizarine, to be prepared, however, by the new process, which process is to be the subject of

the patent, and is the process of preparing the known product alizarine, from anthracine. The specification states that "the alizarine" is precipitated, that "the yellow flocks of alizarine" are obtained, and that "the alizarine" is in such a form that it can be employed in the same manner as the different preparations from madder; and the claim is for the "process for the production of alizarine." The provisional specification deposited in England, December 18th, 1868, states that "yellow flocks of alizarine are precipitated," and that "the alizarine prepared in this artificial way is perfectly pure;" and the full specification, filed in England, June 17th, 1869, claims "the artificial production of alizarine." No other conclusion can be reached than that Graebe and Liebermann, in the specification of No. 95,465, intended by "alizarine" the chemical substance known by the formula C_{14} H_8 O_4, and thought that was what their process produced. There is no suggestion of anthrapurpurine or isopurpurine, or of any process for producing them. Their published statements show that it was the synthesis of the alizarine of madder which they were making, the specification of No. 95,465 shows that and nothing else, and it is not contended that the alizarine of madder contains anthrapurpurine or isopurpurine. It is very clear, from the testimony, that it is to anthrapurpurine or isopurpurine that the artificial alizarine sold by the defendants owes its efficiency as a dye-stuff, and its practical success in the market, and that such product is produced by the bisulpho-acid process of Perkin; and it is not satisfactorily shown that the monosulpho-acid process of Caro or the bromine process of No. 4,321 will either of them practically produce that product.

Inasmuch as the defendants' article is produced from anthracine or its derivatives by some method, and is a dye-stuff called artificial alizarine, it is contended that the sale of it infringes No. 4,321. The articles in market, called artificial alizarine, at the present day, are substances all of which are made from anthracine, but they vary all the way from nearly pure alizarine, made by the monosulpho-acid process, through the products of the bisulpho-acid process, which contain combinations of alizarine and anthrapurpurine, up to an article of pure

purpurine, free from alizarine. All of these are used as dyestuffs, according to the shade of color and other qualities desired. The specific article put in evidence in this case as an infringement contains about 60 per cent. of anthrapurpurine. It is claimed by the plaintiff to be the artificial alizarine described in No. 4,321, and to be physically, chemically, and in coloring properties similar to that. But what that is is not defined in No. 4,321, except that it is the product of the process described in No. 4,321. Therefore, unless it is shown that the process of No. 4,321 was followed to produce the defendants' article, or unless it is shown that that article could not be produced by any other process, the defendants' article cannot be identified as the product of the process of No. 4,321. Nothing of the kind is shown. On the other hand, the defendants' article is made abroad and by a process different from that of No. 4,321. It, therefore, cannot be the product of that process. If the words of the claim "by any other method which will produce a like result" mean any other method which will produce the only product mentioned in the description, namely, alizarine, as then understood, having the formula C_{14} H_8 O_4, the defendants' article is not that product, for it contains other dyeing ingredients which the alizarine of the patent does not contain. If the words of the claim are to be construed to cover all artificial alizarine, whatever its ingredients, produced from anthracine or its derivatives by methods invented since Graebe and Liebermann invented the bromine process, we then have a patent for a product or composition of matter, which gives no information as to how it is to be identified. Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be held to infringe the patent which is not made by that process.

The Circuit Court found as a fact that the defendants' article was produced by the process described in No. 154,536. But it regarded that process as the same process chemically as the process of No. 4,321, on the view that the bromine used in the latter was merely a vehicle, and in the former sulphuric acid

was substituted as a vehicle, and, though superior, performed the same office in the same way; and so, as it regarded the two processes as the same, it held the two products to be the same. We consider it, however, to be established that the defendants' article is not made by the process of No. 4,321, but is made by the bisulpho-acid process of Perkin, which yields anthrapurpurine, and which, while it may involve the process of No. 154,536, goes beyond it. The bisulpho-acid process puts in two atoms of anhydrous sulphuric acid instead of one, and additional oxygen is carried in, and anthrapurpurine is produced, the formula of which is $C_{14}H_8O_5$. Aside from this, it is shown that the dyeing qualities of the defendants' article depend on the anthrapurpurine or isopurpurine it contains, and not on the alizarine. As the only alizarine mentioned in No. 95,465, or in No. 4,321, is alizarine the formula of which is $C_{14}H_8O_4$, the alizarine of madder, the process described in those patents, to be a sufficient support for a valid patent, as being properly described, must be a process which will produce that article and no other; and No. 4,321, to be valid as a patent for a product, must be a patent which will produce, by the process it describes, that article and no other. Unless that process will practically produce the defendants' article, No. 4,321 is not infringed; and it is not established, by the evidence, that it will.

There is another view of the case. According to the description in No. 95,465, and in No. 4,321, and the evidence, the article produced by the process described was the alizarine of madder, having the chemical formula $C_{14}H_8O_4$. It was an old article. While a new process for producing it was patentable, the product itself could not be patented, even though it was a product made artificially for the first time, in contradistinction to being eliminated from the madder root. Calling it artificial alizarine did not make it a new composition of matter, and patentable as such, by reason of its having been prepared artificially for the first time from anthracine, if it was set forth as alizarine, a well known substance. *The Wood Paper Patent*, 23 How. 566, 593. There was, therefore, no foundation for reissue No. 4,321, for the product, because, on

the description given, no patent for the product could have been taken out originally.

Still further, the claim of No. 4,321 is not a claim merely for the product of the process described in it, but is a claim for anything which may be called artificial alizarine, produced from anthracine or its derivatives, by either of the methods described, or by any other method, equivalent or not, which will produce anything called artificial alizarine. The scope of such a claim is seen in this suit. An article is sought to be covered by the reissue, which it is demonstrated Graebe and Liebermann never made by their bromine process, which they knew that process would not produce, which they recognized as produced first by some one else by a different process, and which has become the subject of a large industry abroad and an extensive use in this country, through discoveries made, as they acknowledge, since their bromine process was invented. After those discoveries were made, after it was seen that the bisulpho-acid process would produce desirable dye-stuffs, and could be worked practically and profitably to that end, it was sought to control the market for the product in the United States, by obtaining this reissue No. 4,321.

We have not deemed it necessary to consider more particularly the question whether the reissued patent, No. 4,321, is or is not for a different invention from that described in the original patent. It certainly is, unless the product claimed in the reissue is precisely that product, and no other, which the process described in the original patent produces. There can be no better evidence, as against the appellee, of what that product is, than the declarations of the original patent itself, and of the patentees elsewhere, as already shown. Nor have we deemed it necessary to inquire or determine whether, even if the product claimed in the reissue were the same as that which the process described in the original patent produces, it could have been made the subject of a reissued patent at the time when, and under the circumstances in which, this reissue was made. It is so clear that the defendants are not shown to have infringed, that we have not deemed it necessary to consider other questions any further.

Statement of Facts.

It results, from these considerations, that, if the claim of No. 4,321 is to be construed so broadly as to cover the defendants' article, it is wider in its scope than the original actual invention of Graebe and Liebermann, and wider than anything indicated in the specification of the original patent; and that, if it is to be construed so as to cover only the product which the process described in it will produce, it is not shown that the defendants' article is that product or can be practically produced by that process. In either view,

The decree of the Circuit Court must be reversed, and the case be remanded to that court, with direction to dismiss the bill of complaint.

ARMOUR *v.* HAHN.

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

Argued April 3d, 1884.—Decided April 14th, 1884.

Master and Servant.

The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants.

Carpenters, under charge of a foreman, and bricklayers, all employed by the owner through his superintendent, were engaged in the erection of a building, with a cornice supported by sticks of timber passing through the wall (which was thirteen inches thick) and projecting sixteen inches, and to be bricked up at the sides and ultimately over the top of the timbers. When the wall had been bricked up on a level with, but not yet over, the timbers, the foreman of the carpenters directed two of them to take a joist for the edge of the cornice, and to push it out to the ends of the projecting timbers. In so arranging the joist, a carpenter stepped on the projecting part of one of the timbers, which tipped over, whereby he fell and was hurt. *Held*, That the owner of the building was not liable to him for the injury.

This is an action brought by Hahn against Armour and others (of whom Armour alone was served with process), to recover damages for injuries suffered by the plaintiff while

employed as a carpenter in the erection of a building for the defendants.

The petition alleged that the plaintiff was and long had been in the defendant's employ as a carpenter, and while at work, together with others, in building an addition to a large packing-house owned and occupied by the defendants, was directed by them and their agents to take a joist and place it on the outer ends of sticks of timber inserted in and projecting from the wall of the new building; that while arranging and adjusting the joist, in accordance with the instructions of the defendants and their agents, it became necessary for him to step out upon one of the projecting timbers; that, immediately upon placing one foot upon the projecting timber, and while stooping over to arrange the joist, and without any notice, warning, or reason to believe that the projecting timber was insecure or unsafe, and without any fault or neglect on his part, the timber gave way, precipitating him from the top of the wall thirty-four feet to the platform beneath; that the defendants, well knowing the danger, negligently and wrongfully directed him to go out upon the projecting timber to arrange the joist, without advising him of the danger; and that by reason of the negligence of the defendants, in not having secured the projecting timber to the wall, and in not notifying him of its dangerous condition, he suffered great bodily injuries.

The testimony introduced for the plaintiff at the trial was in substance as follows: The plaintiff was engaged with twelve or thirteen other carpenters, all paid by the day, in the erection of the new building. Bricklayers and other laborers were also at work upon it. The plaintiff was employed and paid by one Alcutt, the superintendent of the packing-house. One Fitzgerald was foreman of the carpenters, but not of the other workmen. The plaintiff, who had been working on one end of the roof, went to the other end, and was there set to work by the foreman upon the cornice. The cornice was made by inserting in the brick wall (which was thirteen inches thick) at intervals of eight or nine feet and at right angles with it, sticks of timber projecting about sixteen inches from the wall; and by placing on the outer ends of those timbers, and parallel to

the wall, joists sixteen or eighteen feet long and two and a half inches wide. The plaintiff and another of the carpenters were directed by their foreman to take a joist and put it out in its proper place on the projecting timbers. They took it and laid it upon those timbers. The foreman told them to push the joist out to the end of the timbers, but did not tell them to go out. Each man pushed out his end of the joist. The plaintiff, in order to reach over and place the joist, sat down with both feet on one of the projecting timbers, one foot on the part of it inside the wall, and the other foot on the part outside, when the timber tipped over, and caused the plaintiff to fall some thirty-four feet to the platform below, and to suffer the injuries sued for. The wall had just been bricked up on each side of this timber to a level with its upper surface, but no bricks had been laid over it. The foreman stood eight or ten feet further in; there was a space for the bricklayers to build up the wall, and they were working upon it. The plaintiff testified that he helped to put some of the sticks of timber in the old wall, and spiked them to the girders; that he did not know who put this stick of timber in the new wall; that it appeared to be secure; that if it had been fastened he could have stepped out upon it without danger; that if he had kept both feet inside the wall, he could have pushed the joist out, but could not have seen whether it was in the proper place; that he could see that the timber was not spiked, but could not see whether it was fastened; that it could not be spiked then; and that "the usual way of doing it was putting this timber in, and leaving it that way temporarily, and afterwards building the wall up over it." There was also evidence of the extent of the plaintiff's injuries.

At the close of the evidence for the plaintiff, a demurrer to that evidence, upon the ground that it proved no cause of action, was filed by the defendant, in accordance with the following provision of the statutes of Kansas:

"The party on whom rests the burthen of the issues must first produce his evidence; after he has closed his evidence, the adverse party may interpose and file a demurrer thereto, upon the

ground that no cause of action or defence is proved. If the court shall sustain the demurrer, such judgment shall be rendered for the party demurring, as the state of the pleadings, or the proof, shall demand; if the demurrer be overruled, the adverse party will then produce his evidence." Laws of Kansas of 1872, ch. 162, § 1, cl. 3.

The demurrer was argued and submitted to the court, and overruled. The defendant excepted to the ruling. No further evidence was introduced by either party at the trial. The case was submitted, under instructions excepted to by the defendant, and which it is unnecessary to state, to the jury, who returned a verdict for the plaintiff in the sum of $7,500. Judgment was rendered on the verdict, and the defendant sued out this writ of error.

Mr. J. Brumback (with whom was *Mr. Wallace Pratt*) for plaintiff in error.

Mr. Thomas P. Fenlon (with whom was *Mr. Byron Sherry*) for defendant in error.—I. A demurrer to evidence, in Kansas, is equivalent to an instruction that there is no evidence on which plaintiff can recover. This court has repeatedly said it should not be given if there is any evidence to support an action. *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Parks* v. *Ross*, 11 How. 362; *Spring Company* v. *Edgar*, 99 U. S. 645; *Pence* v. *Langdon*, 99 U. S. 578; *Moulor* v. *Insurance Co.*, 101 U. S. 708.—II. A master when employing a servant is bound to provide him with a safe working place and machinery. *Coombs* v. *New Bedford Card Co.*, 102 Mass. 572; *Cayzer* v. *Taylor*, 10 Gray, 274; *Seaver* v. *Boston & Maine Railroad Co.*, 14 Gray, 466; *Snow* v. *Housatonic Railroad Co.*, 8 Allen, 441; *Gilman* v. *Eastern Railroad Corporation*, 10 Allen, 233. —III. If the negligence of the master combines with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master. *Crutchfield* v. *Richmond & Danville Railroad Co.*, 76 N. C. 320; *Booth* v. *Boston & Albany Railroad Co.*, 73 N. Y. 38; *Boyce* v. *Fitzpatrick*, 80 Ind. 526; *Grand Trunk Railway of*

Canada v. *Cummings*, 106 U. S. 700.—IV. It is the duty of an employer, inviting employés to use his structure and machinery, to use proper care and diligence to make them fit for use. *Railroad Company* v. *Fort*, 17 Wall. 553; *Sullivan* v. *India Manufacturing Co.*, 113 Mass. 396; *O'Connor* v. *Adams*, 120 Mass. 427; *Hobbitt* v. *Railway Co.*, 4 Exch. 253; *Mellors* v. *Shaw*, 1 B. & S. 437; *Lawler* v. *Androscoggin Railroad*, 62 Me. 463; *Fifield* v. *Northern Railroad*, 42 N. H. 225; *Hard* v. *Vermont & Canada Railroad*, 32 Vt. 473; *Snow* v. *Housatonic Railroad*, 8 Allen, 441; *Northcoate* v. *Bachelder*, 111 Mass. 322; *Ladd* v. *New Bedford Railroad*, 119 Mass. 412; *Sword* v. *Edgar*, 59 N. Y. 28; *Blank* v. *N. Y. C. Railroad Co.*, 60 N. Y. 607; *Patterson* v. *Pittsburg & Cornellsville Railroad*, 76 Penn. St. 389; *Mad River, &c., Railroad* v. *Barber*, 5 Ohio St. 541; *Chicago & N. W. R. Co.* v. *Jackson*, 55 Ill. 492; *Chicago B. & Q. R. Co.* v. *Gregory*, 58 Ill. 272; *Chicago & N. W. R. Co.* v. *Ward*, 61 Ill. 131; *Toledo, Peoria & Warsaw Railroad* v. *Conroy*, 61 Ill. 162; *Chicago & Alton Railroad* v. *Sullivan*, 63 Ill. 293; *Toledo Wabash & Western Railroad* v. *Fredericks*, 71 Ill. 294; *Indianapolis, &c., Railroad* v. *Flanigan*, 77 Ill. 365; *Columbus & Indianapolis Railroad* v. *Arnold*, 31 Ind. 175; *Muldowney* v. *Illinois Central Railroad Co.*, 36 Iowa, 463; *Brabbits* v. *Chicago & N. W. R. Co.*, 38 Wis. 289; *Wedgwood* v. *Chicago & N. W. R. Co.*, 41 Wis. 478; *LeClair* v. *St. Paul & Pacific Railroad*, 20 Minn. 9; *Gibson* v. *Pacific Railroad*, 46 Mo. 163; *Keegan* v. *Kavanaugh*, 62 Mo. 230; *Whalen* v. *Centenary Church*, 62 Mo. 326; *Mobile & Ohio Railroad* v. *Thomas*, 42 Ala. 672; *McGlynn* v. *Brodie*, 31 Cal. 376; *Malone* v. *Hanley*, 46 Cal. 409. When a master employs a servant in a work of a dangerous character he is bound to take all reasonable precaution for the safety of the workman. It is not enough for him to employ competent workmen to construct his apparatus. If an expert he must inspect the work; and if not he must employ a competent person to do it. *Toledo Railroad* v. *Moore*, 77 Ill. 217. Agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those engaged in operating. They are

charged with the master's duty to the servant. *Ford* v. *Fitchburg Railroad Co.*, 110 Mass. 240.

Mr. Justice Gray delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

This court is of opinion that the Circuit Court erred in not rendering judgment for the defendant on his demurrer to the plaintiff's evidence.

There was no evidence tending to prove any negligence on the part of the firm of which the defendant was a member, or of their superintendent, or of the foreman of the gang of carpenters. The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows. The plaintiff was not a minor, employed in work which was strange to him, but was a man of full age, engaged in ordinary work of his trade as a carpenter. The evidence tended to show that he and one of his comrades were directed by their foreman to push the joist out on the projecting sticks of timber, not that he told them to go out themselves. The projecting timber upon which the plaintiff placed his foot was inserted in a wall which was in the course of being built, and which at the time had been bricked up only so far as to be on a level with the upper surface of the timber. The usual course, as the plaintiff himself testified, was to put the timber in, and leave it in that way temporarily, and afterwards build the wall up over it. It is not pretended that the stick of timber was in itself unsound or unsuitable for its purpose. If it was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building; or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object, the erection of the building, and therefore,

within the strictest limits of the rule of law upon the subject, fellow servants, one of whom cannot maintain an action for injuries caused by the negligence of another against their common master. *Hough* v. *Railway Co.*, 100 U. S. 213; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478.

The judgment of the Circuit Court must therefore be reversed, and the case remanded for further proceedings in conformity with this opinion.

Judgment reversed.

TURNER & SEYMOUR MANUFACTURING COMPANY *v.* DOVER STAMPING COMPANY.

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

Submitted March 31st, 1884.—Decided April 14th, 1884.

Patent.

When an inventor takes out a patent founded on a claim which does not include his whole invention, and rests for twelve years, and then surrenders his patent and takes a reissue with a broader claim, under circumstances which warrant the conclusion that the act is caused by successful competition of a rival, he will be held to have dedicated to the public so much of his invention as was not included in the original claim. *Miller* v. *Brass Company*, 104 U. S. 350, cited and followed.

This was a bill in equity brought by the appellees to enjoin the appellants from infringing their rights as assignees of a patent for an improvement in egg-beaters. The decree below granted the injunction and determined the amount of profits. From this decree the defendant below appealed. The invention and claims are set forth in the opinion of the court.

Mr. John S. Beach and *Mr. John K. Beach* for appellant.

Mr. E. Merwin and *Mr. T. W. Clarke* for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the appellees as assignees of

Timothy Earle, for an injunction and an account, against the appellants, as infringers of reissued letters patent No. 6,542, for an improvement in egg-beaters, dated July 13th, 1875, for which the application was filed June 8th, 1875, the original No. 39,134, dated July 7th, 1863.

The bill was filed July 14th, 1877, an interlocutory decree declaring the infringement and granting a perpetual injunction was pronounced July 9th, 1879, and a final decree in favor of the complainants confirming the master's report of the amount of profits made by the defendants was entered April 26th, 1881. From this decree the present appeal is prosecuted.

The following is a copy of the reissued letters patent, in which the parts in italics are not in the original, and the parts enclosed in [ ] are in the original, and excluded from the reissue:

"To all whom it may concern:

"Be it known that I, Timothy Earle, of Lincoln (*formerly Smithfield*), in the County of Providence and State of Rhode Island, have invented [a] *certain* new and useful improvements in egg-beaters; and I do hereby declare that the following specification, taken in connection with the drawing, making a part of the same, is a full, clear, and exact description thereof.

"Figure 1 is a view of the beater. Fig. 2 is another view of the same, with the rack which works it shown. Fig. 3 is a top view of the same.

"Various devices have been employed for the purpose of beating eggs more expeditiously than by the familiar hand process. One of these devices consists of two wire frames, one within the other, and made to revolve in opposite directions; another consists of a propeller-blade inside of a wire frame, the frame and blades being made to revolve in opposite directions; and still another consists of a propeller-blade, which is made to rotate, while a pair of beaters have at the same time a reciprocating motion.

"All these machines, and all others with which I am acquainted, possess the common fault that the beaters, whether of wire or of the form of propeller-blades, do not cut the yolk and white of the egg, but literally beat them.

"Now, as the albumen of an egg consists of a peculiar thick,

glairy substance, it can be worked more effectually with a cutting instrument than with one which has a blunt edge. In fact, so well is this understood that housewives [universally] *commonly* make use of the blade of a knife for the purpose.

"My invention is designed to obviate the difficulty referred to; and consists in the use of *a revolving* frame, A, *formed of thin strips of metal of the form shown, and* mounted upon a spindle, B, around which it can freely rotate; *and also of* an outer *fixed* frame, C, of the same general form as the inner one, but large enough to permit the inner frame to rotate within it. *The outer frame* is attached to the spindle B, and *with it* furnishes a support *or frame for the operative parts of the machine* [for it.] The inner frame is *further* provided with a series of cutters *or blades* [a a a a] *a a, etc.*, arranged in any manner suitable for cutting *through* the fluid in many different [planes] *places.* These cutters *or blades* are simply pieces of sheet-tin or other suitable metal of the width of the inner frame, and *are attached to the same by their ends, as is shown, and they are all* so placed that their edges shall cut the material to be agitated when the frame A is rotated. *The blades which form the outer fixed frame C are also placed in a similar position, and when the machine is in operation, cut through the current of material which is carried past them by the revolving frame, and thus aid in the operation in a similar manner.* Upon the top of the frame A is attached a tooth wheel, D, through which, by means of the rack, E, Fig. 3, worked by the hand, a rotary motion is given *to the inner frame A* in alternate directions. *The frame C, at its upper end, is so formed and arranged in relation to the pinion D as to leave the proper space between them, upon either side, to receive the rack, E, and serve as a guide or bearing to keep the rack in gear with the pinion; and H is a circular flange attached to the lower side of the pinion to prevent the rack from falling down.*

"*My invention also relates to the method of holding the machine in position while it is used. In the previous machines for this purpose the machine has been generally attached to or supported upon and in connection with the vessel which contained the materials to be operated upon, thus requiring a specific kind of vessel for the purpose, which, in effect, formed part of the machine; or the frame of the machine was fixed to some stationary object, with the revolving beater or beaters projecting downward below the ma-*

chine into the vessel which contained the matters to be treated, the vessel being held below the machine, and entirely detached from it. But by my improvement the machine becomes a separate detached implement, which can be used in any vessel, and without any mechanical fastening of the machine to the vessel or to any other object. This part of my invention, therefore, consists in providing the bottom of the fixed frame C of the machine with a foot, F, or other suitable support, to rest upon the bottom of the vessel to support the lower part of the machine and raise the revolving-beater frame A above the fixed frame C sufficiently to permit it to revolve freely; and also providing the top of the machine with a handle, G, by which the machine can be held upright upon the bottom of the vessel by one hand, while the beater-frame is operated by the other, as is described.

"When the machine is to be used it is placed with its foot F resting upon the bottom of the vessel containing the broken eggs. The left hand bears upon the handle G and holds the machine in position. The rack E, held by the handle in the right hand, is engaged with the pinion D, and the proper motion imparted to the frame A.

"It is obvious that a continuous rotary motion may be easily imparted to the frame A by means of a crank and suitable gearing, and the beneficial effect of the *blades or* cutters [a a a] *A, a, etc.*, would be obtained as well; but I prefer the method described of communicating motion to frame A, for the reason that the machine is more easily cleaned and is more convenient for domestic use.

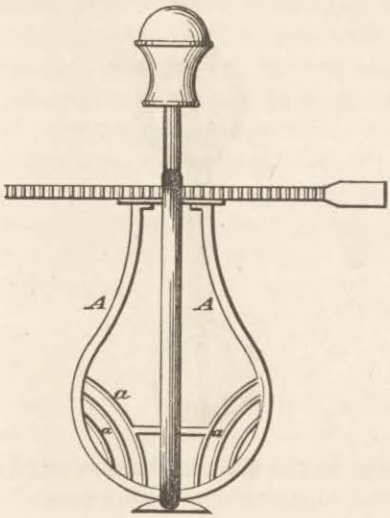
"[What I claim as my invention and desire to secure by letters patent is the use of a series of cutting edges a a a a when attached to a frame A, which is capable of being rotated substantially as described for the purpose specified.]

"*What I claim is:*

"1. *The revolving beater-frame formed of thin plain blades or cutters, arranged to cut edgewise through the material by their rotation, substantially as described.*

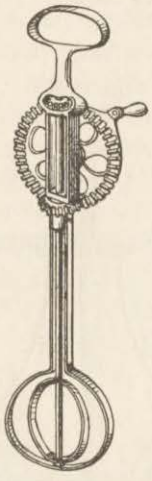
"2. *The combination of the fixed frame, which contains and supports the operative machinery, provided with a foot or support at the bottom, the handle at the top, and suitable mechanism for rotating the beater, substantially as described.*"

The following is a copy of Fig. 2 annexed to specifications and sufficiently illustrates them:



The cutting portion of the appellant's beater consists of an outer frame and inner frame, each of which is made to revolve around a central spindle by means of a cog-wheel and pinion. Each frame is composed of two curved pieces of tin joined together, or of one piece joined at its two ends so as to make nearly a circle; these pieces are thin, plain, flat pieces of tin, and are so arranged as to cut edgewise through the material by their rotation. In neither the inner nor the outer frame are there any additional blades or cutters like the blades a, a, a, a.

It is represented in the following drawing:



The controversy in the Circuit Court seemed to be mainly on the question of infringement; and that turned on the construction to be given to the first claim of the reissued patent, no point being made as to the second claim. It was insisted by the defendants below that their device was not an infringement of the claim as contained in the original patent, and that a fair construction of the first claim in the reissued patent would limit it substantially to the same thing. In deciding the point, the learned judge, holding the Circuit Court, said:

"The question of infringement of the first claim of the reissued patent depends upon the construction of the claim. If it should be properly limited so as to be confined to the frame with the cutters or blades, which are described in the specification and in the drawings, to wit: a frame with the cutters, a, a, a, a, then there is no infringement; but if the claim is to be construed so as to include a beater frame formed of thin, plain blades, then the invention which is recited in the first claim is found in the defendants' egg-beater.

"The devices which were in use prior to the invention of the plaintiffs' assignor were composed of round wire, which, by their rotation, broke rather than cut the material. The part of

the invention which is the subject of the first claim consisted in such an introduction of the knife-blade of the housewife and the mechanism for operating the blade into an egg-beater, that the egg could be rapidly cut, and the egg matter could be aerated, and be beaten into froth. The original, and also the reissued specification, dwelt upon the particular form of the cutters of the inner frame, and the original claim limited the invention to the cutters a, a, &c., but the scope of the invention was larger, and the principle was embodied in any revolving frame composed of thin and plain, as distinguished from corrugated, cutting surfaces, so arranged as when rotated to cut edgewise through the material, provided the frame was constructed and arranged substantially in the manner described in the specification. It is not claimed that the reissue is void, upon the ground that it is for a different invention from that shown or indicated in the original specification, but such a construction is attempted to be given to the reissued claim, as would limit it to the precise language of the surrendered patent. The patent was surrendered because the grant was not co-extensive with the invention, and it would be an unnatural construction of the reissued patent, which should cramp the claim within the limitations which had been discarded. In my opinion, the natural meaning of the words which were used is to be permitted, and giving to the claim such a freedom of construction, the defendants' device is an infringement."

We are quite satisfied that the difference between the original claim and the first claim of the reissued patent, is substantial and not verbal. The former is necessarily limited to the particular device described as a frame, with a series of cutting edges attached, in the mode designated, and capable of rotation. The latter embraces every revolving beater-frame, formed of thin, plain blades or cutters, arranged to cut edgewise through the material by their rotation. It is immaterial whether or not the latter might have been covered by the language of the specification, as included in the invention. We are dealing with the claims, and nothing else. And it cannot be successfully contended that the original claim implicitly contained all that is expressed in the claim of the reissued

patent. The original claim has been made broader by the reissue, so as to embrace the device used by the appellants, which was not previously an infringement.

And that raises the question, whether, under the circumstances disclosed by this record, the reissue is valid.

To avoid this question, it is, indeed, contended now by the appellees, that the two claims under examination are identical; that their apparent differences are merely literal; that their meaning is the same; and this conclusion is thought to be reached, not by restraining the reissue to the language of the original, but by a process of construction, by the use of supposed implications, to expand the words of the original so as to cover everything embraced in the reissue; the only alternative, indeed, that could be adopted, to escape the inconsistency of maintaining that claims, which were diverse upon the question of infringement, were identical upon the question of the validity of the patent.

But, as already intimated, this position is not tenable. There is nothing in the language or recitals of the original patent, nor are there any just and reasonable inferences of which they are susceptible, which justify a construction of the claim that would embrace any device other than that described in the specifications and represented in the drawings; much less to include every mechanical arrangement which embodies a cutting edge with a revolving frame, to cut instead of break the egg material upon which it is meant to operate.

The question then recurs, what are the circumstances which affect the validity of the reissue, and how do they affect it?

They are few, but decisive. The original patent was issued July 7th, 1863. Eleven years after, in 1874, the competition of the appellants' device became apparent and was felt. In 1875, application was made for the reissue; the original patent was surrendered and the reissued patent granted, July 13th, 1875. Here is a delay of nearly twelve years, without the offer of an explanation or excuse, without even the suggestion of inadvertence or mistake in the original application. The only inference that can be drawn is, that the discovery and experience of successful competition in 1874 suggested first and led

to the discovery, that the original claim did not cover everything that might have been embraced, and was not broad enough to maintain the monopoly desired but not secured.

This brings the case directly within the principle of *Miller* v. *Brass Company*, 104 U. S. 350, and the numerous others which have followed it, including that of *Clements* v. *Odorless Apparatus Company*, 109 U. S. 641, all of which have been decided since the interlocutory decree in this case was pronounced.

For these reasons,

The decree of the Circuit Court is reversed, and the cause is remanded, with directions to dismiss the bill, and it is so ordered.

IRVINE *v.* DUNHAM.

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

Argued March 31st, April 1st, 1884.—Decided April 14th, 1884.

Trust.

On the facts in this case the court finds that the deed in controversy was not a mere gratuity and left in escrow; but that it was delivered, and imposed upon the appellant a trust in favor of the grantor of the appellee to which the appellee has succeeded.

When a trustee denies the trust and refuses to perform it a court of equity will appoint a new trustee in his place, and the old trustee will not be entitled to retain the property under cover of having an account as trustee, before paying over the net proceeds.

The bill of complaint in this case was filed by Dunham, the appellee, against Irvine, the appellant. It averred that on March 28th, 1874, Irvine and one Richard H. Sinton were the joint and equal owners of one undivided half of the Morgan Mine in Calaveras County, in the State of California; that the legal title to such undivided half was vested in Irvine, but was held by him in trust for himself and Sinton equally, share and share alike; that the undivided half of the mine had been ac-

quired by Irvine and Sinton by their common efforts and at their common expense, and pursuant to an agreement between them to acquire the title thereto and sell and otherwise dispose of the same, and share equally the profits and losses. The other undivided half of the mine was, so the bill alleged, held by Irvine in trust for certain other persons.

The bill further alleged, that on the said March 28th, 1874, Irvine executed to Sinton an instrument and declaration of trust in writing of that date, of which the following is a copy:

"This is to declare that I, William Irvine, of San Francisco, California, am the owner of one undivided half of that certain gold-bearing quartz lode or mine situated on Carson Hill, Calaveras County, California, and known familiarly as the 'Morgan Mine,' and that I hold said half interest equally for myself and R. H. Sinton, also of San Francisco, share and share alike; and I hereby promise and bind myself, my heirs and assigns, whenever said mine shall be sold or otherwise disposed of, to account fully and truly to said Sinton, his heirs or assigns, for the one-half of all net proceeds of such sale or other disposition of said half interest.

"All necessary expenses, including counsel fees heretofore incurred, or that may hereafter be incurred, in and about the property, up to the time of such sale or other disposition thereof, to be first paid before division of such proceeds.

"Witness my hand and seal, this 28th day of March, A.D. 1874.

"WILLIAM IRVINE. [Seal.]

"Witnesses:

"T. K. WILSON.

"H. J. TILDEN."

The bill also averred, that on September 8th, 1874, Sinton assigned and conveyed to one George P. Ihrie all his right and title in the mine, and declaration of trust, and everything coming or that might come to him by virtue thereof, that on March 17th, 1875, Irvine, and the owners of the other undivided half of the mine, organized under the laws of California a corporate body called the Morgan Mining Company, and that on April 9th following, Irvine and the other persons having an interest in the mine, except Ihrie, sold and conveyed

the same to the corporation, and received in consideration thereof shares of stock in the company, in proportion to their interest in the property conveyed, Irvine receiving ten thousand shares for the undivided half held by him for himself in trust and for Ihrie, as the grantee of Sinton, and that Ihrie then and there became entitled to the one-half of the ten thousand shares.

It was further alleged, that on June 29th, 1875, Ihrie conveyed all his title and interest in the mine and in the five thousand shares of the stock of the Morgan Mining Company to Dunham, the complainant, for whose use and benefit Irvine held the shares subject to the payment of the expenses, &c., mentioned in the declaration of trust.

The bill further alleged, that after the conveyance by Ihrie of his interest in the stock of the Morgan Mining Company to complainant, the latter applied to Irvine for an account of the necessary expenses and fees incurred by him in and about the mine up to the conveyance thereof to the company, and offered to pay him one-half thereof, and demanded a transfer to himself of the shares of stock in the company held in trust for him by Irvine, but Irvine refused to render any account, denied the complainant's right to the stock or any part of it, denied that he held any stock in trust for complainant, and claimed all of the ten thousand shares as his own, and denied that he was ever trustee in the premises for Sinton, or Ihrie, or the complainant.

The bill further averred that the complainant was ready, and that he then offered to pay into court, the one-half of all the expenses and fees paid by Irvine, on account of the mine, up to the conveyance thereof to the Morgan Mining Company, and such further sums as the court might deem equitable and just; that Irvine had it in his power to transfer the stock held in trust by him for the complainant to a *bona fide* purchaser, for value, without notice, and that he would do so unless restrained by injunction.

The prayer of the bill was that Irvine be decreed to hold in trust for the complainant said five thousand shares of the capital stock; that the court would declare what sum was

justly due to Irvine from the complainant on account of the necessary expenses, &c., incurred by him in and about the mine, and that upon the payment of the same by complainant to Irvine the latter might be decreed to assign and transfer said five thousand shares to him.

The answer of Irvine denied that Sinton was ever the owner of an undivided fourth of said mine, or of any share or interest therein or any part thereof; denied that Irvine ever held the legal title to the mine or to any part or share thereof, in trust for himself and Sinton; denied that the undivided half thereof was acquired by himself and Sinton by their common efforts and at their common expense for their equal benefit, but averred that he acquired said undivided half for his own sole and exclusive use and benefit, and that Sinton contributed neither effort nor expense towards its acquisition.

The answer further averred that Irvine, on March 28th, 1874, being about to leave California for a trip to the Atlantic States, to be absent for several months, signed the declaration of trust as a mere gratuity to Sinton, upon the express agreement between him and Sinton that the same should be left in the custody of T. K. Wilson, who was Irvine's attorney, and that it was not to take effect except in case of the death of Irvine upon his proposed journey, and in case he should return to California that the instrument should be delivered up to him; that the instrument was never in any manner delivered to Sinton, and that Irvine, after so signing it, did perform his journey and returned therefrom to the State of California in the month of August, 1874. The answer of Irvine was put at issue by general replication.

Upon final hearing the Circuit Court decreed that Irvine hold as trustee, for the use and benefit of the complainant, the one-half of 9,997 shares of the capital stock of the Morgan Mining Company, the shares being the gross proceeds received by Irvine as the consideration of a conveyance and disposition by him to the Morgan Mining Company of one-half of the mining property, the half of the stocks so held by Irvine in trust for the complainant being subject to a claim of Irvine for one-half of all the necessary expenses referred to in the decla-

ration of trust, and of assessments on said stock made by the Morgan Mining Company and paid by Irvine. And the court confirmed the report of the master to whom the case had been referred, finding that the one-half of the expenses and assessments paid by Irvine was $14,221.76; and decreed that upon the payment of that sum by the complainant to Irvine, the latter should assign and transfer to complainant 4,998½ shares of the capital stock of the Morgan Mining Company. From this decree Irvine appealed.

Mr. Geo. W. Towle, Jr., and *Mr. James M. Johnston* for appellant.

Mr. Shellabarger for appellee.

Mr. Justice Woods delivered the opinion of the court. He stated the facts in the foregoing language and continued:

It is not disputed that the appellee has succeeded to all the rights of Sinton and Ihrie, if they had any, set forth in the bill of complaint. The question of fact at issue between the parties is, whether or not before the conveyance by the appellant to the Morgan Mining Company of the Morgan Mine, he held the title to an undivided fourth of the mine in trust for Sinton.

The declaration of trust signed by Irvine on March 28th, 1874, unless impeached, is evidence which settles this question conclusively in favor of the appellee. The appellant, however, contends, as appears from his answer and testimony, that his promise to hold one-fourth of the mine in trust for the complainant was a mere gratuity; that Sinton never paid any money or rendered any services in obtaining title to the mine; that the declaration of trust was never delivered, and that it was to take effect and bind him in case he never returned from proposed journey. The burden is on the appellant to make this appear.

It is shown by the record that in December, 1869, or January, 1870, the appellant purchased at a tax sale the title to the Morgan mine, that he received a deed therefor dated June 29th, 1870, from the sheriff, and was put in possession of the property by a writ of assistance. Prior to the purchase at the

tax sale James G. Fair and A. A. Selover had been in possession of the mine; they claimed that Irvine had purchased the mine at the tax sale for them. Irvine demanded a large sum for his services, and after some delay gave them notice that if they did not accede to his demand he would hold the title for himself. Fair and Selover never paid the sum demanded by appellant, or any part of it, and appear to have abandoned all claim to the property. About this time, Henry D. Bacon and his associates, seven in number, were claiming title to the mine. On April 14th, 1873, they compromised their controversy with the appellant by an agreement that he should apply for a patent for the property in his own name, and, having obtained it, should sell the property and divide its proceeds, retaining one-half himself and turning over the other half to Bacon and his associates. The appellant accordingly applied for and obtained a patent in his own name for the property. When the Morgan Mining Company was formed, and the mine was conveyed to it, Bacon and his associates got half the stock in consideration of their interest in the mine held in trust for them by the appellant, who received the other half of the stock.

Without going into a discussion of the evidence, we state our opinion to be, after a careful examination of the record, that it is established by the testimony that Sinton, who was an experienced dealer in real property, contributed money and aided the appellant by his advice and co-operation in obtaining the tax title to the Morgan mine, and afterwards in getting the patent therefor from the United States, and in compromising the controversy between the appellant and Bacon and his associates in regard to the ownership of the mine; and that the money and services were contributed by Sinton on the agreement and understanding that he and the appellant were to share equally in the results of the enterprise. The fact that Sinton furnished the appellant money on account of the mine is found by the master to whom the case was referred, and no exception was taken to that part of his report. It is established that the appellant, after the compromise with Bacon and others, agreed to hold the title to the undivided half of the mine in trust for himself and Sinton, share and share alike,

subject to the payment of the proportion of such undivided half in the costs and expenses incurred in securing title to and managing the property. The declaration signed by the appellant on March 28th, 1874, was simply an admission in writing by him of the contract between him and the appellee in relation to their interest in the Morgan mine.

The contention of the appellant that the declaration of trust was a mere gratuity is not sustained by the proof. On the contrary, independently of the declaration, the testimony in the record establishes the trust and its terms, as set up in the bill of complaint, and shows that the declaration of trust was not voluntary, but was based on a valuable consideration.

The appellant contends that the declaration of trust was put in the hands of Wilson as an escrow, to be delivered to Sinton only in case the appellant died on his proposed journey, and to be redelivered to the appellant in case he returned to California, and that as he did return, the declaration of trust became ineffectual to bind him. This contention amounts to this, that by accepting the declaration of trust upon the terms alleged by the appellant, Sinton agreed that if the appellant returned from his trip to the Eastern States, he would give up all claim to his share of the property. If such had been the agreement of the parties, they would naturally have embodied it in the written instrument. It contains no such stipulation. It is an unqualified and unconditional admission by the appellant that he held the property in trust for Sinton and himself, and that when it was sold or disposed of, he would divide its net proceeds equally between Sinton and himself. We find no evidence in the record sufficient to sustain the improbable story that Sinton agreed, in case appellant should return in safety from his trip to the Atlantic States, that he would give up his interest in this valuable property, to secure which he had contributed money, and services extending over a period of several years. In other words, we do not find that the declaration of trust was subject to any such condition.

The next contention of the appellant is that the decree should be reversed, because there has been no sale or disposal of his property, and that by the terms of the trust Sinton

had only a right to the net proceeds after its sale or disposal.

But the record shows that the property had been disposed of by conveyance to the Morgan Mining Company. The deed of the appellant to the company effectually divested him of all title to the property. It became the property of the corporation, in which he retained no interest or estate. Mr. Justice Bradley, in *Morgan* v. *The Railroad Company*, 1 Woods, 15. The conveyance was, therefore, a disposal of the property, and whether the consideration was cash or shares of the capital stock of the company, was immaterial. The appellant having parted with the title to the property, was bound to account for its proceeds to the beneficiary of the trust according to the terms of the trust.

The appellant next contends that he is entitled, under the terms of the trust, to hold on to the stock, which he received as a consideration for the conveyance of the trust property, until there has been an accounting and the expenses and counsel fees have been paid. But by his answer he denies the trust, he claims to hold the stock for himself alone, he wants no accounting and does not offer to account, or to hand over any net proceeds of the property after an accounting. In other words, he seeks to hold on to the trust property until it suits him to execute a trust, the existence of which he denies.

Where there is a failure of suitable trustees to perform a trust, either from accident or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause, courts of equity will appoint new trustees. *Ellison* v. *Ellison*, 6 Ves. 656, 663; *Lake* v. *De Lambert*, 4 Ves. 592; *Hibbard* v. *Lamb*, Ambler, 309; 2 Mad. Pr. Ch. 133; Com. Dig. Chancery, 4 W. 7. No trustee can be more unsuitable than one who not only refuses to act, but denies the trust. When, therefore, appellant denied that he held in trust the stock claimed by the appellee, the latter, having established the trust, was entitled to have, if he demanded it, a new trustee appointed, or if the appointment of a new trustee were not necessary for the preservation of his rights, to have an account taken by the court of the expenses

and assessments with which his share of the trust property was chargeable, and upon their payment to have a transfer to himself of his share of the stock. The decree of the Circuit Court has given him these rights. There has been an accounting, and the sum with which the appellee's interest in the stock is chargeable has been ascertained, and when the sum so found is paid by appellee, and not till then, the decree of the court requires a transfer to him of his share of the stock. The decree of the court simply executes and winds up a trust, the existence of which it finds, but which the trustee denies and refuses to execute. Both parties got their rights under the decree. It must, therefore, be

Affirmed.

MOULOR *v.* AMERICAN LIFE INSURANCE COMPANY.

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

Argued March 11th, 1884.—Decided April 14th, 1884.

Contract—Insurance—Exception—False Representations—Practice—Trial.

Going to the jury upon one of several defences does not preclude the defendant, at a subsequent trial, from insisting upon other defences, involving the merits, which have not been withdrawn of record or abandoned in pursuance of an agreement with the opposite side.

A judgment will not be reversed upon a general exception to the refusal of the court to grant a series of instructions, presented as one request, because there happen to be in the series some which ought to have been given.

The principle reaffirmed, that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty.

An applicant for life insurance was required to state, categorically, whether he had ever been afflicted with certain specified diseases. He answered that he had not. Upon an examination of the several clauses of the application, in connection with the policy, it was held to be reasonably clear that the company required, as a condition precedent to a valid contract, nothing

more than that the insured would observe good faith towards it, and make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted.

In the absence of explicit stipulations requiring such an interpretation, it should not be inferred that the insured took a life policy with the understanding that it should be void, if, at any time in the past, he was, whether conscious of the fact or not, afflicted with the diseases, or any one of them, specified in the questions propounded by the company. Such a construction of the contract should be avoided, unless clearly demanded by the established rules governing the interpretation of written instruments.

This was an action upon a policy of insurance issued by the American Life Insurance Company of Philadelphia. By its terms the amount insured—$10,000—was payable to Emilie Moulor, the plaintiff in error, her executors, administrators, and assigns, within sixty days after due notice and satisfactory proof of interest and of the death of her husband, the insured, certain indebtedness to the company being first deducted. Upon the first trial there was a verdict for the plaintiff, which was set aside and a new trial awarded. At the next trial, the jury were peremptorily instructed to find for the company, and judgment was, accordingly, entered in its behalf. Upon writ of error to this court, that judgment was reversed upon the ground that, as to certain issues arising out of the evidence, the case should have been submitted to the jury. *Moulor* v. *Insurance Company*, 101 U. S. 708. At the last trial there was a verdict and judgment for the defendant. This writ of error is sued out to review the proceedings and judgment at that trial. The alleged errors and the facts relating to them fully appear in the opinion of the court.

Mr. James Parsons for plaintiff in error.

Mr. Henry Hazlehurst for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

Upon the trial the plaintiff offered to show, by the testimony of witnesses, that at a previous trial, in 1875, the company went to the jury upon the single issue of an alleged breach of warranty, and did not seek a verdict upon the ground that the

insured had committed suicide. The offer was denied, and the action of the court thereon is assigned for error. The avowed object of the proof was to establish a waiver by the company of any defence founded upon that clause of the policy which declares that it shall be void in case the insured "die by his own hand." Undoubtedly, it was competent for the company to waive that or any other defence arising out of the conditions of the policy; but, clearly, its willingness, at one trial, to risk its case before the jury, upon a single one of several issues made, did not preclude it, at a subsequent trial, from insisting upon other defences, involving the merits, which had not been withdrawn of record, or abandoned in pursuance of an agreement with the plaintiff.

After the evidence was closed, the plaintiff submitted to the court a series of instructions, twenty-three in number, and asked that the jury be charged as therein indicated. As to instructions eleven, twelve, and nineteen, no ruling was made, nor was an exception taken for the failure of the court to pass upon them. The twenty-third, relating to the before-mentioned waiver of defence upon the ground of self-destruction, was rightly refused, because the evidence showed no such waiver. As to the remaining instructions, the court said, generally, that the propositions announced in them could not be affirmed, because they were either unsound or irrelevant. A general exception was taken to the "answers" of the court to the application to charge the jury as indicated in plaintiff's points. That exception, however, was too vague and indefinite. Some of the instructions submitted might well have been given, while others were abstract, or did not embody a correct exposition of the law of the case. Those instructions, although separately numbered, seem to have been presented as one request, and the exception was general as to the action of the court in respect of them all. If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed. As some of the plaintiff's instructions were properly overruled, we ought not, under the general exception taken, to reverse the

judgment merely because, in the series presented as one request, there were some which ought to have been given. *Indianapolis, &c., Railroad Company* v. *Horst*, 93 U. S. 295; *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 Ib. 328; *Johnson* v. *Jones*, 1 Black, 210; *Beaver* v. *Taylor*, 93 U. S. 46; *Beckwith* v. *Bean*, 98 Ib. 266.

But there were certain parts of the charge to which exceptions were taken in due form. The rulings, the correctness of which is questioned by the assignments of error, will be presently stated. It is necessary that we should first ascertain the precise nature of the case disclosed by the evidence.

The seventh question in the application for insurance required the insured to answer Yes or No, as to whether he had ever been afflicted with any of the following diseases: Insanity, gout, rheumatism, palsy, scrofula, convulsions, dropsy, smallpox, yellow fever, fistula, rupture, asthma, spitting of blood, consumption, and diseases of the lungs, throat, heart, and urinary organs. As to each, the answer of the insured was, No.

The tenth question was: "Has the party's father, mother, brothers or sisters been afflicted with consumption or any other serious family disease, such as scrofula, insanity, &c.?" The answer was, "No, not since childhood."

The fourteenth question was: "Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predispositions, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted?" The answer was, No.

To the sixteenth question, "Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed, that any untrue or fraudulent answers, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon?" the answer was, Yes.

At the close of the series of questions, nineteen in number.

propounded to and answered by the applicant, are the following paragraphs:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.

"And it is further agreed that if at any time hereafter the company shall discover that any of said answers or statements are untrue or evasive, or that there has been any concealment of facts, then, and in every such case, the company may refuse to receive further premiums on any policy so granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid."

The policy recites that the agreement of the company to pay the sum specified is "in consideration of the representations made to them in the application," and of the payment of the premium at the time specified; further, "it is hereby declared and agreed that if the representations and answers made to this company, on the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then and in every such case the policy shall be null and void."

The main defence was that the insured had been afflicted with scrofula, asthma and consumption prior to the making of his application, and that, in view of his statement that he had never been so afflicted, the policy was, by its terms, null and void.

There was, undoubtedly, evidence tending to show that the insured had been afflicted with those diseases, or some of them, prior to his application; but there was also evidence tending to show not only that he was then in sound health, but that, at the time of his application, he did not know or believe that he

had ever been afflicted with any of them in a sensible, appreciable form.

Referring to the seventh question in the application, the court—after observing that the answer thereto was untrue, and the policy avoided, if the insured had been, at any time, afflicted with either of the diseases last referred to—instructed the jury: "It is of no consequence, in such case, whether he knew it to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so." Again: "That he, the insured, did not know he was then afflicted, is of no importance whatever, except as it may bear upon the question, Was he afflicted? If he was, his answer (for the truth of which he bound himself) was untrue, and his knowledge, or absence of knowledge, on the subject, is of no consequence." Further: "You [the jury] must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer in this respect, was untrue, and notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it." To so much of the charge as we have quoted the plaintiff excepted.

Assuming—as in view of the finding of the jury we must assume—that the insured was, at the date of his application, or had been prior thereto, afflicted with the disease of scrofula, asthma, or consumption, the question arises whether the beneficiary may not recover, unless it appears that he had knowledge or some reason to believe when he applied for insurance, that he was or had been afflicted with either of those diseases. The Circuit Court plainly proceeded upon the ground that his knowledge or belief as to having been afflicted with the diseases specified, or some one of them, was not an essential element in the contract; in other words, if the assured ever had, in fact, any one of the diseases mentioned in his answer to the seventh question, there could be no recovery, although the jury should find from the evidence that he acted in perfect good faith, and had no reason to suspect, much less to believe or know, that he had ever been so afflicted. If, upon a reasonable interpretation, such was the contract, the duty of the court

is to enforce it according to its terms; for the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon conditions or contingencies such as the court below decided were embodied in the policy in suit. The contracts involved in *Jeffries* v. *Life Ins. Co.*, 22 Wall. 47, and *Aetna Life Ins. Co.* v. *France, &c.*, 91 U. S. 510, were held to be of that kind. But, unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided. In the absence of explicit, unequivocal stipulations, requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void and all premiums paid thereon forfeited, if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some one of the diseases mentioned in the question to which he was required to make a categorical answer. If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skilful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion.

In *National Bank* v. *Insurance Company*, 95 U. S. 673—which was a case of fire insurance, involving, among others, the question whether the statements as to the value of the property insured were warranties—it was said: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured

under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." See, also, *Grace* v. *American Insurance Company*, 109 U. S. 278, 282. These rules of interpretation, equally applicable in cases of life insurance, forbid the conclusion that the answers to the questions in the application constituted warranties, to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk, that is, in matters which are of the essence of the contract.

We have seen that the application contains a stipulation that it shall form a part of the contract of insurance; also, that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform fixed rule of interpretation, and what was the intention of the parties. Taken together, it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact, literal fulfilment of all the declarations embodied in the application. It is true that the word "warranted" is in the application; and, although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the terms of which control when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus, we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all the

adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from a strict warranty.

But it is contended that if the answers of the assured are to be deemed representations only, the policy was, nevertheless, forfeited, if those representations were untrue in respect of any matters material to the risk. The argument is, that if the insured was, at the time of his application, or had been at any former period of his life, seriously or in an appreciable sense, afflicted with scrofula, asthma, or consumption, his answer, without qualification, that he had never been so afflicted, being untrue, avoided the policy, without reference to any knowledge or belief he had upon the subject. The soundness of this proposition could not be disputed if, as assumed, the knowledge or good faith of the insured, as to the existence of such diseases, was, under the terms of the contract in suit, of no consequence whatever in determining the liability of the company. But is that assumption authorized by a proper interpretation of the two instruments constituting the contract? We think not.

Looking into the application upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information. The applicant was required to answer yes or no as to whether he had been afflicted with certain diseases. In respect of some of those diseases, particularly consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them, in active form, without at the time being conscious of the fact, and beyond the power of any one, however learned or skilful, to discover. Did the company expect, when requiring categorical answers as to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated?

Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain?

We shall be aided in the solution of these inquiries by an examination of other questions propounded to the applicant. In that way we may ascertain what was in the minds of the parties.

Beyond doubt, the phrase "other known cause," in the fourteenth question, serves the double purpose of interpreting and qualifying all that precedes it in the same clause or sentence. For instance, the applicant was not required to state all the circumstances, within his recollection, of his family history, but those only which rendered the proposed insurance more than usually hazardous, and of which he had personal knowledge, or of which he had information fairly justifying a belief of their existence. If he omitted to state circumstances in his "family history" of which he had no knowledge, nor any information deserving attention, that omission would not avoid the policy, although it subsequently appeared that those circumstances, if known to the company, would have shown that the proposed insurance was more than usually hazardous. Apart from other questions or clauses in the application, the tenth question would indicate that an incorrect or untrue answer as to whether the applicant's "father, mother, brothers, or sisters had been affected with consumption, or any other serious family disease, such as scrofula, insanity, &c.," would absolve the company from all liability. Yet, in the fourteenth question, the insured, being asked as to his family history and as to "hereditary predispositions"—an inquiry substantially covering some of the specific matters referred to in the tenth question—was, as we have seen, only required to state such circumstances as were known to him, or of which he had information, and which rendered an insurance upon his life more than usually hazardous. So, in reference to that part of the fourteenth question relating to the then physical condition of the applicant. Suppose, at the time of his application, he had a disease of the lungs or heart, but was entirely unaware that he was so affected. In such a case, he would have met all the

requirements of that particular question, and acted in the utmost good faith, by answering no, thereby implying that he was aware of no circumstance in his then physical condition which rendered an insurance upon his life more than usually hazardous. And yet, according to the contention of the company, if he had, at any former period of his life, been afflicted with a disease of the heart or lungs, his positive answer to the seventh question, that he had not been so afflicted, was fatal to the contract; this, although the applicant had no knowledge or information of the existence at any time of such a disease in his system. So, also, in reference to the inquiry in the fourteenth question as to any "constitutional infirmity" of the insured. If, in answering that question, he was required to disclose only such constitutional infirmities as were then known to him, or which he had reason to believe then existed, it would be unreasonable to infer that he was expected, in answer to a prior question in the same policy, to guarantee absolutely, and as a condition precedent to any binding contract, that he had never, at any time, been afflicted with diseases of which, perhaps, he never had, and could not have, any knowledge whatever.

The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by "true" and "untrue" answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word "true" is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresen-

tation or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made "fair and true answers."

If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that, consequently, for the want of "fair and true answers," the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and, therefore, whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury. It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insured was, in fact, afflicted with the diseases, or any of them, mentioned in the charge of the court. The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all the circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted.

It results from what has been said that the judgment must be reversed, with directions to set aside the verdict, and for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES *v.* CARPENTER.

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

Argued April 2d, 1884.—Decided April 14th, 1884.

Public Lands—Indian Treaties.

The location of land scrip upon lands reserved for Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void.

This was a suit in equity, to vacate a patent of the United States issued to one August Cluensen, on the 15th of May, 1874, embracing a tract of land in the county of Pipestone, in the State of Missouri, described as the southwesterly quarter of section one (1), in township one hundred and six (106), range forty-six (46), west of the fifth (5th) principal meridian, according to the government surveys. The ground of the suit was that by treaty between the United States and the Yankton tribe of Sioux or Dacotah Indians, ratified on the 26th of February, 1859, the tract, which embraces what is known as the Red Pipestone Quarry, in that county, was reserved from sale or appropriation under any scrip or warrant of the government. The eighth article of the treaty stipulated that the Yankton Indians should be "secured in the free and unrestricted use" of the quarry, or "so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes;" and the United States agreed to cause to be surveyed and marked, so much thereof as should be "necessary and proper for that purpose, and retain the same and keep it open and free for the Indians to visit and procure stone for pipes, so long as they shall desire." Revision of Ind. Treaties, 860. The bill alleged that the tract described is a part of the Red Pipestone Quarry mentioned in this article.

In the execution of their agreement, the United States caused so much of the quarry as appeared to be necessary and proper for the purposes of the reservation provided for to be surveyed and marked. A diagram and the field notes of the survey

were duly returned, filed, and recorded in the General Land Office, and in the office of the Surveyor-General of Minnesota. In February, 1860, copies of them were transmitted by the Commissioner of the General Land Office to the Surveyor-General of the United States for that State with instructions "to lay the same down" on the map of the State in his office, and to respect them when the public surveys reached the locality, by closing their lines upon the reservation. At this time the land included in the reservation was not surveyed; but afterwards, for some unexplained reason, and in violation of the instructions, it was surveyed with other public lands in its vicinity. In July, 1872, after this survey, the commissioner directed the surveyor-general to locate the reservation on the official plat in his office, from the field notes and plat of the original survey, and to transmit authentic copies to the general and local land offices; or, if it should be impossible to locate it from these data, to direct a re-survey of the tract, so that it might be located and described upon the official plats, and its boundaries respected in accordance with the treaty.

In pursuance of these instructions the surveyor-general caused a re-survey of the quarry reserve, and immediately marked it upon the official plats in his office. Its boundaries as resurveyed correspond and are substantially coincident with the lines of the original survey, and embrace the quarter section of land above described. Notwithstanding the reservation by the terms of the treaty and its survey, and appropriation to the purposes mentioned, one August Cluensen, on the 15th of July, 1871, was permitted by the land officers of the district to locate upon the quarter section a piece of land scrip issued under the authority of the laws of the United States, known as Louisiana Agricultural College scrip, and to enter the section at that office with this scrip. On the 15th of May, 1874, a patent was issued to him pursuant to his entry. All the interest which he thus acquired, if any, was subsequently transferred, by divers mesne conveyances, to the defendant, Herbert M. Carpenter, who claimed to be the owner of the premises covered by the patent. The bill averred that all the provisions of the treaty were still in force, that the Yankton Indians had always con-

tinued to visit and procure stone from the quarry, and had always desired, and still desired so to do; and that the officers and agents of the government, in all that they did in connection with the entry of the land and issuing the patent acted without authority of law and in violation of the provisions of the treaty. The bill concluded with a prayer for a decree that the patent and the entry on which it rests might be vacated, and for further relief. To this bill the defendants demurred for want of equity. The demurrer was sustained and the bill dismissed; and the case came here on appeal.

Mr. Assistant Attorney-General Maury for appellant.

Mr. John B. Sanborn for appellee.

Mr. Justice Field delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The action of the government in causing the tract described to be marked on the official plats in the land offices as reserved from sale was clearly within the line of its duty under the stipulations of the treaty. The bill alleges that the tract was a part of the Red Pipestone Quarry mentioned in the eighth article. After the treaty, until the survey was made, and the actual extent of the reservation was thus designated, no part of the land containing the quarry could have been taken up either by settlement or by location under the Louisiana Agricultural College scrip. The whole of such land was by the treaty withdrawn from private entry or appropriation until the government had determined whether any portion less than the whole should be reserved. Its power of selection, if the whole was not retained, could not be restricted by the action of private parties. So, in any view which can be taken, the entry of Cluensen was void. It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department.

The court therefore erred in sustaining the demurrer. The decree must accordingly be reversed, with directions to overrule the demurrer, the defendant to have leave to answer; and

It is so ordered.

CHAMBERS & Others *v.* HARRINGTON & Another.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued April 1st and 2d, 1884.—Decided April 14th, 1884.

Jurisdiction—Mineral Lands.

The decision of a court of competent jurisdiction upon adverse claims to a patent for mineral lands under §§ 2325, 2326 Rev. Stat. is subject to review in this court when the amount in controversy is sufficient.

When several adjoining claims to mineral lands are held in common, work for the benefit of all done upon any one of them in a given year to an amount equal to that required to be done upon all in that year meets the requirements of § 2324 Rev. Stat. The language of the court in *Jackson* v. *Roby*, 109 U. S. 440, cited and approved.

The defendants in error as plaintiffs brought suit in the District Court for the Third Judicial District of the Territory of Utah, under § 2326 Rev. Stat., to have adverse claims to patents for mineral lands determined. Judgment for plaintiffs there, which was affirmed by the Supreme Court of the Territory on appeal. The defendants appealed to this court from the judgment of the Supreme Court. The facts making the case are stated in the opinion of the court.

Mr. Shellabarger for appellants.

Mr. John R. McBride for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Utah.

The case has its origin in a proceeding under §§ 2325 and 2326 of the Revised Statutes, to obtain a patent for mineral lands of the United States.

Opinion of the Court.

The first of these sections requires that, after a discovery of a mine or lode, and the steps required to mark out and assert a claim to it, if the discoverer desires a patent, he shall give notice of that fact, by a publication for sixty days, the nature of which is such as to call the attention to the proceeding of any one having an adverse claim. § 2326 requires of any person desiring to contest the claimant's right, to file his adverse claim in the land office, with the particulars of it, under oath. It then declares:

"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceeding in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim."

It is then provided that, on filing a copy of the judgment-roll in the case, with the register of the land office, and making the other requisite showing, a patent shall issue to the successful party in the litigation.

It is now urged that such a judgment is not subject to review in this court, and the appeal should be dismissed.

But it is apparent that the statute requires a judicial proceeding, in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a State court or a Federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a State court, the judgment may not be brought to this court for review, as in other similar cases. *Belk* v. *Meagher*, 104 U. S. 279.

The only question on the merits of the case requiring much attention arises out of the requirement of § 2324 of the Revised Statutes, that some work should be done on every claim, in

every year, from the date of the discovery until the issue of the patent. The language of the statute on the subject is this:

"On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the 10th day of June, 1874, and each year thereafter for each one hundred feet in length along the vein until a patent has been issued therefor; but when such claims are held in common such expenditures may be made upon any one claim."

It then provides for proceedings in favor of co-owners who do their work or pay for it, against those who do not, to forfeit their interest in the claim.

This latter clause clearly shows that one meaning of the phrase "held in common" is where there are more owners of the claim than one, while the use of the word *claims* held in common, on which work done on one of such claims shall be sufficient, shows that there must be more than one claim so held, in order to make the case where work on one of them shall answer the statute as to all of them.

It is not difficult, in looking at the policy of the government in regard to its mineral lands, to understand the purpose of this provision. For many years after the discovery of the rich deposits of gold and silver in the public lands of the United States, millions of dollars' worth of these metals were taken out by industrious miners without any notice or attention on the part of the government. The earliest legislation by Congress simply recognized the obligatory force of the local rules of each mining locality in regard to obtaining, transferring, and identifying the possession of these parties.

Later, provision was made for acquiring title to the land where these deposits were found, and prescribing rules for the location and indentification of claims, and securing their possession against trespass by others than their discoverers.

But in all this legislation to the present time, though by appropriate proceedings and the payment of a very small sum,

a legal title in the form of a patent may be obtained for such mines, the possession under a claim established according to law is fully recognized by the acts of Congress, and the patent adds little to the security of the party in continuous possession of a mine he has discovered or bought.

These mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves; and it was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in every year, or it would be treated as abandoned.

In the statute we are considering, Congress, when it came to regulate these matters and provide for granting a title to claimants, adopted the prevalent rule as to claims asserted prior to the statute, and as to those made afterwards it required one hundred dollars' worth of labor or improvement to be made in each year on every claim. Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive, to be done on one of them. But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them.

The principle is well stated by Judge Sawyer in the case of *Mount Diabolo M. & M. Company* v. *Callison*, 5 Sawyer, 439. "Work done," he says, "outside of the claim, or outside of

any claim, if done for the purpose and as a means of prospecting or developing the claim, as in cases of tunnels, drifts, &c., is as available for holding the claim, as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and where such is the case work in furtherance of the system is work on the claims intended to be developed." In the case of *Jackson* v. *Roby*, decided at the present term, 109 U. S. 440, similar language is used. "It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of the different locations to combine and work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. . . . In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case, the expenditures required may be made or the labor be performed, upon any one of them." That was a case of placer mining in which the tailings from one claim were carried by a flume and deposited on another which was contiguous, and it was held this latter claim was not aided, but its development rather injured, by this work. This claim was not, therefore, kept valid by such work, and some remarks were made in the opinion which would not, perhaps, be strictly applicable to discoveries and works done in developing lodes or veins.

In the case before us the appellees became successively owners of three claims contiguous to each other, supposed to be located on the same lode. These were, first, the Parley's Park claim; second, the Central; and third, the Lady of the Lake. They continued their work on the Parley's Park claim from 1872 until July 19th, 1878, when they transferred it to the Lady of the Lake claim, and did no more work on the other until September 13th, 1879, when one Cassidy, claiming that the Parley's Park claim was forfeited for want of work on it for more than a year, located a mining claim called the Acci-

dental, which embraces the premises in dispute, and which is part of the Parley's Park claim.

This claim of Cassidy—the Accidental—is the one on which appellants, who became its owners, now rely, and if the work done on the Lady of the Lake is not work done in common on the three claims of appellees, within the meaning of the statute, the claim of the appellant must prevail.

The finding of facts by the court below on that point is as follows:

"5th. That during the year beginning on the 19th of July, 1878, the owners of the Parley's Park claim were also the owners of two certain claims, called respectively the 'Central' and 'Lady of the Lake'—the Central adjoining the Parley's Park and Lady of the Lake adjoining the Central mining claim—and that, with a view to the future working and development of all three of said claims, the owners thereof located what is called the 'Main Shaft' in the Lady of the Lake surface ground. That said shaft is in such proximity to said Parley's Park mining claim that work in it has a tendency to develop said claim, and said shaft was located and intended for the purpose of developing all of said claims.

"I find that during said last named year work was prosecuted in said shaft, and by improvements made thereat exceeding in value $300, and of not less than two thousand dollars in value. No work was done in said year after July 19th, 1878, and prior to the 15th day of September, 1879, in Parley's Park surface ground, or within its limits, by the owners thereof."

We are of opinion that this brings the case clearly within the principles we have laid down, and the work was effectual to protect the Parley's Park claim against an intruder.

By the act of February 11th, 1875, 18 Stat. 315, § 2324 was so amended that work on a tunnel in a mine should be held to dispense with work on the surface and taken and considered as work expended on the lode, whether located prior to or since the passage of that act.

We are not able to see that this affects the character of other work to be done or improvements to be made according to the law as it stood before, except as it gives a special value to making a tunnel.

The questions raised on the admission of evidence to prove the existence and discovery of a lode by defendants, were, we think, well decided and need no further comment.

The decree of the Supreme Court of Utah is affirmed.

EILERS *v.* BOATMAN & Others.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Submitted April 3d, 1884.—Decided April 14th, 1884.

Practice.

The Supreme Court of a Territory states as conclusion of law matter which should be stated as finding of fact. This court treats it as a finding of fact, under the act of April 7th, 1874, 18 Stat. 27

Action for the settlement of adverse claims to mineral lands under § 2326 Rev. Stat.

Mr. C. K. Gilchrist for appellant.

Mr. C. W. Bennett for appellees.

Mr. Justice Miller delivered the opinion of the court.

This, like *Chambers* v. *Harrington*, *ante*, 350, is an appeal from the decree of the Supreme Court of Utah in a contest for a mine carried on under § 2326 of the Revised Statutes.

The appellant does not deny the priority of location, or the continuous work on the Nabob—the claim of the appellee—but insists that the notice and description of the claim of the defendants were not sufficient to apprise other prospectors of its precise location.

This, in the first place, is matter of fact, and was found by the court below against appellant, for we think that the following language, though called by the judge a conclusion of law, is really a finding of facts, namely:

"1. That the notice of the location of the Nabob mining claim contained a sufficient description by reference to natural

objects and permanent and well-known monuments to identify the same.

"2. That said Nabob claim was so marked on the ground that its boundaries could be readily placed."

If, however, we revert to the specific findings of fact so named in the record, we think the second and fourth findings, which give a more minute description of the courses, distances, natural objects, and stakes, justify the two conclusions above recited.

A point is made by appellant that the Flagstaff Mining Company was in possession of the lode at the time the Nabob claim was located.

We do not see how this would improve the subsequent location of appellant.

But it is sufficient to say that no such finding is made by the court in regard to the Flagstaff claim.

By chapter 80 of the acts of Congress, approved April 7, 1874, 18 Stat. 27, this court is required to accept the findings of fact made by the Supreme Courts of the Territories as true on appeal to this court. See *Stringfellow* v. *Cain*, 99 U. S. 610; *Hecht* v. *Boughton*, 105 U. S. 235.

In this case the Supreme Court in its judgment affirms the findings of the District Court. As we think the judgment of the Supreme Court of Utah was right on the facts so found, there is nothing left but to

Affirm the judgment, and it is so ordered.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY & Others *v.* SHIRLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Submitted March 24th, 1884.—Decided April 14th, 1884.

Removal of Causes.

Under the act of March 3d, 1875, 18 Stat. 470, a suit cannot be removed on the ground of citizenship, unless the requisite citizenship existed both when the suit was begun and when the petition for removal was filed. *Gibson* v. *Bruce*, 108 U. S. 561, cited and followed.

A substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as concerns the right of removal of the cause. *Cable* v. *Ellis*, 110 U. S. 389, approved.

This was an appeal from an order of the Circuit Court remanding the cause back to the State court from whence it had been removed. The facts are stated in the opinion of the court.

Mr. John G. Winter for appellants.

Mr. J. Hubley Ashton for appellee.

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

This is an appeal from an order remanding a cause removed from a State court. The record shows that the suit was begun by Shirley, the appellee, a citizen of Texas, on the 16th of July, 1870, in the District Court of McLennan County, Texas, against the Waco Tap Railroad Company, a Texas corporation, to recover a balance claimed to be due on a contract for the construction of the railroad of the defendant company. The company answered the petition on the 25th of November, 1870. Supplemental petitions were filed on the 16th and 17th of December, 1872, bringing in the Houston and Texas Central Railroad Company, another Texas corporation, as a defendant. The case was tried to a jury on the 2d of February, 1875, and judgment rendered in favor of Shirley. This judgment was reversed by the Supreme Court of the State on the 28th of December, 1875, upon a writ of error brought by the

Waco Tap Company, and, on the 16th of March, 1877, the cause was remanded to the District Court for further proceedings. After the case got back to the District Court the petition was several times amended, to the effect that since the commencement of the suit the road, road-bed, franchises, &c., of the Waco Tap Company had been sold to the Houston and Texas Central Company under a deed of trust, and that the Waco Tap Company had become merged in the Houston and Texas Central Company. The Houston and Texas Central and the Waco Tap Companies answered this amended petition, and the cause was again tried to a jury and a judgment rendered in favor of Shirley on the 25th of November, 1878. This judgment also was reversed by the Supreme Court of the State on the 16th of January, 1880, and the cause again remanded to the District Court for further proceedings.

A statute of Texas provides that:

"Whenever a sale of the road-bed, track, franchise, and chartered powers and privileges [of a railroad company] is made, . . . the directors or managers of the sold-out company, at the time of the sale, . . . shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full power to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and property remaining in their hands after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have the authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of the property and effects which shall come into their hands; and no suit pending for or against any railroad company at the time the sale may be made of its road-bed, track, franchise, and chartered privileges shall abate, but the same shall be continued in the name of the trustees of the sold-out company." Paschal's Dig. 4916.

At the November term, 1881, of the District Court, the petition was again amended, and John T. Flint and others, all citizens of Texas, who were directors of the Waco Tap Com-

pany at the time of the sale of the road-bed, &c., brought in as defendants. In this last amended petition, Shirley describes himself as at that time a citizen of New York. Citations were issued to the individual defendants on the 18th of April, 1882, requiring them to appear and answer on the first Monday in May. At the appointed time they all appeared and filed a demurrer. On the 20th of May they filed a petition, accompanied with the necessary security, for the removal of the cause to the Circuit Court of the United States for the Northern District of Texas. In the petition it is stated that the individual defendants were, at the time the suit was commenced against them, and still continued to be, citizens of Texas, and Shirley a citizen of New York, and "that the main and essential controversy in this case is between the said plaintiff and the said trustees, John T. Flint et al., principal petitioners herein." The Houston and Texas Central Railroad Company united in the petition, alleging "that this suit or action, as against it, is purely incidental and collateral to and wholly depends upon the plaintiff's right to recover in his said suit or action against its co-defendants herein, the said John T. Flint et al., trustees of the said sold-out company, . . . for damages for breach of contract by said sold-out company now represented by said Flint et al., trustees."

The cause was docketed in the Circuit Court on the 2d of October, 1882, and on the 6th a motion was made to remand. This motion was granted on the 18th of October, and from the order to that effect the present appeal was taken.

We think the Circuit Court was clearly right in sending the case back to the State court. The suit was begun in 1870. At that time Shirley was a citizen of Texas. The proceeding to bring in the trustees of the sold-out company was not the commencement of a new suit, but the continuation of the old one. The trustees were nothing more than the legal representatives of the company that had been sold out, and took its place on the record as a party. The suit remained the same, but with the name of one of the parties changed.

In *Gibson* v. *Bruce*, 108 U. S. 561, it was decided that under the act of March 3d, 1875, c. 137, a suit could not be removed

on the ground of citizenship, unless the requisite citzenship existed both when the suit was begun and when the petition for removal was filed; and in *Cable* v. *Ellis*, 110 U. S. 389, that a substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned. The record shows that Shirley was a citizen of Texas when the suit was begun, and the right of the railroad company to remove the suit, even if the necessary citizenship had existed, expired with the first term of the State court after the act of 1875 went into effect at which the case could have been tried. Long after this time had elapsed, the railroad company filed an answer to an amended petition and actually went to trial in the State court. This trial resulted in another judgment against the company, which was also reversed by the Supreme Court, and the case sent back for another trial. The trustees were not brought in as parties until all this had been done. It follows that the necessary citizenship did not exist at the commencement of the suit, and that the petition for removal was filed too late. Without considering any of the other questions in the case,

We affirm the order to remand.

SANTA CRUZ COUNTY SUPERVISORS *v.* SANTA CRUZ RAILROAD COMPANY.

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

Submitted March 31st, 1884.—Decided April 14th, 1884.

Jurisdiction.

This court will not take jurisdiction to review the action of a State court if the federal question raised here was not raised below, and if no opportunity was given to the State court to pass upon it.

Motion to dismiss, on the ground that the federal question raised here was not raised below.

Mr. Edward R. Taylor for defendant in error, moving.

Mr. S. O. Houghton for plaintiff in error, opposing.

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

This was a suit brought by the Santa Cruz Railroad Company to require the Board of Commissioners of the County of Santa Cruz to deliver certain bonds, claimed to be due from the county under a contract with the railroad company. The defences were, 1, that the contract was unilateral, and, therefore, not binding on the county; 2, that the board of supervisors exceeded its authority in making the contract; and, 3, that a repealing statute, passed after the contract was entered into, took away the power of the board to make any further deliveries of bonds. No objection whatever was made to the validity of the statute under which the board assumed to act in making the contract. The whole defence rested on the construction and effect to be given to certain statutes, which no one denied the constitutional power of the legislature to enact.

The ground of federal jurisdiction, relied on in the brief of counsel for the county, is "that, by the issuance of the bonds demanded in this proceeding, the State would deprive the tax-payers of the county of Santa Cruz of property without due process of law, contrary to the right, privilege or immunity secured by the first section of the Fourteenth Amendment of the Constitution of the United States."

That was not the question presented to or decided by the State court. In that court the inquiry was, whether the proceedings of the board to charge the county were according to law; not whether the law under which the proceedings were had was constitutional and binding on the tax-payers. The State court decided that the proceedings were in accordance with the requirements of the law, and thus created an obligation on the part of the county to deliver the bonds, which was not discharged by the repealing statute relied on. This decision involved no question of federal law, and is not reviewable here.

The motion to dismiss is granted.

BLAIR *v.* CUMING COUNTY.

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

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

Internal Improvements—Municipal Bonds.

Bonds issued by the county commissioners of a county in Nebraska, on behalf of a precinct in that county, to aid a company in improving the water-power of a river for the purpose of propelling public grist-mills, are issued to aid in constructing a "work of internal improvement," within the meaning of the act of Nebraska, of February 15th, 1869, as amended by the act of March 3d, 1870, Laws of 1869, p. 92; and Laws of 1870, p. 15; and Gen. Stat. of 1873, ch. 35, p. 448.

Although, in such a bond and its coupons, the precinct is the promisor, a suit to recover on such coupons is properly brought against the county.

Where such bonds purport, on their face, to be issued by the board of county commissioners, on behalf of the precinct, and are signed by the chairman of the board, and attested by its clerk, who is also the clerk of the county, and are sealed with the seal of the county, and the coupons are signed by such clerk, and the bonds refer to the coupons as annexed, the bonds and coupons are issued by the county commissioners.

This was an action brought in the Circuit Court of the United States for the District of Nebraska, by the plaintiff in error against the county of Cuming, a body corporate of the State of Nebraska, to recover the money due on coupons cut from certain bonds. The case was tried on a petition and a demurrer thereto, the latter alleging, as cause of demurrer, that the petition did not state facts sufficient to constitute a cause of action.

By an act of the legislature of Nebraska, which was passed and took effect February 15th, 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 purpose," as amended by an act passed March 3d, 1870, Laws of 1869, p. 92; and Laws of 1870, p. 15; and Gen. Stat. of 1873, chap. 35, p. 448, it was provided as follows:

Statement of Facts.

"Section 1. That 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 cent. 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 a county the question of borrowing money."

Section 2 enacted that the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on the bonds as it should become due, and that an additional amount should be levied and collected to pay the principal of the bonds when it should become due; section 3, that the proposition should state the rate of interest the bonds should draw, and when the principal and interest should be made payable; section 4, that if a majority of the votes cast should be in favor of the proposition submitted, the county commissioners or the city council should enter the proposition and result of record, and publish notice of its adoption, and thereupon issue the bonds, which should continue a subsisting debt against the county or city, until they should be paid; and section 5, that the proper officers of the county or city should cause to be annually levied, collected and paid to the holders of the bonds a special tax on all taxable property in the county or city, sufficient to pay the annual interest, as it should become due, and, when the principal should become due, such officers should in like manner collect an additional amount to pay the same as it should become due. Section 7 was in these words:

"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 cases the precinct

Statement of Facts.

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 bond shall be the same as other bonds, but shall contain a statement stating the special nature of such bonds."

The petition counted on 188 coupons for $25 each, cut from bonds of the following tenor:

"No. 43. United States of America. $500.

Dated July 1st, 1875.

"County of Cuming, *State of Nebraska:*

(West Point Precinct Bond.)

"Know all men by these presents, that the West Point Precinct, in the county of Cuming and State of Nebraska, acknowledges itself indebted to the bearer hereof in the sum of five hundred dollars for value received, which said sum the said West Point Precinct promise and agree to pay to the bearer hereof at the National Park Bank, in the city of New York, on the first day of July, anno Domini 1895, and also interest thereon at the rate of ten per cent. per annum semi-annually, on the first days of January and July in each and every year ensuing the date hereof, on presentation of the annexed coupons or interest warrants, as they severally fall due, at the National Park Bank, in the city of New York, in lawful money of the United States.

"This bond is one of a series of sixty bonds of five hundred dollars each, amounting in the aggregate to thirty thousand dollars, issued by the West Point Precinct, of Cuming County, and State of Nebraska, as authorized by a vote of its legal voters, and in accordance with chapter 35 Revised General Statutes, approved February 15th, 1869, and (an) act setting aside the revenue arising from the taxation of works of internal improvements to pay the bonds issued to construct or complete the same.

"These bonds are issued to aid the West Point Manufacturing Company in improving the water-power of the Elkhorn River for the purpose of propelling public grist-mills, and other works of internal improvement of a public nature, in said West Point Precinct. To secure the payment of the principal and interest of

said bonds, the annual revenue and all the taxable property of said West Point Precinct is pledged.

"In testimony whereof, the board of county commissioners of Cuming County, State of Nebraska, have caused this bond to be signed on behalf of West Point Precinct, in the county of Cuming, and State of Nebraska, by its chairman, attested by its clerk, who has affixed thereto the seal of the said county, at the clerk's office in West Point, in the said county, this first day of July, A. D. 1875.

"THOMAS ROEH, *Clerk.* C. L. SIECKE, *Chairman.*

"(Cuming County seal, Nebraska.)"

Each coupon was in the following form:

"$25.00 $25.00.

"The West Point Precinct, Cuming County, State of Nebraska, will pay the bearer twenty-five dollars, at the National Park Bank, in the city of New York, on the first day of July, 1877, on bond No. 43.

"No. 43. THOMAS ROEH, *Clerk.*"

The coupons fell due as follows: 16 on July 1st, 1877, 43 on January 1st, 1878, 43 on July 1st, 1878, 43 on January 1st, 1879, and 43 on July 1st, 1879. The petition alleges that on the 1st of September, 1875, the defendant made, executed and delivered the coupons, each of them being signed by the clerk of the county, for semi-annual interest on the bond; and that the bonds are special bonds of the county, issued by its board of county commissioners, in behalf of West Point Precinct, a voting district within and a part of the county, in accordance with the provisions of chapter 35, General Statutes of Nebraska. It sets out a copy of one of the bonds and copies of five of the coupons. It avers that on the 1st of January, 1876, the plaintiff became the purchaser of all the coupons, in good faith and for a valuable consideration, before they became due and payable; that the only works of internal improvement of a public nature, for which the bonds were so issued to said company, "were the improvement of the water-power of the said Elkhorn River, for the purpose of propelling public grist-mills" in said precinct in said county; that the improving of said water-

power for said purpose "would and did render the water-power of said river available and useful for propelling other works of internal improvement of a public nature, which were or thereafter might be constructed and located upon the said river in said precinct;" that, at the time of the sale and delivery of the bonds to the plaintiff, he had "no notice or knowledge of any other works of internal improvement of a public nature in aid of which the said bonds were so issued, except the said works specially mentioned and described in said bonds, viz., the improvement of the water-power of the Elkhorn River for the purpose of propelling public grist-mills" in said precinct; that the bonds and their attached coupons were "issued and negotiated by the defendant under and by virtue of a majority vote of the qualified voters of West Point Precinct, a local subdivision of said Cuming County, and in pursuance" of said act of February 15th, 1869; and that "the improvement of the water-power of the Elkhorn River, to aid which said bonds were issued and negotiated, consisted in constructing a canal for water-power purposes in said West Point Precinct."

The Circuit Court sustained the demurrer, to which ruling the plaintiff excepted, and, as he refused to amend the petition, the court dismissed the action and entered a judgment for the defendant, for costs, and the plaintiff excepted to the judgment. To review the judgment the plaintiff sued out a writ of error.

Mr. Walter C. Larned for plaintiff in error.

Mr. Uriah Bruner and *Mr. R. F. Stevenson* for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

It is urged against the right of the plaintiff to recover, that in the bonds and coupons the West Point Precinct promises to pay, and so the obligations are not those of the defendant and it cannot be sued on them. This question was decided by this court in *Davenport* v. *County of Dodge*, 105 U. S. 237, in regard to precinct bonds issued under the same statute, and it was held that a suit against the county on coupons cut from

special bonds issued by the county commissioners for the precinct was a proper suit.

It is also contended that the statute (sec. 7) required that precinct bonds should be issued as special county bonds for the precinct, by the county commissioners, and did not authorize the chairman of the board and its clerk to issue the bonds; that the county commissioners could not delegate their authority to sign and issue the bonds to any one else, or to one of their number; and that precinct bonds signed by one of the county commissioners, as chairman, and attested by the clerk of the board, and coupons signed by some one as clerk, have no validity. We see no force in these objections. The bonds bear the seal of the county and purport to be issued by the board of county commissioners, on behalf of the precinct. The bond states that the board, in testimony of the statements in the bond, has caused the bond to be signed on behalf of the precinct, by the chairman of the board, and to be attested by the clerk of the board (who appears, by the petition, to have been the clerk of the county), and that such clerk has affixed thereto the seal of the county. This was a sufficient compliance with the statute. The commissioners, by statute, constituted "a board." That was their official designation, when meeting to perform any duties with which they were charged. Gen. Stat. of 1873, chap. 13, secs. 7, 14, pp. 233, 234. The attestation of the bonds by the signatures of the chairman and the clerk of the board, and the county seal, was proper. It was not necessary that all the commissioners should sign the bonds. What was done was not an issuing of the bonds by the chairman and clerk. The coupons, in the form in which they were issued, annexed to the bond, were adopted as coupons, by the statement in the body of the bond, and the question as to any one of them, when detached, is only one of genuineness and identity. The bonds are special bonds for the precinct, and contain a sufficient statement showing their special nature, that is, that they are special bonds for the precinct.

It is also objected that the bonds state that they are issued under the act of 1869, to aid the company in improving the water-power of the river for the purpose of propelling public

grist-mills "and other works of internal improvement of a public nature" in the precinct; and that the latter part of the statement is indefinite, and the other works to be aided or improved, or propelled, should be described or identified, so that it may be seen they were works of internal improvement, within the statute, and also because the proposition voted on must, in order to be a lawful one, have stated what the specific "other works" were. It is a sufficient answer to this objection to say, that the petition states, and the demurrer admits, that the only work of internal improvement of a public nature for which the bonds were issued to the company, was the improvement of the water-power of the Elkhorn River for the purpose of propelling public grist-mills in the precinct; that the improving of such water-power for that purpose rendered it available and useful for propelling other works of internal improvement of a public nature, which were or thereafter might be constructed and located on that river in that precinct; that the improvement of the water-power of that river, to aid which the bonds were issued and negotiated, consisted in constructing a canal for water-power purposes in the precinct; and that the bonds and their attached coupons were issued and negotiated under and by virtue of a majority vote of the qualified voters of the precinct, and in pursuance of the act. Thus, there is a distinct statement as well as an admission, that no work of internal improvement was covered by the vote or the issue of the bonds, other than the one of improving such water-power for the purpose of propelling public grist-mills in the precinct. The statement in the bonds in regard to propelling other works of internal improvement of a public nature in the precinct, is explained by the allegation in the petition that the improving of the water-power for the purpose stated rendered it available to propel other works of internal improvement of a public nature, then existing, or which might be constructed on the river within the bounds of the precinct. But this was an incidental result, and aside from the only work in aid of which, or purpose for which, the bonds were issued, as existing, or as notified to, or known by, the plaintiff, at the time of the sale and delivery of the bonds to him.

It is also objected that improving the water-power of the river, by constructing a canal for water-power purposes, is merely digging a mill race, and that the doing so, for the purpose of propelling a public grist-mill in the precinct, is not constructing a work of internal improvement, within the statute. We are not referred to any decision of the highest court of Nebraska, made before the plaintiff became, on January 1st, 1876, the *bona fide* owner of these coupons, or even since, holding in accordance with the contention of the defendant.

In *Osborne* v. *County of Adams*, 106 U. S. 181, this court decided, in November, 1882, that, under the same statute that is in question here, bonds issued to aid in the construction of a steam grist-mill were not issued to aid in the construction of a work of internal improvement. There was a suggestion in the opinion in that case, that the statute did not cover the construction of any kind of grist-mill as a work of internal improvement. During the same term a petition for rehearing was filed, and the attention of the court was called to the case of *Traver* v. *Merrick County*, 14 Neb. 327, in which the Supreme Court of Nebraska had held, at its January Term, 1883, that county bonds issued by county commissioners, under the act of 1869, as a loan to an individual to aid in building a public grist-mill and water-power in the county, were valid. But this court adhered to its view that the act did not cover the construction of a steam grist-mill, and denied the rehearing. *Osborne* v. *Adams County*, 109 U. S. 1.

In *Union Pacific Railroad* v. *Commissioners*, 4 Neb. 450, it was held, in 1876, that a public wagon bridge, over the Platte River, as an extension of a public highway, was a work of internal improvement, under the act of 1869, being a work from the construction of which benefits were to be derived by the public. But the court said that no authority existed to aid a merely private enterprise. See, also, *United States* v. *Dodge County*, 110 U. S. 156.

In *The State* v. *Thorne*, 9 Neb. 458, 460, in 1880, it was suggested that works of internal improvement, under the act, might include railroads, turnpikes, canals, and numerous other enterprises, not objects of private concern purely

Opinion of the Court.

In *Dawson County* v. *McNamar*, 10 Neb. 276, in 1880, it was held that the building of a county court house was not a work of internal improvement, under the act, and it was said that "works of internal improvement" meant "only those works within the State in which the whole body of the people are supposed to be more or less interested, and by which they may be benefited."

In *Traver* v. *Merrick County*, before cited, the court considered the act of 1869 and the question whether a water grist-mill was a work of internal improvement, within the meaning of that act. It cited the provisions of an act "relating to mills and mill dams," which passed and took effect February 26th, 1873, Gen. Stat. of 1873, chap. 44, p. 472, and especially sections 1, 2 and 24 to 29 of that act, as authorizing a person who, in good faith, had expended a considerable sum of money towards the erection of a grist-mill on a stream, to obtain an injunction against the making by another person of a dam across the same stream on his own land, the effect of which would be to destroy the water-power of the former; and it stated that, under the cases of *Nosser* v. *Seeley*, 10 Neb. 460, and *Seeley* v. *Bridges*, 13 Id. 547, that was the settled law of the State. The act of 1873 provides that all mills for grinding grain, and which shall grind for toll, shall be deemed public mills; that the owner or occupier of every public mill shall grind the grain brought to his mill as well as the nature and condition of his mill will permit, and in due time as the same shall be brought; and that he shall post in the mill his rates of toll, and the county commissioners of the county shall establish and regulate the amount of toll to be charged. The court held, in *Traver* v. *Merrick County*, that the legislature had authority to provide that streams capable of being applied to mill purposes should be so utilized for the benefit of the public; that the right to erect a mill and dam, on paying damages for the injury caused, was granted for the better use of the water-power, on considerations of public policy and the general good, with a view to keeping up mills for use; and that, under the act of 1873, water grist-mills were mills for the use of the public. It also held that, under the act of 1869, works of in-

ternal improvement were not restricted to railroads and works of like character, such as canals, turnpikes and bridges; that, if an internal improvement was for public use, subject to the control and regulation of the legislature, it was within the act; and that, as the mill in that case was one to be propelled by water, and was for the use of all who might desire to patronize it, at such rates of toll as might be prescribed by the county commissioners of the county, it was a work of internal improvement, within the act.

We concur in these views, and regard them as a sound exposition of the legislation of Nebraska. In *Traver* v. *Merrick County* the thing aided was the building a public grist-mill and water-power. As we understand the present case, the thing aided is the improving the water-power of a river, by constructing a canal for water-power purposes to propel public grist-mills. This is within the act of 1869. A water grist-mill cannot be run so as to be a public grist-mill, unless it is furnished with water-power, and, if an existing river needs to be improved to furnish such power, the improvement of it is a public work of internal improvement.

In *Township of Burlington* v. *Beasley*, 94 U. S. 310, this court held that a steam custom grist-mill, not on a water-course or operated by water-power, was a "work of internal improvement," within an act of Kansas authorizing municipal bonds in aid of "the construction of railroads or water-power, . . . or for other works of internal improvement." The decision was based, in part, on the ground, that there was another act which declared that "all water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay, are hereby declared public mills," and provided for the order in which customers should be served, and prescribed the duties of the miller, and that the rates of toll should be posted; and, as it would also be competent for the legislature to regulate the toll, it was held that aid to the mill was aid of a public work of internal improvement.

Enterprises of a class within which that in the present case falls are so far of a public nature that private property may be appropriated to carry them into effect. *Boston & Roxbury*

Syllabus.

Mill Corp. v. *Newman*, 12 Pick. 467; *Commonwealth* v. *Essex Company*, 13 Gray, 239, 249; *Lowell* v. *Boston*, 111 Mass. 454, 464; *Scudder* v. *Trenton Delaware Falls Co.*, 1 Saxton Ch. 694; *Beekman* v. *Saratoga & Schenectady Railroad Co.*, 3 Paige, 45. And when the legislature has given to grist-mills and the water-power connected with them such a public character as in the present case, the improvement of the water-power must be regarded as a public work of internal improvement, which may be aided in its construction by the issue of bonds, under the act in question.

These conclusions require that

The judgment of the Circuit Court should be reversed, and the case be remanded to that court, with direction to overrule the demurrer to the petition, and to take such further proceedings in the cause as may be required by law and as shall not be inconsistent with this opinion.

STEWART & Another *v.* HOYT'S EXECUTORS.

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

Argued April 9th, 1884.—Decided April 21st, 1884.

Contract—Lease—Railroad.

By a lease from one railroad corporation of its railroad to another railroad corporation, subject to a previous mortgage, the lessee covenanted to pay as rent a certain proportion of the gross earnings, and to state accounts semi-annually, and further covenanted, if the rent for any six months should be insufficient to pay the interest due at the end of the six months on the mortgage bonds, then to advance a sufficient sum to take up, and to take up the balance of the coupons for such interest; and it was agreed that for all sums so advanced the lessee should have a lien before all other liens except the mortgage. Eighteen months later, after the lessee had accordingly paid and taken up some coupons, and had declined to take up others, on account of the refusal of the lessor to accept in payment of rent coupons so taken up, the two corporations executed a supplemental agreement, by which, in lieu of the rent reserved in the lease, and of all advances of money to take up coupons, the lessee covenanted to pay, and the lessor to accept, as rent, a larger proportion of the gross earnings, "all accounts

Statement of Facts.

being settled exactly, and all liabilities and obligations between the two companies being adjusted and discharged by and upon the semi-annual statements provided in said lease;" the lessor released the lessee from any obligation to make future advances of money to take up coupons, and from liability for any previous neglect to make such advances, and from any obligation to pay money in the nature of rent and advances, except the proportion of the gross earnings stipulated in the supplemental agreement; and all the provisions of the lease, except as so modified, were ratified and confirmed, and "all causes of action for breach of any agreement therein contained," which had arisen since its execution, were mutually waived and released. The lessee afterwards paid rent computed according to the supplemental agreement. *Held*, That any claim of the lessee against the lessor, or against the mortgaged property, for money paid to take up coupons, was released and discharged.

This was an appeal from a decree dismissing a petition of the trustees of the Wisconsin Central Railroad Company to be allowed, out of the proceeds of a sale of the railroad property and franchises of the Milwaukee and Northern Railway Company, under the foreclosure of a mortgage thereof to trustees (of the survivor of whom the appellees are executors), the sum of $5,961.75 paid by the petitioners to take up coupons originally attached to the bonds secured by that mortgage.

The facts material to the understanding of the question of law decided by this court were as follows:

By indenture of November 8th, 1873, the Milwaukee and Northern Railway Company leased its railroad and all its property and franchises to the Wisconsin Central Railroad Company for nine hundred and ninety-nine years:

"Yielding and paying rent therefor as follows, to wit: In and for each year of said term wherein the gross earnings received from the demised premises as hereinafter set forth shall exceed the sum of one million dollars, thirty per cent. of said gross earnings; and in and for each year of said term wherein said gross earnings shall exceed eight hundred thousand dollars, but not exceed one million dollars, thirty-three per cent. of said gross earnings; and in and for each year of said term wherein said gross earnings shall be less than eight hundred thousand dollars, thirty-five per cent. of said gross earnings."

The rent was payable in monthly instalments, upon accounts

as nearly exact as practicable, stated monthly, of the gross earnings for the month next but one preceding, to a trustee selected by the parties jointly, upon trust to keep the sum paid until the next instalment of interest was due upon the mortgage bonds, and then to apply it, or so much of it as necessary, to the payment of that interest; and if any surplus remained, to pay it to the lessor, unless due to the lessee "for advances, as is hereinafter provided, made to or for the benefit of the lessor to pay such interest;" and if such surplus, or any part thereof, was so due, then to pay to the lessee, as afterwards provided, so much as was due for advances and interest. The lessee was also to state semi-annual accounts of the gross earnings, upon which all accounts between the parties were to be balanced. The lease contained, among other covenants, the following:

"Eighth. The second party also covenants to pay the rent hereinbefore reserved when and as payable; and also covenants, if the rent, paid to the trustee aforesaid, in any six months previous to the payment of interest on the said first mortgage bonds, is not enough to pay the whole interest then maturing, to advance so much money as may be necessary to take up the balance of the coupons for interest as they become due and payable, and to take them up; and it is expressly agreed between the parties to these presents that for all sums so advanced the second party shall hold said coupons as a lien, and the same is hereby made and constituted a lien on the rent hereby reserved on all the property hereby demised and leased, prior to and superior to all other liens except said mortgage, until the same be fully reimbursed, with interest at eight per centum per annum, out of the said rent or otherwise by the first party. It is also agreed that any surplus of rent, which appears upon the semi-annual adjustments of accounts, shall be paid to the second party, so far as may be needed to cover any advances and interest thereon made to protect the coupons aforesaid, and that only the residue of said surplus, if any, shall be paid to the first party."

The rent which accrued in the six months next before June 1st, 1874, falling short of paying the interest payable on that day on the coupons, the lessee paid and took up coupons to the

amount of the deficiency, and the lessor received some of these coupons in payment of the rent. The lessor afterwards refused to receive coupons in payment of rent; and on December 1st, 1874, the lessee, which had not meanwhile paid any rent, refused to advance money to take up the coupons. The two corporations, after other disputes had arisen between them, executed, on June 1st, 1875, a supplemental indenture containing the following provisions:

"First. In lieu of the rent reserved in the lease, and of all advances of money to take up the interest coupons of the Milwaukee and Northern Railway Company, as provided in said lease, the Wisconsin Central Railroad Company shall pay, and the Milwaukee and Northern Railway Company shall accept, for and during the space of three years from and after the first day of June, 1875, the amount of forty per cent. of the gross earnings received from the demised premises; and after the expiration of said three years and during the remainder of the term, the rent shall be paid as reserved in said lease, if the rent so reserved is sufficient to pay said coupons; but if not sufficient to pay said coupons, then the Wisconsin Central Railroad Company shall pay, and the Milwaukee and Northern Railway Company shall accept, in full satisfaction of rent for the demised premises, such part of said gross earnings, not exceeding in any event forty per cent. thereof, as shall be sufficient to pay said coupons; all accounts being settled exactly, and all liabilities and obligations between the two companies being adjusted and discharged by and upon the semi-annual statements provided in said lease, and on the thirty-first day of May and the thirtieth day of November in each year, and said semi-annual statements being accepted by each company as final adjustments of all claims for rent of the demised premises to the respective date thereof."

"Fourth. The Milwaukee and Northern Railway Company, in consideration of the increased rental and agreements aforesaid on the part of the Wisconsin Central Railroad Company, hereby releases the Wisconsin Central Railroad Company from any and all obligations to hereafter make any advances of money to take up the interest coupons of the Milwaukee and Northern Railway Company, as stipulated in said lease; and also from any and every obligation and liability arising out of any previous neglect to make

said advances hitherto due and payable under terms of said lease; and also from any and every obligation to pay any money under said lease and any provision thereof, in the nature of rent and advances to or for the benefit of the Milwaukee and Northern Railway Company, except the proportion of gross earnings (not exceeding in any event forty per cent. thereof), which is herein agreed, when and as the same is payable under the terms of this agreement and said lease."

"Sixth. All the provisions of said lease, except so far as are herein expressly modified or changed, are hereby by each of said companies ratified and confirmed; and all causes of action for breach of any agreement therein contained, which have arisen from its date of execution until this day, are hereby mutually waived and forever released by and between said companies."

The lessee paid rent computed according to the supplementary agreement from its date until September, 1875. On January 2d, 1879, the lessee assigned to the petitioners, in trust to pay debts to its employees, and expenses of running its railroad, all sums of money on hand or to be received, and all accounts receivable of every nature, for or on account of earnings and income of either railroad; and delivered to the petitioners the coupons taken up as aforesaid, of which the sum claimed in their petition had not been reimbursed to them.

Mr. J. Hubley Ashton and *Mr. Edwin H. Abbot* for appellants.

Mr. E. Mariner for appellee.

Mr. Justice Gray delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The petitioners contend that for the sum paid to take up coupons in accordance with the provisions of the lease of November 8th, 1873, they have a claim against the lessor, and a lien upon the proceeds of the sale of the mortgaged property, equal to those which the original owners of those coupons had.

But this court concurs in opinion with the Circuit Court that, if the lessee ever had such a claim and lien, they were released by the supplemental agreement of June 1st, 1875, and

the payment of rent, and the adjustment of semi-annual accounts, in accordance therewith. By this agreement, the provisions of the original lease were confirmed and ratified, "except so far as are herein expressly modified or changed;" the proportion of gross earnings to be paid as rent was increased; all accounts between the parties were to be adjusted and discharged by and upon the semi-annual statements; the lessor released the lessee from all obligation to make future advances, and from all liability for past neglect to make advances, to take up coupons; and each party released the other from all causes of action which had arisen for breach of any agreement in the original lease. Any obligation of the lessor to reimburse to the lessee money paid by the latter to take up coupons, arose under an agreement in the original lease and was one of the obligations adjusted and discharged by and upon the semi-annual statements. The intention of the supplemental agreement, as appears upon its face, was to adjust all existing controversies between the parties, by agreeing to pay and receive an increased rate of rent, and by mutually releasing all existing obligations and liabilities, including, on the one side, the lessee's obligation to take up coupons in the future, and its liability for neglect to take them up in the past, and, on the other side, the lessor's obligation and liability to the lessee by reason of coupons already taken up by the latter. The parol evidence introduced by the petitioners at the hearing, if competent in law, was quite insufficient in fact, to control or vary the meaning of the written instrument.

Decree affirmed.

MANSFIELD, COLDWATER & LAKE MICHIGAN RAILWAY COMPANY & Another *v.* SWAN & Another.

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

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

Removal of Causes—Jurisdiction—Costs.

The necessary citizenship must appear in the record in order to give jurisdiction to a court of the United States.

When a cause is removed from a State court the difference of citizenship on which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of removal.

It is an inflexible rule that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. The language of Mr. Justice Curtis in *Dred Scott Case*, 19 How. 566, cited and adopted.

Under the act of March 3d, 1875, 18 Stat. 470, costs may be awarded in a court of the United States against a party wrongfully removing a cause from a State court, when the cause is remanded for want of jurisdiction.

A judgment of this court remanding to a Circuit Court a cause wrongfully removed into it, with directions to remand it to the State court, is an exercise of jurisdiction. In such case costs will be awarded against the party wrongfully removing the cause, when justice and right require.

There was a voluminous record in this case, with a long assignment of errors, and an elaborate brief on behalf of the plaintiffs in error. The court gave no opinion on the questions discussed, but dismissed the case for want of jurisdiction.

Mr. F. H. Hurd and *Mr. C. H. Scribner* for plaintiffs in error.

Mr. I. P. Pugsley for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This was an action at law originally brought in the Court of Common Pleas of Fulton County, Ohio, by John Swan, S. C. Rose, F. M. Hutchinson, and Robert McMann, as partners under the name of Swan, Rose & Co., against the plaintiffs in error. The object of the suit was the recovery of damages for

alleged breaches of a contract for the construction of the railroad of the defendants below. It was commenced June 10th, 1874.

Afterwards on October 28th, 1879, the cause being at issue, the defendants below filed a petition for its removal to the Circuit Court of the United States. They aver therein that one of the petitioners is a corporation created by the laws of Ohio alone, and the other, a corporation consolidated under the laws of Michigan and Ohio, the constituent corporations having been organized under the laws of those States respectively, and that they are, consequently, citizens, one of Ohio, and one of both Michigan and Ohio. It is also alleged, in the petition for removal, "that the plaintiffs, John Swan and Frank M. Hutchinson, at the time of the commencement of this suit, were, and still are, citizens of the State of Pennsylvania; that the said Robert H. McMann was then (according to your petitioners' recollection) a citizen of the State of Ohio, but that he is not now a citizen of that State, but where he now resides or whereof he is now a citizen (except that he is a citizen of one of the States or Territories comprising the United States), your petitioners are unable to state; that he went into bankruptcy in the bankruptcy court held at Cleveland, in the State of Ohio, several years since, and since the alleged claim of the plaintiffs arose, but your petitioners cannot now state whether he has now an assignee in bankruptcy or not, but they are informed and believe that he has not; that the said Stephen C. Rose, at the time of the commencement of this suit, was a citizen of the State of Michigan; that he died therein during the pendency of this suit, and the said Lester E. Rose is the administrator of the estate of the said Stephen C. Rose in the State of Michigan, he holding such office under and by virtue of the laws of that State only, the said Lester E. Rose being a citizen of the State of Michigan when so appointed and now, but that he is not a necessary party as plaintiff in this suit, for the reason, that the suit being prosecuted by the plaintiffs as partners under the firm name and style of Swan, Rose & Co., and for the collection of an alleged debt or claim due to them as such partners, and which arose wholly out of their dealings

as partners, if it exists at all, upon the death of the said Stephen C. Rose the cause of action survived to the other partners."

The petition, being accompanied with a satisfactory bond, was allowed, and an order made for the removal of the cause.

The plaintiffs below afterwards, on December 13th, 1879, moved to remand the cause on the ground, among others, that the Circuit Court had no jurisdiction, because the "real and substantial controversy in the cause is between real and substantial parties who are citizens of the same State and not of different States." But the motion was denied.

Subsequently a trial took place upon the merits, which resulted in a verdict and judgment in favor of the plaintiffs, the defendants in error, for $238,116.18 against the defendants jointly, and the further sum of $116,468.32 against one of them.

Many exceptions to the rulings of the court during the trial were taken and are embodied in a bill of exceptions, on which errors have been assigned, and the writ of error is prosecuted by the defendants below to reverse this judgment.

An examination of the record, however, discloses that the Circuit Court had no jurisdiction to try the action; and as, for this reason, we are constrained to reverse the judgment, we have not deemed it within our province to consider any other questions involved in it.

It appears from the petition for removal, and not otherwise by the record elsewhere, that, at the time the action was first brought in the State court, one of the plaintiffs, and a necessary party, McMann, was a citizen of Ohio, the same State of which the defendants were citizens. It does not affirmatively appear that at the time of the removal he was a citizen of any other State. The averment is, that he was not then a citizen of Ohio, and that his actual citizenship was unknown, except that he was a citizen of one of the States or Territories. It is consistent with this statement, that he was not a citizen of any State. He may have been a citizen of a Territory, and, if so, the requisite citizenship would not exist. *New Orleans* v. *Winter*, 1 Wheat. 91. According to the decision in *Gibson* v. *Bruce*, 108 U. S. 561, the difference of citizenship on

which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of the removal. And according to the uniform decisions of this court, the jurisdiction of the Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record. *Grace* v. *American Central Insurance Company*, 109 U. S. 278, 283; *Robertson* v. *Cease*, 97 U. S. 646. It was error, therefore, in the Circuit Court to assume jurisdiction in the case, and not to remand it, on the motion of the plaintiffs below.

It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112.

In *Jackson* v. *Ashton*, 8 Pet. 148, the court itself raised and insisted on the point of jurisdiction in the Circuit Court; and in that case, it was expressly ruled, that because it did not appear that the Circuit Court had jurisdiction, this court, on

appeal, had no jurisdiction except for the purpose of reversing the decree appealed from, on that ground. And in the most recent utterance of this court upon the point in *Börs* v. *Preston*, *ante*, 252, it was said by Mr. Justice Harlan: "In cases of which the Circuit Courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record." The reason of the rule, and the necessity of its application, are stronger and more obvious, when, as in the present case, the failure of the jurisdiction of the Circuit Court arises, not merely because the record omits the averments necessary to its existence, but because it recites facts which contradict it.

In the *Dred Scott Case*, 19 How. 393–400, it was decided that a judgment of the Circuit Court, upon the sufficiency of a plea in abatement denying its jurisdiction, was open for review upon a writ of error sued out by the party in whose favor the plea had been overruled. And in this view Mr. Justice Curtis, in his dissenting opinion, concurred; and we adopt from that opinion the following statement of the law on the point: "It is true," he said, 19 How. 566, "as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Ab. Error H, 4. And this court followed this practice in *Capron* v. *Van Noorden*, 2 Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of

citizenship had not shown jurisdiction. But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. *Pequignot* v. *The Pennsylvania Railroad Company*, 16 How. 104. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler* v. *Rae*, 7 How. 729. I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power."

This is precisely applicable to the present case, for the motion of the plaintiffs below to remand the cause was equivalent to a special plea to the jurisdiction of the court; but the doctrine applies equally in every case where the jurisdiction does not appear from the record.

It was so applied in the case of *United States* v. *Huckabee*, 16 Wall. 414. There the United States had commenced proceedings in the Circuit Court, under the confiscation acts, to condemn certain real estate, which had been sold by its owners, the defendants in error, to the Confederate government. The United States had, in fact, captured the property during the flagrancy of war, it being an iron foundry and works used for

the manufacture of munitions of war, and had afterwards sold it to Lyon. Huckabee intervened as a claimant, and answered the libel, setting up a claim of title in himself and associates. Lyon also filed an answer, setting up his title, and was made a co-plaintiff with the United States. A decree was made dismissing the libel, and confirming the title of Huckabee. The United States and Lyon prosecuted a writ of error to reverse this judgment. This court decided that the Circuit Court was without jurisdiction of the subject matter, as it was not a case contemplated by the confiscation acts, and that it could not be treated as a private suit in equity between the claimants for the determination of their conflicting titles, because the remedy at law was adequate, and also because they were citizens of the same State. It decided, therefore, that the Circuit Court had no jurisdiction to render any decree in the case upon the merits of the controversy. In stating the conclusion of the court, Mr. Justice Clifford, who delivered its opinion, said, p. 435: "Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has given judgment or decree for the plaintiff, or improperly decreed affirmative relief to a claimant. In such a case, the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy."

There, it will be observed, the plaintiffs in error were seeking to reverse on the merits an adverse decree, vesting title in the opposing party, in a proceeding instituted by themselves. The court reversed that decree to their advantage, for want of the jurisdiction in the court below which they had invoked and set in motion.

An analogous principle was acted on in *Barney* v. *Baltimore*, 6 Wall. 280, where a decree of the Circuit Court, dismissing a bill on the merits, was reversed because that court had no jurisdiction, and a decree of dismissal without prejudice directed; and in *Thompson* v. *Railroad Companies*, 6 Wall.

134, where the question was one purely of procedure, whether the remedy was at law or in equity, although, in that class of cases, where the jurisdiction relates to the subject matter and is administered by the same court, but in another form of proceeding, it would seem more reasonable that the objection might be waived by the conduct of the parties. See, also, *Hurt* v. *Hollingsworth*, 100 U. S. 100. And in *Williams* v. *Nottawa*, 104 U. S. 209, it was held to be the duty of the Circuit Court to execute the provisions of the 5th section of the act of March 3d, 1875, c. 137, 18 Stat. pt. 3, p. 470, by dismissing a suit of its own motion, whenever it appeared that it did not really and substantially involve a dispute or controversy properly within its jurisdiction, and equally so of this court, when, on error or appeal, it appeared that the Circuit Court had failed to do so, in a proper case, to reverse its judgment or decree for that reason, and to remand the cause with direction to dismiss the suit.

In *Grace* v. *American Central Insurance Company*, 109 U. S. 278, it is true that this court passed upon all the questions in the case affecting its merits, although it reversed the judgment because the jurisdiction of the Circuit Court was not apparent; but it was thought convenient and proper to do so, in that case, because the record itself made it probable that its omission of the statements necessary to show jurisdiction was inadvertent, and might be supplied for a future trial in the same court. In the present case, however, the want of jurisdiction appears affirmatively from the record.

For these reasons the judgment of the Circuit Court must be reversed, and the cause remanded with directions to remand the same to the Court of Common Pleas of Fulton County, Ohio.

It remains, however, to dispose of the question of costs.

It is clear that the plaintiffs in error, having wrongfully caused the removal of the cause from the State court, ought to pay the costs incurred in the Circuit Court, and there is no want of power in the court to award a judgment against them to that effect. By sec. 5 of the act of March 3d, 1875, the Circuit Court is directed, in remanding a cause, to "make such

order as to costs as shall be just;" and the bond given by the removing party under sec. 3 is a bond to pay "all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto." These provisions were manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs. *McIver* v. *Wattles*, 9 Wheat. 650; *The Mayor* v. *Cooper*, 6 Wall. 247.

As to costs in this court, the question is not covered by any statutory provision, and must be settled on other grounds. Ordinarily, by the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs, the exception being that where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and, as the court can render no judgment for or against either party, it cannot render a judgment even for costs. Nevertheless there is a judgment or final order in the cause dismissing it for want of jurisdiction. Accordingly, in *Winchester* v. *Jackson*, 3 Cranch, 514, costs were allowed where a writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different States, the plaintiff in error being plaintiff below. But in respect to that case, it is to be observed, that the want of jurisdiction disclosed by the record was that of the Circuit Court, and that there was jurisdiction in this court to consider and determine the question of the jurisdiction of the Circuit Court, and to reverse its judgment, had it been the other way, for want of jurisdiction. And the judgment for costs in that case is justified on that ground, and seems to have been rendered against the plaintiff in error, because he was the losing party in the sense of having ineffectually invoked the jurisdiction of the Circuit Court. And this is just what has taken place in the present suit. Here the plaintiffs in error wrongfully removed the cause to the Circuit Court. They seek by a writ of error to this court to reverse upon the merits the judgment rendered

against them, and bring here the whole record. That discloses the want of jurisdiction in the Circuit Court to render any judgment, and this court, in the exercise of its jurisdiction, reverses the judgment for that reason alone, its jurisdiction extending no further. It could not dismiss the writ of error for want of jurisdiction in the Circuit Court, for that would be to give effect to such want of jurisdiction; and this court has jurisdiction of the writ of error to reverse the judgment on that ground. *Assessor* v. *Osbornes*, 9 Wall. 567–575.

In *Montalet* v. *Murray*, 4 Cranch, 46, the judgment was reversed, because it did not appear from the record that the Circuit Court had jurisdiction, and with costs, following *Winchester* v. *Jackson*, *ubi supra*, and thereupon, it is stated in the report, that, "on the last day of the term, the court gave the following general directions to the clerk: that in cases of reversal, costs do not go of course, but in all cases of affirmance they do; and that when a judgment is reversed for want of jurisdiction, it must be without costs." No formal rule of the court covers the case of a reversal on that ground, although paragraph 3 of Rule 24, which provides, that in "cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court," leaves room for the exercise of discretion in its application to such cases. The whole subject was very much discussed by Mr. Justice Woodbury in the case of *Burnham* v. *Rangeley*, 2 Woodb. & Min. 417–424, where he collects a large number of authorities on the subject. In the present case, the writ of error is not dismissed for want of jurisdiction in this court; on the contrary, the jurisdiction of the court is exercised in reversing the judgment for want of jurisdiction in the Circuit Court; and although, in a formal and nominal sense the plaintiffs in error prevail in obtaining a reversal of a judgment against them, the cause of that reversal is their own fault in invoking a jurisdiction to which they had no right to resort, and its effect is, to defeat the entire proceeding which they originated and have prosecuted. In a true and proper sense, the plaintiffs in error are the losing and not the prevailing party, and this court having jurisdiction upon their

writ of error so to determine, and in that determination being compelled to reverse the judgment, of which on other grounds they complain, although denying their right to be heard for that purpose, has jurisdiction, also, in order to give effect to its judgment upon the whole case against them, to do what justice and right seem to require, by awarding judgment against them for the costs that have accrued in this court.

The judgment of the Circuit Court is accordingly reversed, with costs against the plaintiffs in error, and the cause is remanded to the Circuit Court, with directions to render a judgment against them for costs in that court, and to remand the cause to the Court of Common Pleas of Fulton County, Ohio; and

It is so ordered.

HORNBUCKLE & Another *v.* STAFFORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Submitted April 9th, 1884.—Decided April 21st, 1884.

Error—Evidence.

A decree will not be reversed for error in improperly excluding evidence when it is clear that the exclusion worked no prejudice to the excepting party.

Mr. Luther H. Pike submitted the case for plaintiff in error on his brief.

No appearance for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

This suit was brought by Stafford, the appellee, against Hornbuckle and Marshall, the appellants, to restrain them from diverting from his ditch a certain quantity of water to which he claimed to be entitled. The complaint alleged that the appellee was entitled to such quantity of the waters of Avalanche Creek, or Gulch as it is sometimes called in the record, in the county of Meagher and Territory of Montana, as would amount to thirty-five inches miner's measurement, at any point

on said creek above the place where the White and Tower ditch taps the same, and that his right to said quantity of water was, on July 11th, 1871, established by a decree of the District Court for the Third Judicial District of Montana in a suit wherein one John Gallagher and the appellants were plaintiffs, and one Basey and the appellee and others were defendants. The decree was affirmed on appeal by the Supreme Court of the Territory of Montana, and on appeal from the latter court was affirmed by this court. The case is reported under the name of *Basey* v. *Gallagher*, 2 Wall. 670. The complaint further alleged that the appellee was the owner of a water ditch known as the Basey ditch, which tapped said creek about one mile below what was known as the Avalanche ditch, and above the White and Tower ditch, and was entitled to flow into said ditch such a volume of the water of Avalanche Creek as would make thirty-five inches miner's measurement at the head of the White and Tower ditch, which would be equivalent to one hundred and twenty-five inches at the head of the Basey ditch. The complaint then charged that on April, 1878, the appellants unlawfully diverted all of the water of said creek above the heads of the Basey and the White and Tower ditches so as to prevent the water or any part of it from flowing into the ditches of the appellee, and continued to do so, notwithstanding the demand of appellee that they permit the water to flow into his ditch.

The prayer of the complaint was that appellants be forever enjoined and restrained from diverting the water from the appellee's ditches, and for general relief.

The answer of the appellants contained denials of all the material allegations of the complaint, and specially averred that in the year 1869 a company named the Hellgate & Avalanche Ditch Company was formed by Samuel Clem and four associates to construct a ditch to conduct the waters of Avalanche Creek to the foot-hills of Cave Gulch; that appellee became a member of the company and contributed to its property the White and Tower ditch and the water connected therewith, and the other associates contributed certain mining ground, and that each member of the company owned one-sixth

of the common property; that the company constructed its proposed ditch and afterwards purchased the Basey ditch, &c., and that in the fall of the year 1870 all the waters of the Avalanche Creek were turned into the Hellgate & Avalanche ditch, including all the water to which the appellee had any title, and thenceforward the water had always been used by the company as the joint property of its members, and that the appellee, until a short time before the beginning of this suit, never set up any claim to the exclusive use of any part thereof; that on March 30th, 1878, the appellee conveyed, by his deed of that date, to the appellants, all his interest in the Hellgate & Avalanche Ditch Company, and since that time they have been the exclusive owners of the Hellgate & Avalanche ditch and all the water rights connected therewith, having previously purchased the interests of the other owners. The answer denied that on July 11th, 1871, a decree was rendered as averred in the complaint, but admitted that a decree was rendered in a cause wherein John Gallagher and the appellants were plaintiffs, and Basey and the appellee and others were defendants, adjudging to the appellee thirty-five inches of the water of Avalanche Creek, and averred that the decree was so entered awarding the water aforesaid to the appellee by the consent of the members of said company, and because the title to said water right stood in the name of the appellee, and for no other reason, but that the water was awarded to the appellee in trust for the benefit of the owners of the Hellgate & Avalanche Ditch Company.

Issue was taken on the answer by replication, and the issues of fact were tried by a jury, which returned a general verdict for the appellee, and also returned certain special findings, as follows: They found that the thirty-five inches of water, decreed to the appellee by the decree of July 11th, 1879, was held by the appellee for himself and as his own property, and not in trust for the members of the Hellgate & Avalanche Ditch Company, and that he had never parted with his right to said water to the company, either before or after the decree, and that after the decree the water did not belong to the Hellgate & Avalanche Ditch Company. Upon the general

and special verdict of the jury, as well as upon the pleadings, proceedings and evidence in the cause, the court decreed that the appellee was entitled to the possession and enjoyment of thirty-five inches of the water of Avalanche Creek to flow in at the head of the White and Tower ditch, or one hundred and twenty-five inches to flow in at the head of the Basey ditch, and that he hold and enjoy the same, and that the appellants be forever enjoined from interfering with the unobstructed flow of said water to the ditches of the appellee.

From this decree Hornbuckle and Marshall appealed to the Supreme Court of the Territory of Montana, by which the decree was affirmed. The same appellants have brought, by the present appeal, the decree of the Supreme Court of Montana to this court for review.

The case, in its nature and substance, belongs to the equity side of the court. *Basey* v. *Gallagher*, 20 Wall. 670. The testimony is all in the record. The points contested between the parties were whether, under the decree made July 11th, 1871, by the District Court of the Third Judicial District of Montana, and afterwards affirmed by the Supreme Court of Montana and this court, the appellee was entitled, in his own right, to thirty-five inches of the water of Avalanche Creek, or whether he held such right in trust for all the associates of the Hellgate & Avalanche Ditch Company, and whether, if the appellee had a several and individual right in the water, the deed made by him to the appellants on March 30th, 1878, conveyed to them such individual right.

The appellee asserted that he held under the decree individually and in his own right the thirty-five inches of water, and that he did not convey such right to the appellants by the deed of March 30th, 1878. The decree in the case of Gallagher and the present appellant *v.* Basey and the present appellee and another, rendered June 11th, 1871, is upon its face a decree in favor of the appellee individually and in his own right, declaring him to be entitled to the thirty-five inches of water in Avalanche Creek. The Hellgate & Avalanche Company is not mentioned in the decree, nor is there any intimation that the appellee was

to hold the right to the water in trust for any other person or company of persons.

It is also clear that the deed of the appellee to the appellants of March 30th, 1878, did not convey to them the right to the thirty-five inches of water awarded to the appellee by the decree of July 11th, 1871. It was a quit-claim deed for his undivided four-fifteenths interest in the property known as the Hellgate & Avalanche Ditch Company, and contained this reservation: "This deed shall not be so construed as to affect individual rights to waters in Avalanche Gulch."

The decree of the Supreme Court of Montana Territory in the present case must therefore be affirmed, unless the appellants can make good some of their assignments of error.

The first assignment of error relates to the refusal by the District Court to admit in evidence the complaint and answer in the case of *Gallagher* v. *Basey*, offered by the appellants, the court having already admitted the decree rendered in that case. The purpose of the evidence offered was to explain the decree, and to show by the complaint and answer that the right to thirty-five inches of water awarded to the appellee by the decree was not his individual right, but was decreed to him in trust for the Hellgate & Avalanche Ditch Company.

The decree having been put in evidence, it was clearly erroneous to exclude the pleadings upon which this decree was based. Even parol evidence is admissible when necessary to show what was tried in a suit, the record of which is offered in a subsequent action between the same parties. *Campbell* v. *Rankin*, 99 U. S. 261. But in order to sustain the exception to the exclusion of the pleadings in the case of *Gallagher* v. *Basey*, it was necessary that the exception should show what the excluded testimony was, in order that it might appear whether the evidence was material or not. *Dunlop* v. *Munroe*, 7 Cranch, 242, 270; *Reed* v. *Gardner*, 17 Wall. 409; *Montville* v. *American Tract Society*, 123 Mass. 129. This was done by the appellants. A copy of the complaint and answer in the case of *Gallagher* v. *Basey and others* is set out in the bill of exceptions. An inspection of the excluded testimony shows that the complaint and answer do not in any degree tend to

support the contention of appellants, to wit, that the thirty-five inches of water awarded appellee by the decree was awarded to him in trust for the Hellgate & Avalanche Ditch Company. The company is not mentioned in the pleadings, and there is no averment that the appellee held the water right claimed by him for any one but himself.

While, therefore, the appellants were entitled to put the complaint and answer in evidence as a part of the record, it is clear that the exclusion of the pleadings in no degree prejudiced their case. The decree will not be reversed for such an error. *Gregg* v. *Moss*, 14 Wall. 564.

The appellants next contend that the decree should be reversed because the court excluded evidence offered by them to show that the consideration on which the appellee became a member of the Hellgate & Avalanche Ditch Company, was the conveyance of his water right in Avalanche Creek to the company. The evidence was properly excluded, because this issue had been passed upon in the case of *Gallagher and others* v. *Basey and others*, between the same parties, and decided, as appears by the decree of the court, against the contention of appellants. That decree remaining in full force, was not open to contest in a subsequent suit between the same parties. The testimony was, therefore, properly excluded.

The next and last ground alleged for the reversal of the decree is that the court erred in refusing to permit Hornbuckle, one of the appellants, to testify that when the appellee executed the deed of March 30th, 1878, to the appellants, he made no claim or assertion of any individual right to any of the water of Avalanche Creek. The evidence excluded was clearly inadmissible. The deed expressly reserved the individual rights in the water. The reservation could not be affected by the evidence offered. When a reservation is made in a deed, it is not necessary in order to give it effect that the grantor should, when he executes the deed, assert verbally his right to the property excepted from the conveyance. Evidence that he made no such assertion is clearly incompetent and inadmissible.

We are of opinion, therefore, that neither of the grounds

upon which appellants ask the reversal of the decree is well founded. Other exceptions were taken during the course of the jury trial, but no assignments of error are founded upon them.

Upon an examination of the whole record, we are convinced that the decree of the District Court, which was affirmed by the Supreme Court of the Territory of Montana, was according to "the right of the cause and matter of law." It is plain the appellants had no case.

Decree affirmed.

GAINES *v.* MILLER, Administrator.

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

Argued April 9th, 1884.—Decided April 21st, 1884.

Equity—Principal and Agent.

The lawful representative of a deceased person who ratifies sales of property made by an agent of executors in their own wrong, may maintain an action at law against the agent for money had and received to recover the proceeds of the sale in his hands.

The ratification extends to all the dealings on the subject between the agent and his principals; and if the principals have converted the simple debt into a judgment, the lawful representative is bound by it.

In Missouri the excuse for avoiding the operation of the statute of limitations, that the debtor by absconding or concealing himself prevented the commencement of an action, is available in actions at law as well as in equity. § 3244 Rev. Stat. Mo.

This bill was filed by the appellant on May 11th, 1880. Its material allegations were as follows: The appellant was born in 1806, and was the daughter of the late Daniel Clark of the city of New Orleans. On July 13th, 1813, Clark duly executed his last will and testament, by which he devised and bequeathed to the appellant all his estate. He died August 16th, 1813. Appellant did not know that she was the daughter of Clark until 1834. On June 18th of that year she propounded for probate in the Parish Court for the Parish of Orleans, Louisi-

ana, his last will, and after a litigation of more than twenty years it was admitted to probate on February 23d, 1856. In the mean time, in the year 1827, she had become of age, in 1832 she was married to William W. Whitney, who died in 1838, and in 1846 she was married to General Edmund P. Gaines. Gen. Gaines died in 1858, and appellant has since remained a widow.

A short time after the death of Clark, in 1813, Richard Relf and Beverly Chew "began to act as executors of his estate in their own wrong and without authority of law, under a will of Clark executed in the year 1811, which had been revoked by his will of 1813." By power of attorney, they appointed Samuel Hammond, the defendant's intestate, their agent to sell and convey the lands belonging to the estate of Clark lying in the State of Missouri. Hammond, prior to April 9th, 1819, sold lands and received therefor, over and above the credits and commissions to which he was entitled, the sum of $6,841.80. Relf and Chew sued Hammond for the money so received by him, and in August, 1819, recovered a judgment against him therefor. On October 8th, 1823, an execution was issued on the judgment and levied on lands of Hammond, being the north half of New Madrid, survey No. 2,500, which were bought in by Relf and Chew, and the purchase money thereof, to wit, $427.77, credited on the judgment. Hammond was a resident of Missouri from about the year 1815 until December, 1824, when, being insolvent and indebted to the estate of Clark for the balance due on said judgment, he fraudulently absconded and secretly left the State of Missouri, concealing himself from appellant by travelling to places unknown to her. He went to the State of South Carolina, where he lived until his death, which took place in August, 1842. No letters of administration were taken out on the estate of Hammond until October 25th, 1879, when property of his estate in the State of Missouri having been discovered, letters were granted to the appellee, Charles Miller, by the Probate Court of the City of St. Louis.

The prayer of the bill was, that the court would decree that the estate of Hammond was indebted to appellant in the sum

of money demanded, namely, $6,841.80, with the interest thereon, and that she was equitably entitled to recover the same in this suit.

The defendant filed a demurrer to the bill on the following among other grounds: (1) Because the case stated in the bill is one of which a court of equity has no jurisdiction; and (2) because the bill shows that a suit had been brought by those recognized by the court as the lawful representatives of Daniel Clark, and that more than sixty years ago judgment had been rendered therein against Hammond for the same money for which this suit was brought, and that such judgment had never been vacated or reversed.

The Circuit Court sustained the demurrer and dismissed the bill, and the complainant appealed.

Mr. Britton A. Hill for appellant submitted on his brief.

Mr. Henry H. Denison for appellee.

Mr. Justice Woods delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The demurrer was properly sustained on both grounds.

The theory of the bill, as appears from its averments and as it is stated by counsel for appellant, is that appellant is the proper party to sue, in her own name, for the proceeds of the lands of her father's estate, sold by Hammond in 1819 under power of attorney from Relf and Chew, and that by bringing this suit she affirms and ratifies the sale.

The appellant having ratified the sale, the only obligation which can rest upon Hammond's administrator is to pay over to the appellant the money received by Hammond as the consideration of the sale. It is, therefore, simply a case of money had and received by him for the use of appellant, and a declaration in assumpsit on the common counts would have fully stated the appellant's cause of action. Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. *Pickard* v. *Bankes*, 13 East, 20; *Spratt* v. *Hobhouse*,

4 Bing. 173; *Israel* v. *Douglass*, 1 Hen. Bl. 239; *Beardsley* v. *Root*, 11 Johns. 464; *Hale* v. *Marston*, 17 Mass. 575; *Claflin* v. *Godfrey*, 21 Pick. 1. The remedy at law is adequate and complete.

There is no averment in the bill of complaint of any ground of equity jurisdiction. No trust is alleged, no discovery is sought. The appellant has no lien on the property of Hammond's estate, and avers none. The only semblance of a fraud alleged is, that Hammond fraudulently absconded and secretly left the State of Missouri, concealing himself by travelling in places unknown to the appellant. But this averment does not relate to the cause of action. It is only made as an excuse for not bringing the suit at an earlier time, and to take the case out of the bar of the statute of limitations. The law of Missouri, Revised Statutes, sec. 3244, provides, that if any person, by absconding or concealing himself, prevent the commencement of an action, such action may be commenced within the time limited by the statute, after the commencement of such action shall have ceased to be so prevented. The excuse made by appellant for not sooner bringing her suit was, therefore, available in an action at law. Having found assets of Hammond's estate in Missouri, and an administrator having been appointed, an action at law was the plain and adequate method for the recovery of the appellant's rights. The Circuit Court, sitting as a court of equity, had, therefore, no jurisdiction of the case. *Hipp* v. *Babin*, 19 How. 271.

The second ground of demurrer is also well taken. The appellant, by ratifying the sale made by Relf and Chew, through their agent, Hammond, ratified the acts of Relf and Chew in respect to the purchase money received by Hammond. If Hammond, as their agent, had paid over to them the money received from the sales made by him, the appellant could not, having ratified the sale, repudiate the payment. If a principal ratifies that which favors him, he ratifies the whole. *Skinner* v. *Dayton*, 19 Johns. 513, 554; *Odiorne* v. *Maxey*, 13 Mass. 178, 182; *Menkins* v. *Watson*, 27 Missouri, 163; *Small* v. *Atwood*, 6 Clark & Finn. 232. By ratifying the sale, the appellant places herself in the position of Relf and Chew, and

Hammond has the same rights against her as he had against them.

Relf and Chew having sued Hammond and recovered judgment against him for the money received by him, the demand for the money was merged in the judgment. They could not bring suit on the claim for the money. *Biddleson* v. *Whitel*, 1 W. Bl. 506; *Wayman* v. *Cochrane*, 35 Ill. 152. Neither could the appellant. Their only remedy was to enforce the judgment or to bring another suit upon it. If the judgment was paid, Hammond was discharged from any demand either by Relf and Chew or the appellant.

There is a conclusive presumption of law that the judgment has been paid. By an act of the Territorial legislature passed January 20th, 1816, the common law of England was adopted as the law of the Territory of Missouri. By the common law, the lapse of twenty years, without explanatory circumstances, affords a presumption of law that the debt is paid, even though it be due by specialty. *Oswald* v. *Legh*, 1 Term, 270; *Lesley* v. *Nones*, 7 S. & R. 410; *Jackson* v. *Wood*, 12 Johns. 242; Best on Presumptions, § 137.

And, by the Revised Statutes of Missouri of 1835, page 396, it was provided as follows:

"Every judgment and decree of any court hereafter rendered or made, shall be presumed to be paid and satisfied after the expiration of twenty years from the time of giving such judgment or decree, and every judgment and decree rendered or made at the time this act shall take effect, shall be presumed to be paid and satisfied after the expiration of twenty years from the time this act shall take effect."

This provision has been substantially continued in force to the present time, 1 Rev. Statutes of Missouri, sec. 3251, and forms a part of the settled jurisprudence of the State. In the case of *Chalmers* v. *Wilkinson*, 10 Missouri, 98, it was held by the Supreme Court that, as to judgments rendered prior to the act of 1835, the presumption of payment after twenty years raised by the common law, continues unaffected by that act,

which, as to such judgments, is only cumulative. This presumption is a rule of evidence and not a limitation, and is not subject to the exceptions and incidents of an act of limitation. *Cape Girardeau County* v. *Harbison*, 58 Missouri, 90; *Smith's Ex'r* v. *Benton*, 15 Missouri, 371.

If, therefore, twenty years after its date suit had been brought against Hammond, in his lifetime, on the judgment recovered against him by Relf and Chew, he could have availed himself of the conclusive presumption which that law raises, that the judgment had been paid. The presumption is no weaker when the suit is brought against the administrator of his estate sixty-one years after the date of the judgment.

The case, therefore, as stated by the bill, is this: Appellant seeks to recover on a claim for money had and received, which had been reduced to judgment more than sixty years, and which the law conclusively presumed had been paid more than forty years before her suit was brought.

We are of opinion, therefore, that the decree of the Circuit Court sustaining the demurrer to the bill was right, and it must be

Affirmed.

CLAIBORNE COUNTY *v.* BROOKS.

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

Argued April 2d, 1884.—Decided April 21st, 1884.

Municipal Corporations.

When the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations shall possess, the decisions are authoritative upon the courts of the United States.

In the absence of State statutes, or of settled decisions of the highest court of a State, the rule of interpretation in respect of the powers of political and municipal corporations is to be found in the analogies furnished by their prototypes in the country of common origin, varied and modified by circumstances peculiar to our political and social condition.

Statement of Facts.

The power to issue commercial paper is foreign to the objects in the creation of political divisions into counties and townships, and is not to be conceded to such organizations unless by virtue of express legislation, or by very strong implication from such legislation.

The power which the statutes of Tennessee confer upon a county in that State, to erect a court-house, jail, and other necessary county buildings, does not authorize the issue of commercial paper as evidence or security for a debt contracted for the construction of such a building. *Ross* v. *Anderson County*, 8 Baxter, 249, shown to be consistent with this decision.

This was an action of debt, brought by the appellee, the plaintiff below, as bankrupt assignee of Howard, Cole & Co., against the county of Claiborne, Tennessee, on its bond or obligation, dated 7th day of April, 1868, payable to one V. H. Sturm or order for $5,000, with interest, and indorsed by Sturm to Howard, Cole & Co.

The following is a copy of the bond, together with the indorsement thereon, to wit:

"County Court. April Term, 1868.

"The State of Tennessee, *County of Claiborne:*

"On or before the first day of January, 1870, the County of Claiborne is hereby bound and promises to pay to V. H. Sturm, or order, the sum of five thousand dollars, bearing interest from this date at the rate of six per centum per annum until paid. And this bond is redeemable by the county at any earlier date if they choose to do so.

"By order of the County Court of said county, at its quarterly term, on the first Monday of April, 1868, a majority of the acting justices of the peace for said county having voted the same, and ordered the bond of the county to be issued therefor.

"Witness Thomas L. Davis, chairman of the County Court of said county, and the seal of the court, this 7th day of April, 1868.

"[seal] Thos. L. Davis, *Chairman.*

"Attest: David Cardwell, *Clk.*"

Indorsed: "Pay to Howard, Cole & Co., waiving demand, notice and protest. Victor H. Sturm."

The case was commenced in the State court and was removed into the Circuit Court of the United States, and came up for trial on the pleas of *non est factum*, *nil debet*, and payment, other pleas having been overruled on demurrer.

Statement of Facts.

A verdict being rendered in favor of the plaintiff under the charge of the court, exceptions were taken to the charge.

The bill of exceptions stated that on the trial the plaintiff introduced proof tending to show that the county of Claiborne, by its County Court, appointed commissioners, who contracted with Sturm for the erection of a court-house in Tazewell, the county seat; that by the original contract he was to receive $8,000; and that the contract was subsequently modified so as to enlarge the building, without fixing specifically the additional price to be paid. The plaintiff further exhibited proof of the following orders made by the County Court and entered of record, namely, on the 6th of April, 1868, the following:

"*Ordered*, by the court that V. H. Sturm be allowed the sum of ten thousand dollars, in part pay for the court-house."

And on the 4th day of January, 1869, the following:

"It was this day ordered by the court that Benjamin Ausmus, revenue collector of Claiborne County, be permitted to examine and investigate the payment or transfer of certain county bonds issued in favor of V. H. Sturm, and whether or not said bonds have been paid, transferred, or assigned to any party for a full and valid consideration before the 7th July, 1868; and if so, that the said Ausmus, as revenue collector, be allowed to pay over or deposit what funds he may have on hand, collected for that purpose, to the person or persons holding legal and lawful possession of said bonds. But should the bonds have been enjoined before or since the above date, then the money so collected and in the hands of said revenue collector will be deposited with the clerk of the Chancery Court at Knoxville, taking his receipt therefor."

There was also evidence tending to show that the bond sued on was made and delivered to Sturm by the chairman of the County Court, together with another similar bond, which has been paid.

The defendant introduced evidence tending to show: That the value of the additional work on the court-house was $3,000; that between $10,000 and $11,000 had been paid to the con-

tractor, V. H. Sturm, and his order, outside of the amount called for in the bond sued on.

The following sections of the Code of Tennessee show the powers of counties in that State in relation to the erection of public buildings and the making of contracts:

§ 402. "Every county is a corporation, and the justices in the County Court assembled are the representatives of the county and authorized to act for it."

§ 403. "Suits may be maintained against a county for any just claim as against other corporations."

§ 404. "Each county may acquire and hold property for county purposes, and make all contracts necessary or expedient for the management, control and improvement thereof, and for the better exercise of its civil and political power; may do such other acts and exercise such other powers as may be allowed by law."

§ 408. "It is the duty of the County Court to erect a court-house, jail, and other necessary county buildings."

§ 410. Such buildings "shall be erected within the limits of the county town."

§ 411. "The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the County Court, and it may levy a special tax for that purpose."

§ 414. [Confers power on the justices of the County Court, when deemed for the public interest, to change the site of the county jail or court-house, and to order a sale of the site or materials]; "and they may also order that a more eligible, convenient, healthy, or secure site be purchased, and cause to be erected thereon a new jail or court-house, better suited to the convenience of said town, and secure the safe custody, health, and comfort of the prisoners."

§ 415. "The said justices shall appoint not less than three nor more than five commissioners, a majority of whom shall be competent—

"To make such sale and purchase;

"To contract for and superintend the erection of the new jail and court-house; and

"To carry into execution all such orders as said justices may deem necessary and proper in the premises."

The defendant's attorney requested the court to instruct the jury—

"*First.* That in the absence of express power conferred by statute, the county of Claiborne, as a corporation, had no power to make and issue a negotiable interest-bearing bond such as the one sued on, there being no implied power to issue such a bond.

"*Second.* There being no authority for the issuance of such bonds, the chairman of the County Court had no right to make or issue it, and the payment of a similar bond by the county would not operate as a ratification or this bond or make it valid."

Amongst other things not excepted to, the judge instructed the jury as follows, to wit:

"*First.* That the defendant, Clairborne County, a corporation under the laws of Tennessee, through the County Court, was authorized to erect a court-house; that the power to erect implied the right to contract for the same, and if the court had the right to make a contract for the erection of the court-house, he instructed them that the court had the incidental or implied power to execute a note, bond, or other negotiable security in payment of such contract, and might legally issue such an instrument as the bond sued on."

"That a corporation with power to make a contract like an individual, might make and issue commercial paper as evidence of or security for the contract."

"The court further instructed the jury that they would look to the evidence and ascertain whether the County Court ordered the chairman to make the bond sued on; if it did not so order, the chairman had no power or authority to make it; but if, after its execution, the county court made an order on the tax collector to hunt up the holders of this and another bond like this, and pay it, that this would be a ratification of the action of the chairman, and would validate the bond sued on.

"If the jury should so find, they would then find in favor of the plaintiff the amount of the bond and interest thereon at six per cent. per annum from its date."

To these portions of the charge the defendant excepted, and assigns the same for error.

The jury returned a verdict of $8,741 for the plaintiff, being for principal and interest of the bond.

Judgment was entered for plaintiff accordingly, and the defendant sued out this writ of error.

Mr. Jesse L. Rogers for plaintiff in error.

Mr. James G. Rose for defendant in error.—There was no error in the charge that the authority that could make the bond in the first instance, the County Court, could ratify an unauthorized making of it. *Supervisors* v. *Schend*, 5 Wall. 772; *County of Ray* v. *Vansycle*, 96 U. S. 675, 687. The right to construct the buildings included the right to create debts for doing so. *Lynde* v. *The County*, 16 Wall. 6; *Wood* v. *Tipton County*, 7 Baxter, 112; *Carey* v. *Campbell County*, 5 Sneed, 515; *Davidson County* v. *Alwell*, 4 Lea, 28; *Camp* v. *Knox County*, 3 Lea. 199; *Mills* v. *Gleason*, 11 Wis. 470; *Bank* v. *Chillicothe*, 7 Ohio, part 2, 31. That a trading corporation may issue commercial paper is not doubted. The power of a municipal corporation to do the same has been sustained in the following cases. *Meyer* v. *Muscatine*, 1 Wall. 384; *Rogers* v. *Burlington*, 3 Wall. 654; *Lynde* v. *The County*, 16 Wall. 6; *Ross* v. *Anderson County*, 8 Baxter, 249; *De Voss* v. *Richmond*, 11 Gratt. 338; *Evansville, Indiana, &c., Railroad* v. *Evansville*, 15 Ind. 395; *Hamilton* v. *Pittsburg*, 34 Penn. St. 496; *Middleton* v. *Alleghany County*, 37 Penn. St. 237, 241; *Reinbath* v. *Pittsburg*, 41 Penn. St. 278.

Mr. Justice Bradley delivered the opinion of the court. He stated the facts as above, and continued:

From the instructions requested by the defendant and those given by the court (although there is a want of explicitness in the bill of exceptions), we gather that the real controversy was, whether the defendant could set up against the assignees of the bond a defence (such as payment) which would have been good against Sturm, the original holder, as to whom evidence was given tending to show that he had received from the county all, or nearly all, that he was entitled to, independently of the bond sued on. Unless this was the real controversy we

do not see the relevancy of the charge. For, if the right of the defendant to set up the defence which it had against the bond in the hands of Sturm was not denied or disputed, we do not see of what importance the particular form of the instrument would have been. But if the form was relied on as precluding any such defence, then the charge was clearly material, and had a decisive bearing upon the case.

The doctrine of the charge is that the power of a county to erect a court-house involves and implies the power to contract for its erection, and the power to contract involves and implies the power to execute notes, bonds, and other commercial paper as evidence or security for the contract; or, to state it according to its legitimate conclusion and result, it is this, that whenever a county has power to contract for the performance of any work or for any other thing, it has incidental power to issue commercial paper in payment thereof; that the one power implies the other. It being clear that the county of Claiborne had power to erect a court-house, the court below held that this involved an implied power to contract out the work, and to issue negotiable bonds of a commercial character in payment thereof.

We cannot concur in this view. The erection of court-houses, jails and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes, and other commercial paper in payment of county debts and charges; and if they have this power, then such obligations issued by the county authorities and passing into the hands of *bona fide* holders, would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid; and it would then be in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or

are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it. Our views on this subject were distinctly expressed in the case of *Police Jury* v. *Britton*, 15 Wall. 566, where, speaking of the power of local political bodies to issue commercial paper, we said: "It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees, or other local representatives of townships, counties, and parishes, have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated. We do not mean to be understood that it requires in all cases express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in future." pp. 571–2.

In that case the suit was brought on coupons of bonds given to take up certain levee warrants issued by the police jury of the parish; and the court were unanimously of opinion that the police jury had no power to issue such bonds.

In the subsequent case of *The Mayor of Nashville* v. *Ray*, 19 Wall. 468, the circumstances were somewhat different. That was the case of an incorporated city, and the suit was brought on treasury warrants drawn by the mayor and recorder on the

city treasurer, payable to bearer, and originally delivered to various persons for work done for the city; they were afterwards received by the tax collector in payment of taxes, and then sold for such price as they would bring to raise money for city purposes; the plaintiff had purchased the warrants in suit, and evidence was given to show that he had notice that they had been paid in and received for taxes; but the court below held that the corporation had the right to issue promissory notes and other securities; and that, if it was the usage to reissue them in this way, they would, when sold and reissued, be obligatory on the city. All the justices of this court held that when originally issued, they were valid as vouchers and evidences of actual indebtedness, and the three dissenting justices held with the court below that they were valid obligations when reissued; but a majority of the court concurred in reversing the judgment, and four of the justices were of opinion that, as the city had no express power to borrow money or to issue commercial paper, and, in their view, no general power by which it was necessarily implied, the warrants when once paid in for taxes were nothing but redeemed vouchers, and *functus officio*, and ceased to have any validity, and that the city officers had no authority to reissue them; that it was an unauthorized use of the city's credit, and an attempt to borrow money and to issue commercial paper without any power or authority to do so; and that the plaintiff's claim of being a *bona fide* holder could not avail him. In discussing the subject the following remarks were made, which were quoted with approval in the subsequent case of *Wall* v. *County of Monroe*, 103 U. S. 78: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however

irregular or fraudulently issued, is an abuse of their true character and purpose." And again: "Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers or people. Persons receiving it from them know whether it is issued, and whether they receive it for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect."

The counsel for the defendant in error relies strongly on the cases of *Lynde* v. *County of Winnebago*, 16 Wall. 6, decided by this court, and the *State ex rel. Ross* v. *Anderson County*, 8 Baxter, 249, decided by the Supreme Court of Tennessee, as well as upon various decisions of other State courts, particularly *Williamsport* v. *Commonwealth*, 84 Penn. St. 487; *Mills* v. *Gleason*, 11 Wisconsin, 470, and *Bank of Chillicothe* v. *Chillicothe*, 7 Ohio, pt. 2, p. 31.

Conceding that views different from those which we have expressed are entertained by some of the State courts, and that they may be controlling in the States where they are thus entertained, we are more especially concerned to know what is held to be the law in Tennessee, as well as what may have been held in the decisions of this court in former cases.

In the case of *Lynde* v. *County of Winnebago*, the county had express legislative authority to *borrow money* for the erection of public buildings, to be determined by the people of the county at any regular election, or special election called for the purpose. The question in the case was, not as to the existence of the power, but as to the effect of the evidence on the question whether the conditions for its exercise had been complied

with. The court held that the evidence was sufficient, and sustained the bonds. It was not pretended that the county would have had power to issue them if such power had not been conferred by the legislature, either expressly or by necessary implication, from the express power to "borrow money."

In the case of *The State ex rel. Ross* v. *Anderson County*, the authority to issue bonds was still more explicit. An act of the legislature of Tennessee, passed in 1852, ch. 191, had authorized certain counties to subscribe stock in any chartered railroad located through said counties, in any amount determined upon, in the manner prescribed by law, and *to issue bonds* for the amount subscribed. Another act, passed in 1854, applied these provisions expressly to Anderson County, and the bonds in question in that case were issued in pursuance of this act, although the preliminary proceedings had been taken under a different act which authorized a subscription to the stock, but did not expressly authorize the issue of bonds therefor. The Supreme Court of Tennessee, it is true, expressed an opinion that authority to issue the bonds was implied from the power given to subscribe for stock without the aid of the act of 1854, stating, as a general rule, "that a county, like another corporation, having right to create a debt, has also the incidental right to issue the commercial evidence of it, in such forms as may be satisfactory to the parties." But the statement of this general proposition may be regarded as only a *dictum* in the case, since the judgment was fully supported by the express provisions of the act of 1852, ch. 191, if not by the power given to subscribe for stock in a railroad corporation. We are not referred to any other decision of the Supreme Court of Tennessee which comes any nearer to a determination of the question.

It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State. But as all, or nearly all the

States of the Union, are subdivided into political districts similar to those of the country from which our laws and institutions are in great part derived, having the same general purposes and powers of local government and administration, we feel authorized, in the absence of local State statutes or decisions to the contrary, to interpret their general powers in accordance with the analogy furnished by their common prototypes, varied and modified, of course, by the changed conditions and circumstances which arise from our peculiar form of government, our social state and physical surroundings.

With regard to the political divisions of counties and townships, we have heretofore, in the cases referred to, expressed our views as to their power of issuing paper obligations of a commercial character. We consider such a power as entirely foreign to the purposes of their creation, and as never to be conceded except by express legislation, or by necessary, or, at least, very strong implication from such legislation. The reasons for these views were fully expressed in those cases, and need not be repeated. We adhere to them without modification.

But when a case comes before us from a State in which a different policy prevails, clearly shown by the local constitution or statutes, or by the settled decisions of the State courts, we are bound to decide it accordingly. We are not satisfied that this is such a case.

The sections of the Code of Tennessee already referred to, so far as we can perceive, confer only the ordinary powers generally given to county jurisdictions. No extraordinary powers are given; and no mode of raising funds for the erection or repair of public buildings is pointed out, except the levy of a special tax. In the case of *Wells* v. *Supervisors*, 102 U. S. 625, 631, we held that the power to issue county bonds did not arise from a power to subscribe for stock in a railroad company, where authority was at the same time given to assess and collect a tax for the payment of the capital stock, and no other authority to raise the requisite funds was given.

Under the Code of Tennessee contracts may of course be made for the erection or repair of public buildings, and the power to issue vouchers for payment is necessarily implied; but

no power is given to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities. No such power is expressly given, and in our judgment no such power is necessarily implied. The document sued on in this case may very well have served the purpose of a voucher to show a stated account as between Sturm and the county, and may be of such form as to be assignable by indorsement, but it must always be liable, in whosesoever hands it may come, to be open for examination as to its validity, honesty, and correctness.

The judgment of the Circuit Court must be reversed, and the cause remanded with directions to award a new trial, and to take such further proceedings as may be in accordance with this opinion.

SLIDELL & Another *v.* GRANDJEAN, Deputy Surveyor of the United States.

SAME *v.* RICHARDSON, Register of State Land Office of Louisiana.

SAME *v.* EMLER & Others.

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

SAME *v.* TSCHIRN.

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

Public Land—Houmas Grant—Spanish Custom—Construction of Statutes.

In an order by a Spanish governor of Louisiana recognizing an Indian grant and directing the issue of "a complete title," these words, as translated, refer to the instruments which constitute the evidence of title, and not to the estate or interest conveyed.

It was a usage of the Spanish government, in granting lands on the river, to reserve lands in the rear of the grants to the depth of forty arpents, the

Statement of Facts.

grantee of the river front having the preference right to purchase the reservation.

Usages and customs respecting the alienation of lands prevailing in Louisiana previous to its acquisition by the United States have, to a great extent, the efficacy of law, and are to be respected in considering the rights of grantees of the former government.

When established, such usages and customs control the construction and qualify and limit the force of positive enactments.

The original Houmas grant in Louisiana from the Indians, on the 5th of October, 1774, had a defined length on the river Mississippi, and designated coterminous proprietors to the north and to the south, but no depth to the grant was named. The Spanish governor executed a formal grant of the tract, describing it as of the common depth of forty arpents. Two years later, on the petition of the grantee, the governor directed his adjutant to give the petitioner the land which might be vacant after forty arpents in depth. This was done by a survey running the northern and southern boundaries on courses from the Mississippi for forty arpents and for two arpents additional; *Held*, That, in view of the Spanish usages, and of the action of the Spanish authorities, and of the action of Congress and of United States officials, all of which are referred to, the concession extended in the designated courses to the depth of eighty arpents from the river.

In case of doubt, a legislative grant should always be construed most strongly against the grantee.

When a statute authorizes the creation of a commission of three to decide upon land grants, a majority of whom "shall have power to decide," "which decisions shall be laid before Congress," "and be subject to their determination," their decisions have no binding force until acted upon by Congress.

An act confirming "the decisions in favor of land claimants made by" A, B, and C, reciting their names, does not confirm a decision made by A and B and dissented from by C, although the act under which the commission was created provided that a majority of the commissioners should have power to decide.

A legislative confirmation of a grant of land of which no quantity is given, no boundary stated, and no rule for its ascertainment furnished, is void for uncertainty. The distinction between such a confirmation and that passed upon in *Langdeau* v. *Hanes*, 21 Wall. 521, pointed out.

These suits, which involved the validity of the titles to land in Louisiana under what is known as the Houmas grant, were heard together. The court below held that that grant was limited to a depth of 40 arpents from the river. The claimants under the grant appealed from this decision in three of the cases and brought their writ of error to reverse the fourth. The voluminous facts, action of Spanish authorities, action of Congress, action of United States authorities, decisions of commissions,

and decisions of courts, which go to make up the issues, or bear upon them, are fully set forth in the opinion of the court.

Mr. James L. Bradford for appellants and for plaintiffs in error.

Mr. Solicitor-General for Grandjean and as *amicus curiæ*.

Mr. William Grant (*Mr. J. D. Rouse* was with him) for appellee Richardson, and defendant Tschirn.

The case was argued on the 2d January, and a decision announced on the 3d March, 1884. On the 24th March, 1884,

Mr. Justice Field announced the following order:

On the argument of these cases the contention of the plaintiffs was that the grant of Governor Galvez to Maurice Conway, on the 21st of June, 1777, embraced all the land in the rear of the original grant to him and Latil by Governor Unzaga, in November, 1774, included within the boundary lines of that grant extended to the limits of the possessions of the Spanish Crown. In support of that contention, reliance was placed upon the report of the commissioners appointed under the act of Congress of 1805, the plats of the surveyor Lafon and the alleged confirmation by the act of June 2d, 1858. We held that the grant of Galvez derived no aid from these sources, but must depend for its extent upon the language of the concession and the proceedings of the adjutant Andry in establishing its northern and southern boundaries; and that it was therefore limited to two arpents in the rear of the original grant.

The plaintiffs ask a rehearing, contending that if they are not entitled to the land claimed under the report of the commissioners construed by reference to the plats of Lafon and the confirmatory act of June 2d, 1858, they are entitled by virtue of the concession and accompanying report of Andry construed in accordance with the usages of the country, having the force of law, to forty arpents, the quantity alleged to be the amount intended in the absence of specific designation to be ceded in

cases of grants in the rear of the land of proprietors on the river, thus giving to the two grants an extent of eighty arpents from the river. And the plaintiffs have presented so many considerations in support of this view, that the court will receive arguments from counsel upon this point, to be in writing and filed within two weeks from date. The clerk will give to the counsel of the plaintiffs and to the Attorney-General a copy of this memorandum.

Mr. Willis Drummond and *Mr. Robert H. Bradford* on this point filed a brief for appellants and plaintiffs in error.

Mr. J. D. Rouse and *Mr. William Grant* filed a brief for all the defendants.

Mr. Solicitor-General filed a brief for the United States.

These briefs were handed to the court on the 8th April, 1884.

Mr. Justice Field delivered the opinion of the court.

Of these suits the first three are in equity; the fourth is at law. They were argued together, as they are all founded upon the supposed validity of the plaintiffs' title to the Conway division of the Houmas grant in Louisiana beyond the depth of eighty arpents from the Mississippi River. If their title beyond that depth be sustained other questions will arise for consideration, but if that fails those questions will be unimportant. The Houmas grant is famous in the history of land titles in Louisiana, from the protracted controversy in the Land Department to which it gave rise, and the discussion created in Congress by the attempt made to secure its legislative confirmation. The documents to which our attention has been called as sustaining the pretensions of the plaintiffs, or in opposition to them, are scattered through many volumes. They consist of the original proceedings and concessions under the Spanish government; the orders of the territorial governor and certificates of a local surveyor after the cession of the country to the United States; the proceedings of the board of commissioners created by Congress to examine into and report upon land

claims in that Territory; various petitions to the officers of the Land Department, and their reports thereon; the opinion of the Secretary of the Treasury and of the Attorney-General upon the nature and extent of the grant, and the proceedings of Congress in passing an act of confirmation, and subsequently repealing it. We shall endeavor to condense the history of the grant, and of the various proceedings taken with reference to it, into as narrow a compass as possible.

On the 5th of October, 1774, while Louisiana was under the dominion of Spain, tribes of Indians, known as the Houmas and Bayou Goula tribes, had possession of certain land situated on the left bank of the Mississippi River, about twenty-two leagues above New Orleans, and claimed some interest in it, the extent and nature of which are not given. Whatever that interest may have been, the Indians sold it on that day to two persons by the name of Maurice Conway and Alexander Latil for the consideration of $150. A conveyance of that date executed at New Orleans before a notary public by one Calazare, describing himself as chief of the tribes, appointed such by the governor of the province, recites that the tract had once belonged to a Frenchman, that he had sold it to another Frenchman, who had abandoned it, and that afterwards, being vacant, the two Indian tribes fixed their residence upon it by permission of the governor. The chief, on behalf of the Indians, renouncing whatever rights they possessed, ceded the land to the purchasers, and stipulated that after obtaining the permission of the governor they might possess it as absolute owners; that a copy of the instrument should be presented to that officer for his approval, without which they could not be permitted to take possession. It would thus seem that the right of the tribes was one of mere occupancy at his will, and that the title at the time was in the Spanish crown. On the same day Unzaga, the governor of the province, approved the instrument thus executed, and in pursuance of the authority vested in him granted the land to the purchasers, directing them, however, to apply to him in order that full title papers—a complete title, as the language used is translated—might be issued to them. The words translated "a

complete title" refer, however, only to the instruments which constitute evidence of title, and not to the estate or interest thereby conveyed. *De Haro* v. *United States*, 5 Wall. 599.

The land granted is described in the conveyance of the Indians as a tract "measuring upwards of half a league, at the distance of twenty-two leagues from this city on this side of the river, joining on the upper side lands belonging to John the blacksmith, and on the lower side the place where are erected the huts in which the said two nations of Indians now live; but when the said huts will be taken away, to be transported on the other side of the river, the true boundary on the lower side will be the lands belonging to an old Acadian named Peter; so by the measurement which the said purchasers will make of the said tract of land, according to the said boundaries, its exact contents will be ascertained."

It will be perceived from this description of the land that no depth is given. On the first of November following, the governor executed to the purchasers a formal grant, describing the tract as having "the common depth of forty arpents." The tract was thus rendered susceptible of identification and measurement. Its front bordered on the river; its side lines were determinable by adjoining tracts, and it was of the depth mentioned. When grants fronting on the river were made by the Spanish government, it was customary to reserve, to the depth of forty additional arpents, the lands immediately in the rear, to be used by the front proprietors for pasturage, or to obtain timber for fences or for fuel. The law on this subject, which prevailed in the province, is very clearly and distinctly stated by Mr. Justice Catron in delivering the opinion of this court in *Surgett* v. *Lapice*, 8 How. 48, 66. He says that "the grants were not large, and fronted on the river only to the extent of from two to eight arpents as a general rule, and almost uniformly extended forty arpents back; to these front grants the Spanish government reserved the back lands to another depth of forty arpents; and although few, if any, grants were made of back lands in favor of front proprietors, still they were never granted by the Spanish government to any other proprietor, but used for the purpose of obtaining fuel and for

pasturage by the front owners, so that, for all practical purposes, they were the beneficial proprietors—subject to the policy of levees, and of guarded protection to front owners. We took possession of Lower Louisiana in 1804 [December, 1803]; in 1805 commissioners were appointed, according to an act of Congress, to report on the French and Spanish claims in that section of country, and by the act of April 21st, 1806, it was made a part of their duty 'to inquire into the nature and extent of the claims which may arise from a right, or supposed right, to a double or additional concession on the back of grants or concessions heretofore made,' previous to the transfer of government, 'and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress, at their next ensuing session. And the lands which may be embraced by such report shall not be otherwise disposed of, until a decision of Congress shall have been had thereon.'

"The commissioners were engaged nearly six years in the various and complicated duties imposed on them, and then reported, that, by the laws and usages of the Spanish government, no front proprietor by his own act could acquire a right to land further back than the ordinary depth of forty arpents, and although that government invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore they rejected claims for the second depth, as not having passed as private property to the front proprietor under the stipulations of the treaty by which Louisiana was acquired."

On the 9th of September, 1776, nearly two years after obtaining the grant, Conway presented a petition to the governor stating that he was about to settle on the lands which he and Latil had purchased of the Indians; that he had acquired Latil's interest; that the lands were destitute of fences and were cleared for upwards of a league in depth in "such a manner" that the cypress trees might be "about a league and a half from the river," and that as the grant extended only forty arpents, he could not have access to them to obtain timber for

his fences, and other uses of his plantation. He, therefore, prayed the governor to grant him *all the depth which might be vacant at the end of his forty arpents*, and that Louis Andry, the governor's adjutant, might be appointed to put him in possession of the front and depth "by fixing the needful boundaries," and furnishing him "with copies of the whole transaction" for his "use and guidance." Upon this petition, the governor directed Andry to go upon the land and give the petitioner possession of *that which might be vacant after the forty arpents in depth*, and to make a report of his proceedings —a *proces verbal* as it is termed—in order that full title papers —"a complete title" in the translation—might be issued to the claimant.

In October following this order was executed by Andry. He went upon the land and first measured its front upon the river and ascertained it to be ninety-six arpents. Owing to its situation on a bend of the Mississippi, the tract widened as it receded from the river. He then ran the upper line north fifty degrees west to the depth of forty arpents from the river, "opening for that purpose a road through the woods," and placed there a stake of cypress. He then extended the line two arpents more, and placed another similar stake. He then proceeded to draw in the same way the southern line of the grant, running it north seventy degrees east, going for that purpose a part of the distance through woods, and placing a boundary stake of cypress at the depth of forty arpents, and also at the further depth of two arpents more, "in order," as he stated, "to keep the course." Of his proceedings on this survey Andry made a detailed report.

On the 21st day of June of the following year Galvez, the successor of Unzaga as governor of the province, made to Conway a grant of the land thus surveyed. In the instrument executed by him he recites that he had seen the report of the proceedings of the adjutant of the town relating to the possession given to Conway, pursuant to the order of his predecessor, "of all the vacant land lying behind and in the rear of the first forty arpents" which he then possessed "by ninety-six arpents in front on the river," and that the adjutant had followed the

directions (lines extended) of the original concession; and that these conformed to the rules of survey and to the concessions of adjoining proprietors. He thereupon approved of the proceedings of the adjutant, and granted to Conway "the aforesaid land behind or at the end of the forty arpents which contain his plantation."

These are all the papers relating to the title to the Houmas grant executed by the authority of the governor of the province whilst it belonged to Spain.

As no back line is designated to the second grant its dimensions must be found, if at all, in the limitation to such grants imposed upon the authority of the governor by positive law or established usage. As seen from the opinion of the court in *Surgett* v. *Lapice*, it was the invariable custom of the Spanish government to reserve lands in the rear of grants on the river, to a depth of forty arpents, for the use of the front proprietors. They were always regarded as having a preference right to become the purchasers of those lands; they were never granted to other parties. So well established was this rule in the usages of the province, that it was deemed by our government, after the acquisition of the country, to create in the front proprietor an equitable right to such preference. Accordingly Congress, by the act of March 3d, 1811, provided that every person who owned "a tract of land bordering on any river, creek, bayou, or water course" in the Territory of Orleans, and not exceeding in depth forty arpents French measure, should be "entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpents French measure in depth, nor in quantity of land that which is contained in his own tract," at the price and on the terms and conditions prescribed for other lands in the Territory. The usage of the country determined the depth of these grants of land in the rear of the premises of the front proprietors. In *Jourdan* v. *Barrett*, this court, speaking of these concessions, said: "That back lands at all times meant those in the rear between the extended front lines in the rear, to the distance of forty arpents (each line being a straight one throughout), we

suppose to be undoubted, as a general rule, although there may have been exceptions to it." 4 How. 169, 182.

By reason of this usage it was only deemed essential, in surveying the second concession, to mark the courses of the upper and lower lines of the tract, the other boundaries being readily ascertained, one by the rear line of the original grant, and the other by a line drawn at a distance of eighty arpents from the river. This practice of surveyors is abundantly established by the documents accompanying the proceedings of Congress, or of its committees, with respect to the Houmas grant.

The usages and customs prevailing in the province of Louisiana, affecting the alienation of lands, are to be respected in considering the rights of grantees of the former government. Usages long established and followed have to a great extent the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments. In Spain and in her dependencies great weight is given to such usages in the adjustment of rights of property. "Legitimate custom," says Escriche, "acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence it is said that there may be a custom without law, in opposition to law, and according to law." Escriche's Derecho Espanol, 23, 24; *Panaud* v. *Jones*, 1 Cal. 499.

In *United States* v. *Arredondo* this court, in considering a grant of land in Florida made by the King of Spain, said: "The court not only may, but are bound to notice and respect general customs and usage as the law of the land, equally with the written law, and, when clearly proved, they will control the general law." 6 Pet 691, 715.

Looking at the grant of Galvez and the survey of Andry in the light of the usage prevailing in the province, we have no difficulty in fixing its limits. It was for an additional forty arpents in the rear of the original concession, the lines of that concession being extended in the same course to the depth of eighty arpents from the river. To that extent the grant was complete. Had the holders of it confined their claim to the

land thus limited, there would not probably have been much, if any, controversy with the United States.

But owing to the use of the words "all the vacant land" lying in the rear of the forty arpents, in the recital of the grant, a pretension was set up, after the cession of the country to the United States, that the grant covered all the vacant land within the lines of the original concession extended to the limits of the possessions of the Spanish Crown. This pretension was so obviously preposterous, that it would not merit consideration, but for the bitter and protracted controversy to which it gave rise. The petition by Conway for a grant of the land in the rear of his forty arpents, though asking for all the depth which might be vacant, was made simply to secure all such land to the ordinary and well understood depth of forty additional arpents, from which he might obtain timber for fuel, fences, and other uses of his plantation. The object of reserving from grant to others the land in the rear of proprietors on the river, according to the custom obtaining in the province, was, as before stated, simply to give facilities to them in the use and improvement of their river plantations. The original concession to Conway and Latil embraced less than four thousand acres. The land claimed under the second grant to Conway exceeds one hundred and eighty thousand acres, an augmentation for a timber privilege which could never be allowed except upon the clearest language, admitting no other reasonable construction. The words of the recital in the grant are necessarily controlled by the usage of the country, which limited the extent of such second grant, as already mentioned. If not thus limited, no means existed for ascertaining its extent, and it was therefore void for uncertainty. The conjectural estimate of the distance of the cypress trees, stated to be, owing to the manner in which the lands were cleared, about a league and a half from the river, is too vague to affect the boundaries of the grant against the force of the general usage. In the Spanish law, as at the common law, grants furnishing no available means of identifying the land were necessarily inoperative and void. If the instrument executed by the governor was intended to transfer all the lands between the boundary lines of the original grant,

extended indefinitely whenever, as alleged in the complaint, it might "suit the convenience or interests" of Conway, it was a void act. He possessed no such unlimited authority to alienate the public lands of Spain.

The Territory of Louisiana was ceded by Spain to France in October, 1800, and by France to the United States on the 30th of April, 1803. It was formally transferred on the 20th of December following. It was stipulated by the treaty of cession that the inhabitants should be incorporated into the Union and admitted as such as soon as possible to the rights of citizenship, and that in the mean time they should be maintained and protected in the free enjoyment of their liberty, property and religion. The stipulation as to property has been held to embrace all titles to lands, whether legal or equitable, perfect or imperfect. In *Soulard* v. *United States*, this court said: It "comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory, as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." 4 Pet. 511, 512; see also *Hornsby* v. *United States*, 10 Wall. 224.

After the cession in April, 1803, Congress, in anticipation of the delivery of the Territory, passed the act of October 31st, 1803, 2 Stat. 245, to enable the President to take possession of it, and for its temporary government. The act provided, among other things, that until the expiration of the then existing session of Congress, unless provision for the temporary government of the Territory should be sooner made, the military, civil, and judicial powers, exercised by the officers of the existing government, should be vested in such person or persons, and should be exercised in such manner, as the President might direct for maintaining and protecting the inhabitants of Louisiana in the full enjoyment of their liberty, property, and religion. Under this law the President appointed William C. C. Claiborne, of Mississippi, governor of Louisiana. Soon afterward a petition was presented to him by William Donaldson, William Marriner, and Patrick Conway for a survey of the

land known as the Houmas, they representing themselves to be its owners, and stating that they were desirous of ascertaining its outlines and boundaries with such precision as to avoid any interference with the proprietors of neighboring grants, and thereby prevent disputes; and praying that he would permit William Marriner, or such other person as might be appointed for that purpose, to survey the tract and mark the boundaries; and that he would direct the proprietors of adjoining patents to show their boundaries to the surveyor, and the commander of the district to protect him from unlawful disturbance in the prosecution of his work. Upon this petition the governor made the following order: "The proprietors of land adjoining the tract within mentioned are requested to show their respective boundaries, and the commandant of the district, if necessary, will extend to the surveyor his protection." The petition and order are without date, and it does not appear what was done, if anything, under the order, except what may perhaps be inferred from a plat of a survey subsequently prepared by one Lafon in 1806, and filed with the register of the land office with notice of the claims of Conway and others. Of this plat we shall presently speak. It is assumed in the bill of complaint and in the argument of counsel, that the survey was made under the authority of the governor by persons appointed by him for that purpose, and that the tract was subdivided by them into three separate parcels, designated after those who at the time had become owners thereof, the first or northern one of which being called the Donaldson and Scott tract, the second or middle one the Daniel Clark tract, and the lower or southern one the William Conway tract.

On the 26th of March, 1804, Congress passed an act dividing Louisiana into two Territories, one of which was called the Territory of Orleans, the other the District of Louisiana. The former territory embraced the land covered by the Houmas grant. The act provided for a government for each of them. The fourth section prohibited the governor from interfering with the primary disposal of the soil, or with claims to land within it. 2 Stat. 283, 287. On the 2d of March, 1805, Congress passed an act for ascertaining and adjusting the titles and

claims to lands within the Territories. 2 Stat. 324. It provided that the Territory of Orleans should be divided into two districts in such a manner as the President should direct, for each of which a register was to be appointed. The two districts into which the Territory was accordingly divided were termed the Eastern and Western districts. The Houmas grant was in the Eastern district. The act permitted persons claiming lands in the Territories "by virtue of any legal French or Spanish grant made and completed before October 1st, 1800, and during the time the government which made such grant had the actual possession of the Territories," and required persons claiming lands by virtue of a registered warrant or order of survey, or by any grant or incomplete title bearing date subsequent to October 1st, 1800, to deliver before March 1st, 1806, to the register or recorder of land titles of the district, a notice stating the nature and extent of their respective claims, together with a plat of the tract or tracts claimed, and to deliver to such officer for record the written evidence of their titles, which were to be recorded by him; except where lands were claimed under a complete French or Spanish grant, it was only necessary to record "the original grant or patent, together with the warrant, or order of survey, and the plat." Their evidence or deeds were to be deposited with the register or recorder, to be laid before the board of commissioners, for the creation of which the act also provided.

It declared that two persons to be appointed by the President for each district of the Territory of Orleans should, together with the register or recorder of the district, be commissioners for the purpose of ascertaining, within their respective districts, the rights of persons claiming under any French or Spanish grant, or by the incomplete titles mentioned. The board, or a majority of its members, was authorized to hear and decide, in a summary manner, all matters respecting the claims presented to them; to administer oaths, compel the attendance of witnesses and the production of the public records in which grants of land, warrants, or orders of survey, or other evidences of claims to land, derived from the French or Spanish governments were recorded; to take transcripts of them or any part

of them, and to have access to all other records of a public nature, relating to the granting, sale, or transfer of land; and to decide, in a summary way, according to justice and equity, on all claims filed with the register or recorder in conformity with the act, and on all complete French or Spanish grants, the evidence of which, though not thus filed, might be found on the public records of such grants; and that their decisions should be laid before Congress, and be subject to its determination.

For this latter purpose the clerk of the commissioners was required to prepare two transcripts of the decisions in favor of the claimants, each to be signed by a majority of the commissioners, one of which was to be transmitted to the surveyor-general of the district, and the other to the Secretary of the Treasury. And the commissioners were required to make to the Secretary a report of the claims rejected, with the evidence offered in their support; and he was required to lay the transcripts and reports before Congress at its next session. Under the act the claimants of the Houmas tract delivered to the register of the land office at New Orleans notices of their respective claims to the land which they asserted was covered by the grant to Maurice Conway made by Governor Galvez, June 21st, 1777; Donaldson and Scott to the upper subdivision, Daniel Clark to the middle subdivision, and William Conway to the lower one. Each of these claimants deduced his title from Maurice Conway, and accompanied his notice with a plat of a survey by one Lafon, to whom reference is made above. These plats do not purport to have been prepared entirely from his own surveys, but chiefly by reliance upon the surveys of others. In the certificate given to Donaldson and Scott, which bears date December 28th, 1804, he describes himself as a surveyor commissioned by Governor Claiborne, though not for any particular survey; and certifies to the plat from a survey made by Marriner and from measurements by himself on the river Iberville. In the certificate given to Daniel Clark, which bears date September 25th, 1805, he certifies from surveys of Marriner and measurements of his own on the river Amite and environs of Galveston, a village on that river. In the

certificate to William Conway, which bears date February 20th, 1806, he describes himself as deputized by one Isaac Briggs, surveyor-general of lands south of Tennessee, and certifies to the plat from surveys executed by Andry in 1804, and by himself on the river Amite in 1803. These plats cover all the land embraced within the lines of the original purchase by Conway and Latil from the Indian tribes in 1774, extended back, not only so as to include the additional arpents surveyed by Andry in 1776, and granted by Governor Galvez in 1777, but all the lands beyond these to the limits of the Spanish possessions, several miles distant from the river, and embracing over 180,000 acres. They possess no official character, and have no greater effect as evidence than any private surveys made at the request of claimants. The notices of the claims thus delivered to the register of the land office were by him laid before the the board of commissioners. The board confirmed the claims, following in its decree the description of the land given by the claimants, but not referring to the plat of Lafon. The notice of the claim of William Conway was presented to the board February 28th, 1806, and is as follows:

"*Notice of the claim of William Conway, of the County of Acadia, in the Eastern District of the Territory of Orleans.*

"William Conway claims a tract of land situated in the county aforesaid, at the place called Houmas, on the left bank of the Mississippi, containing twenty-two and a half arpents in front on said river, with an opening towards the rear of 60 degrees and 45 minutes, the upper line running N. 9° 15 E., three hundred and fifty-one arpents, and the lower line directed N. 70° E., and measuring four hundred and fifty-five arpents. Bounded on the upper side by Daniel Clark, and on the lower by Simon Laneau, as more fully described in the annexed plat, executed by Bartholomew Lafon, deputy surveyor, dated February 20th, 1806.

"Part of said land, that is to say, seventeen arpents front, were originally granted with a greater quantity by the Spanish government to Maurice Conway, by virtue of a complete title issued on the 21st day of June, 1777, as per document No. 1, and the same

conveyed to the claimant by the grantee aforesaid, on the 27th day of October, 1786, as per document No. 2.

"And the five and a half arpents remaining to the complement of the 22½ aforesaid were transferred to the claimant, on the 27th day of March, 1781, by Pierre Part, who had purchased the same at the public sale made before Louis Joudice, commandant of the parish of La Fourche of the estate of the late Joachim Mire (alias Belony), on the 7th day of December, 1778, 'as it evidently appears by the authenticated document hereunto annexed, No. 3.'

"It is to be observed that, although the deed of conveyance of Maurice Conway aforesaid contains 27 arpents front, the claimant only possesses seventeen, having disposed of the other ten in favor of Daniel Clark.

"WILLIAM CONWAY."

The decree of confirmation was made by the board on the 3d of March, 1806, and is as follows:

"No. 125. W. Conway.

MONDAY, *3d March*, 1806.

"William Conway, aforesaid, claims a tract of land situated in the county of Acadia, aforesaid, at a place called Houmas, on the left bank of the Mississippi, containing twenty-two and a half arpents in front, with an opening towards the rear of sixty degrees, forty-five minutes, the upper line running N. 9° 15″ E. three hundred and fifty-one arpents, and the lower line directed N. 70° E., and measuring four hundred and fifty-five arpents, bounded on the upper side by Daniel Clark's land, and on the lower side by land of Simon Laneau; it appearing to the board from a patent or complete title exhibited that seventeen arpents of front were, together with a greater quantity granted by the Spanish Government to Maurice Conway, 21st June, 1777; and it appearing that the five and a half arpents of front remaining of the land aforesaid were purchased by Pierre Part at the public sale of the estate of the late Joachim Mire (alias Belony), on the 7th day of December, 1788; and it further appearing to the board from two several instruments of conveyance offered in testimony that the two tracts of land, af'd, have been conveyed to the present claimant, the board do hereby confirm his claim, aforesaid."

Opinion of the Court.

The confirmations of the claims of Donaldson and Scott and of Daniel Clark were substantially in the same form, differing only as to the lines within which it was alleged the lands lay. The claims were respectively designated as No. 133 and No. 127. The decisions were made before one of the commissioners had become a member of the board, and as soon as he qualified he dissented from them. This fact will be important in considering the effect of the legislative confirmation in 1858.

As required by the act of 1805, a transcript of the favorable decisions rendered by the commissioners, including these three, was duly forwarded to the Secretary, who, in January, 1812, transmitted the same to Congress. The decisions themselves were merely an expression of opinion by the commissioners. They had no effect upon the title of the claimants until approved by Congress. Until then they amounted only to a recommendation of their favorable consideration by the government. No recognition of them by Congress was made until the passage of the act of June 2d, 1858, of which we shall hereafter speak. In the mean time efforts were constantly made to procure a recognition of their validity by the officers of the land department, but without success, except in one instance—that by Secretary Bibb in 1844. With that exception and the decision of the two land commissioners, no officer of the government has ever recognized the validity of the grant by Governor Galvez to the extent claimed by Conway and parties deducing their interest from him.

On the 14th of January, 1829, the Surveyor-General of Mississippi, *ex officio* Surveyor-General of Louisiana, addressed a communication to the Commissioner of the General Land Office, enclosing a rough plat of the Houmas grant showing its locality, the extent of land claimed, and its interference with other grants of the Spanish government. In it he stated that, previously and subsequently to the date of the grant, the Spanish authorities had made other grants to a number of individuals within the limits alleged to be covered by the claim of Conway, and that he believed no pretension to the present limits was made until after the right to the land had vested in the United States. He also stated, as another reason why the grant could

not be extended to the Amite River, that neither the petition of Conway, the decree of the governor, nor the proceedings of the surveyor called for or exhibited any such boundaries; and that it was well known to be the custom of the Spanish surveyors, in all cases where a grant called for specific boundaries, to exhibit them in a plat of survey. He then considered where the boundaries were to be established, and he suggested that, if we were to be governed by the customs of the Spanish government, we should run off such a depth as would extend the upper line until it intercepted an older grant. This he was of opinion would strictly conform to the decree of the Spanish governor, although it would not give the claim a depth of eighty arpents, which he thought was designed if the land was found to be vacant. He then asked instructions to guide him, as surveyors were engaged in the immediate vicinity of the grant.

To this communication the Commissioner of the General Land Office replied, under date of February 17th, 1829, expressing the opinion that the grant made by Galvez in 1777 was so vague in its terms, both as to boundary and quantity, that it would be indispensably necessary for courts of justice to interfere for the purpose of defining and designating both; that the claim set up to all the vacant land which might be embraced between the northern and southern boundaries of the original grant, if it were extended in the course called for, led to such absurdities, that he thought it impossible that the courts could sanction it; that the object for which the grant was asked and obtained would, therefore, be the leading consideration on which the courts would probably decide the question; and, in so deciding, they might possibly confine the grant either to the limits of the survey actually made by Andry, or to eighty arpents, the usual extent granted when the front grant was deficient in timber, or to the distance of one league and a half, as requested in the petition; and, that, if this last limitation was adopted, full scope would be given to the court to exercise its discretion; and, if the grant could be adjudged to exceed these limits, it must extend to the utmost boundary of Louisiana. He, therefore, decided that a league and a half should

not be open to entry, and gave instructions accordingly. Lands beyond that depth were, therefore, treated as public lands, and numerous entries of them were made at the district land office.

Before this correspondence between the surveyor-general and the land commissioner, General Wade Hampton, of South Carolina, had acquired title to the claim made by Donaldson and Scott, and to that of Clark; and, he having died, his heirs, through J. S. Preston, one of them, in June, 1836, applied to the land office for a patent, and requested, if it could not be granted, that the land within the claims should be withheld from sale, and that patents should not be issued for the parcels already sold. To this application the commissioner, Mr. Ethan A. Brown, replied, addressing his communication to a senator from Louisiana, through whom the application was presented, stating that inasmuch as he did not consider the claims, to the extent insisted on before the board of commissioners, recognized by the United States, the office could not issue a patent therefor; but as the law did not authorize the sale of any lands, the claim to which was filed with the commissioners for investigation, until the final action of Congress thereon, he had directed the register of the land office at New Orleans to withhold from entry all the lands within the limits of that claim, as described in the reports of the commissioners, and to report a list of all the lands sold within those limits, in order that patents might not be issued therefor.

Notwithstanding this direction of the Commissioner, it would seem that the land officers at New Orleans approved of pre-emption settlements on the land claimed, and floats located there; and in the following year, 1837, complaints of these proceedings were made to the General Land Office by Mr. Preston, on behalf of the heirs of Hampton. A communication from him on their behalf was also laid before the Senate, in which he prayed that the Commissioner should be directed to refuse titles to those who had purchased by pre-emption or otherwise, by refunding the money paid and taking up the certificates of entry as far as possible, and also that he should be directed forthwith to issue a patent for the whole claim. The

memorial was presented and referred to the Committee on Private Land Claims, but nothing came from it.

In the following year, 1838, another effort was made to obtain the action of Congress on the subject, which also failed. And from year to year afterwards communications were made by the claimants, or persons acting for them, to the land department to secure favorable action, and a recognition of the validity of their claims, but always without success until 1844. It would serve no useful purpose to state with particularity the nature and contents of these communications. They are referred to now merely to show the general notoriety given to the pretensions of the claimants, and the princely domain which, under a grant of less than four thousand acres on the river, was claimed by the grantee to enable him to obtain timber for his fences and fuel, and for other uses of his plantation. The general knowledge of the extravagant character of the claims, which may be inferred from these proceedings, may have had something to do with the phraseology used in the attempted confirmation in 1858, which we shall hereafter consider.

Some time in the year 1841 a new idea as to their rights seems to have occurred to the claimants, namely: that the claims were confirmed by the act of Congress of April 18th, 1814, 3 Stat. 139. Accordingly, in August, 1841, application was made to the Commissioner of the General Land Office on behalf of Conway for a patent of his claim, and in May, 1844, a similar application was made on behalf of Hampton's heirs for a patent of their claims. That act provided that certificates of confirmation to land lying in the land districts of Louisiana, which had been issued under the act of March 3d, 1807, and directed to be filed with the proper register of the land office within twelve months after date, and certificates on claims included in the transcript of decisions made in favor of claimants and transmitted to the Secretary of the Treasury, should be delivered, where the lands had not been already previously surveyed, to the principal deputy surveyor of the district and be surveyed; and for the tracts surveyed patents should be issued by the Commissioner of the General Land Office. As the

claims under the Houmas grant were included in the transcript of favorable decisions transmitted to the Secretary of the Treasury, and by him laid before Congress, it was contended that they were thereby confirmed. Mr. Bibb, the Secretary of the Treasury, and head of the land department under the then existing law, concurred in this view; and his opinion was presented in a communication to the Commissioner of the General Land Office under date of August 12th, 1844. In accordance with his opinion patents were issued to the heirs of Hampton for the claims presented by Donaldson and Scott and by Daniel Clark. This action of the Secretary and the issue of the patents gave rise to much unpleasant comment; and soon after the meeting of Congress in December following a resolution was passed by the Senate calling upon the Secretary to communicate a copy of his opinion directing such issue, and of opinions by other officers connected with the General Land Office in relation to the claims, and of the surveys and transcripts of confirmation.

As application had also been made for a patent of the Conway claim, the House of Representatives, on the 7th of January, 1845, passed a joint resolution prohibiting the issue of patents or other evidences of title upon the Houmas grant until the further action of Congress. The resolution having been sent to the Senate was there amended; but upon being returned to the House on the last day of the session it was not taken up, and thus failed to become a law. The Commissioner of the Land Office, in view of this resolution, treated the application for a patent of the Conway claim as a suspended case. After the adjournment of Congress applications for a patent were renewed; but the Commissioner declined to act upon them, in face of the resolution of the two Houses, which failed to become a law only because of disagreement as to its terms, but not as to its general purpose to suspend the issue of a patent.

In June of the following year, 1846, the two Houses of Congress by a joint resolution directed the Attorney-General to examine the evidences of title founded upon the Houmas claims and to report to the President his conclusions; and requested

him, if they were against the legality of the patent issued or to be issued, to bring suits to have the same judicially determined. In response to this resolution the Attorney-General made an extended examination of the title, stating in his report all the various proceedings that had been taken in respect to it, and giving as his conclusion that the Houmas grant passed a title only to a tract forty-two arpents deep from the river, and that the claimants had no legal or equitable right to any land beyond that depth; and that the act of April 18th, 1814, under which patents had been issued for two of the claims, authorized patents only in cases of confirmation under the act of 1807, which did not embrace more than one league square. In thus construing the terms of the grant and limiting its extent it is evident that the Attorney-General was governed by the rules of the common law, rather than by the usages of the Spanish government applicable to the case. Upon this report the President directed that suits in equity be brought in the Circuit Court of the United States to cancel the patents. In one of them a decree was rendered in 1856 declaring the patent upon the claim to Daniel Clark void, on the ground that the case was not within the act of 1814, the court avoiding the expression of any opinion as to the validity or extent of the claim. By a decree rendered within the last few years the patent upon the claim of Donaldson and Scott was also adjudged invalid.

This narrative brings us to the act of the 2d of June, 1858, 11 Stat. 294, entitled "An Act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes."

Its second section enacted,

"That the decisions in favor of land claimants made by P. Grimes, Joshua Lewis, and Thomas B. Robertson, commissioners appointed to adjust private land claims in the eastern district of the Territory of Orleans, communicated to the House of Representatives by the Secretary of the Treasury, on the 9th day of January, one thousand eight hundred and twelve, and which *is* [are] found in the American State Papers, Public Lands (Duff Green's edition), volume two, from page two hundred and twenty-four to three

hundred and sixty-seven, inclusive, be, and the same are hereby, confirmed, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice: *Provided, however*, That any claim so recommended for confirmation, but which may have been rejected, in whole or in part, by any subsequent board of commissioners be, and the same is hereby, specially excepted from confirmation."

Its third section enacted,

"That the locations authorized by the preceding section shall be entered with the register of the proper land office, who shall, on application for that purpose, make out for such claimant, or his legal representatives (as the case may be), a certificate of location, which shall be transmitted to the Commissioner of the General Land Office; and if it shall appear to the satisfaction of the said Commissioner that said certificate has been fairly obtained, according to the true intent and meaning of this act, then, and in that case, patents shall be issued for the land so located as in other cases."

The passage of this act at once excited great commotion among a large number of persons who occupied the land claimed under the Houmas grant, amounting, as stated by counsel, to nearly five thousand. Measures were at once taken to prevent its provisions being carried out. On the 3d of March, 1859, Congress passed a joint resolution suspending the operation and effect of the second section until the end of the 36th Congress, so that no patent or patents should be issued, nor any action be had by the executive branch or department of the government, or any officer or agent thereof, by virtue of it. 11 Stat. 442. And, on the 21st of June, 1860, Congress passed an act repealing the second section, and declaring that it refused to confirm to the claimants under the Houmas grant the lands embraced in the certificates, No. 125 to William Conway, No. 127 to Daniel Clark, and No. 133 to Donaldson and Scott. 12 Stat. 866. The principal questions for our consideration arise upon the construction of the first of these acts; and the effect of its repeal upon the confirmation of the claims. In

the first place, it is to be observed, that the decisions which are confirmed by the second section of the act of 1858 are not described as those of the board of commissioners, nor of the commissioners generally, appointed to adjust private land claims in the eastern district of the Territory of Orleans, which designation might be taken as referring to the board as a special tribunal; but as those rendered in favor of the claimants by the three commissioners designated by name. There were good reasons for this. The three decisions which relate to the claims under the Houmas grant were made by only two of the commissioners. The third commissioner, who joined in the other decisions, was not a member of the board when these three were rendered; but as soon as he became a member he expressed his dissent from them. This dissent accompanies the report of the decisions made to the Secretary of the Treasury, and laid by him before the House of Representatives, and is found in the volume to which reference is made, immediately following the three decisions, in these words:

"The three foregoing decisions were made before I became a member of the Board. As far as I am authorized to do so, I dissent from the same.

"THOMAS B. ROBERTSON."

To the volume of State papers mentioned every one would be obliged to look in order to learn what claims were confirmed; and there this statement would confront him. When we consider the notoriety given to the extravagant claims under the Houmas grant; the continued opposition of all the officers of the government, with one exception, to a recognition of them; the failure of repeated efforts to secure favorable action from Congress; the pendency of legal proceedings authorized by Congress to vacate patents issued upon two of them; the large number of persons in possession who claimed under sales of the government, a fact which had been repeatedly brought to the attention of Congress; we are forced to the conclusion that the limitation of the act to favorable decisions made by the three commissioners was intentional, and

that they were named, *ex industria*, to exclude from confirmation the claims under the Houmas grant, which had given rise to so much controversy and litigation, and had been so uniformly denounced and repudiated.

The position of the plaintiffs, that Congress must have intended to include all reports made by the board because under the act of 1805 a majority of its members were authorized to act upon and determine the validity of claims presented, does not strike us as a logical conclusion. It would rather seem to strengthen our construction, for by naming decisions made by the three commissioners the act indicates that Congress intended to refuse a confirmation of decisions made by two of them. If it had intended to confirm all favorable decisions of the board, whether made by a majority of its members or by them all, its intention could have been expressed by simply mentioning the board, without designating its members, as had been usual where the decisions of similar boards were confirmed. The present instance is the only one, it is believed, where, in the legislation of Congress confirming grants, the names of the commissioners whose favorable action was approved have been mentioned. This departure from the ordinary language in such cases was, we think, for a special purpose. We must assume that the members, by whose vote the act became a law, fully weighed its meaning and intended what it expressed. It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 536; *Dubuque & Pacific Railroad Company* v. *Litchfield*, 23 How. 66, 88; *The Delaware Railroad Tax*, 18 Wall. 206.

The rule is a wise one; it serves to defeat any purpose concealed by the skilful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.

If the construction we thus give is sound, there is an end of the plaintiffs' case and their extravagant pretensions are dissipated. The subsequent repeal of the section affected no rights, and was justified by the fact that what was never intended by the section was claimed under it.

But if we are wrong in this construction, and we should hold that the purpose of the second section of the act of 1858 was to confirm the decisions of the three claims under the Houmas grant, though made by only two of the three commissioners instead of the three named, the case of the plaintiffs would not be advanced. The decisions confirmed the claims, that is, recognized them, as founded in justice and equity, in accordance with which the commissioners were directed to proceed, and the act of 1858 approves of those decisions. What, then, were the claims? The plat of Lafon, as already mentioned, had no official character, and was prepared by him after the cession of the country to the United States. It was not evidence of any kind. The commissioners could pass only upon evidence of title existing before the cession. If the plat, which accompanied the notice of the claims delivered to the register of the land office, was laid before the commissioners with that notice, they do not appear to have followed it, nor to have paid any attention to it in their decisions. They only confirmed the claims as described in the application of the claimants, that of Conway, for a tract on the left bank of the Mississippi, having a front of twenty-two and a half arpents, with its northern line running N. 9° 15′ east three hundred and fifty-one arpents, and the lower line directed N. 70° E. and measuring four hundred and fifty-five arpents, and bounded on the upper and the lower sides by the lands of certain proprietors. If the established usages of the country, limiting the extent of the grant upon which the claims are founded, are regarded, then the confirmation is only of a tract to which the claimants have a perfect title without it. If, however, those

usages are disregarded, the claims are for land of which no quantity is given and no boundary stated, and for their ascertainment no rule is furnished. The confirmation in that case would be void for uncertainty. No court can treat a claim as conferring a right to a specific tract until its boundaries are capable of identification or have been established by a survey. A mere claim to something without form and shape or means of segregation, can have no judicial enforcement.

It is not necessary to call in question or to qualify any of the adjudications cited by counsel as to the efficacy of a legislative confirmation of a claim to land. We had occasion to speak upon that subject in *Langdeau* v. *Hanes,* 21 Wall. 521. We there said that such a confirmation was a recognition of the validity of the claim, and operated as effectually as a grant or quit-claim from the government; that if the claim was to land with defined boundaries or capable of identification, the legislative confirmation perfected the title to the tract; but if the claim was to quantity, and not a specific tract capable of identification, a segregation by survey would be required, and the confirmation would then attach the title to the land segregated. Necessarily the legislative action cannot go beyond that which is claimed. If only something without form and shape is claimed, a confirmation of the claim will amount only to a declaration that the claimant is entitled to that something, but it will not give him a standing in court against occupants of specific tracts under color of title. Here the claim confirmed, upon the theory of the plaintiff that the grant is not limited in depth to the additional forty arpents, is neither to a specific tract, nor to a specific quantity; and until both are ascertained by action of the executive officers of the government under a law authorizing such action, the court is powerless in the matter.

The confirmation, therefore, by the second section of the act of 1858, assuming that it covers the claims under the Houmas grant for an indefinite quantity back of the first concession, did not operate to vest a title to any particular land in the claimants. It amounted only to a declaration that they were entitled to something to which, when ascertained, the

government would grant them a title. As stated by counsel, the position of the government upon that theory of the grant is like that of a donor who has promised to one a gift of land when he shall make a selection of it. In such case the gift is executory until the selection is made; and until then the title remains with the donor, whom the courts cannot compel to make a conveyance. So upon that theory the act of 1860, repealing the second section of the act of 1858, is not to be regarded as the revocation of a grant, but as a declaration that the promised donation will not be made.

In any view, therefore, in which the case of the claimants is examined, we find nothing to sustain their pretensions. They have no title to the lands claimed under the grant in question, beyond the depth of eighty arpents from the Mississippi River, which the courts can recognize as a basis for action against parties in possession, holding under sales from the government. This result renders it unnecessary to notice other questions which would arise for consideration were our conclusions different.

Judgments affirmed.

CORN EXCHANGE BANK *v.* SCHEPPERS & Others.

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

Argued March 26th, 1884.—Decided April 21st, 1884.

Evidence—Promissory Note.

When in the course of dealings A gives to B one series of his own notes payable to his own order to be used for purchase of an article on his account; another series of like notes as accommodation paper to be protected by the other party at maturity; and a third series, part of which is accommodation paper and a part is issued for the purchase of the article, it is for the jury to say, on a suit against A by a bank to which B had hypothecated one of the third series as collateral, whether B had the right to pledge it for his own debt.

The facts at issue appear in the opinion of the court.

Opinion of the Court.

Mr. N. H. Sharpless for appellant.

Mr. C. E. Morgan, Jr., for appellee.

Mr. Justice Miller delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, brought its suit against the defendants on five promissory notes held by the bank, made by the defendants in their partnership name of Scheppers Brothers, payable to their own order and indorsed by them in blank.

Defendants pleaded non-assumpsit, and on trial by jury a verdict and a judgment on it was rendered in favor of defendants.

A bill of exceptions was taken, on which arises the only question in the case for our consideration. From this it appears that the notes sued on were the last of several renewals of two notes of $5,000 each, which had been delivered by defendants to the business firm of Benjamin Bullock's Sons, wool brokers, and by them delivered to the bank. No question arises, as these notes were negotiable, that if the bank received them, as it alleges, as collateral security for a debt of Benjamin Bullock's Sons to it, that plaintiff must recover in this action.

On the other hand, if the two notes were merely left in the office of the bank for safe keeping, temporarily, as sworn to by Joseph Bullock, a partner in the firm of Benjamin Bullock's Sons, then plaintiff should not recover.

This was the only question finally submitted to the jury.

It appears by the bill of exceptions, and it is so stated in the charge of the court to the jury, that the "testimony of Mr. Bullock and Mr. Schetky (the cashier of the bank) is in direct conflict, and the question involved in the case depends mainly upon the credit which you shall attach to what the one or the other of these witnesses says. The claim and right of the bank as set up rests on a receipt of the notes from Joseph Bullock, as collateral security for the $50,000 loan. Joseph Bullock testifies that the bank did not so receive them, while Mr. Schetky testifies that it did; which of these witnesses will you believe?"

To aid the jury in the solution of this question, the judge, at

three different points in his charge, told them, without qualification, that Mr. Bullock had received these notes of defendants to be used for the purchase of wool for them, and for no other purpose, and that it would have been a breach of faith on his part to use them as security for this loan. "Is it probable," he says, "that Mr. Bullock would voluntarily have made such a disposition of collaterals for a debt already in existence, especially as he would have to break his faith with Scheppers Brothers, by misapplying their property to his own use? I do not (he says) suggest that it is or is not probable that he would do this, but simply submit the consideration to you as one that properly arises in passing upon the question involved."

The plaintiff excepted to this part of the charge, not on the ground that if these notes were in the possession of Bullock, with no other right than to use them for the benefit of defendants in purchasing wool, the inference suggested was not justified, but that the court erred in assuming the fact to be, that the notes were held by Bullock for that purpose alone. Whether the judge was correct in this assumption is mainly to be ascertained from the written contract between defendants and Bullock's Sons, and the language of certain receipts given by the latter for notes received from Scheppers Brothers.

The first of these is as follows:

"PHILADELPHIA, *May* 29, 1873.

"BENJAMIN BULLOCK'S SONS, Philadelphia.

"Gentlemen: We wish you to purchase for us 300,000 pounds of fleece washed, tub washed, and unwashed wool in Pennsylvania and Ohio at first cost, not exceeding 42 and a half cents for washed wool and 30 cents for unwashed; said wool to be purchased with a specialty for the combing and delaine qualities. It is distinctly understood you will charge, in addition to the above prices, a commission of two cents per pound, which is the commission you pay your agents. We also agree to pay freight, drayage, storage and insurance on same, and allow you 5 per cent. commission on the actual cost of the above wool. We will issue our notes from time to time, as you may require, and at such dates as we can mutually agree on; said paper to be converted into money for our account at the

market rate. We agree, should we desire to sell any portion of the wool—that is, clothing—we will allow you 5 per cent. commission for selling, grading and guaranteeing the sale.

"(Signed) SCHEPPERS BROTHERS."

"PHILADELPHIA, *May* 29, 1873.

"The above order we accept, and shall endeavor to fill to the best of our ability. Very truly,

"BENJAMIN BULLOCK'S SONS."

Another order of July the 3d, enlarged the amount of wool to be purchased 500,000 pounds, making 800,000 pounds in all.

In the course of this business, and between May 29th and August 1st, inclusive, many notes of defendants were delivered to Bullock's Sons, and by them negotiated. Receipts were given for these notes, which are produced, to the number of six or seven. Some express on their face that the notes are received for wool purchased. Others say on account of wool purchased or to be purchased.

One, dated June 23d, acknowledges the receipt of 20 notes of $5,000 each, amounting to $100,000, the concluding words of which are: "These notes being issued for our benefit to be protected by us at maturity. Benjamin Bullock's Sons."

It was fully proved that these latter notes were understood to be accommodation paper.

The last of these receipts—the one which embraces the two notes in question—reads thus:

"Received, Philadelphia, August 1st, 1873, of Scheppers Brothers their 30 promissory notes, each for $5,000, maturing as follows: 1 January 2–5, 1 January 5–8, 1 January 7–10, 1 January 14–17, 1 January 18–21, 1 January 21–24, 1 January 25–28, 2 January 28–31, 2 February 4–7, 2 February 8–11, 2 February 11–14, 3 February 15–18, 2 February 18–21, 3 February 22–25, 4 February 25–28, aggregating in amount $150,000 for purchase of wool, or to be protected by us at maturity.

"BENJAMIN BULLOCK'S SONS."

We have, then, three classes of receipts given by Bullock's Sons for notes received of Scheppers Brothers during this two months' dealing. One class, the most numerous, expresses that

the notes were received for wool purchased or for wool to be purchased, and having reference, no doubt, to the contract on that subject. Another acknowledges the receipt of notes to the amount of $100,000, to be used as accommodation paper, to be protected at maturity by Bullock's Sons. The third—the one which was given for the two notes in question, and 28 others, which are said to be "for purchase of wool, or to be protected by us (Bullock's Sons) at maturity."

We do not think, in the light of all the circumstances, and the other receipts, and the admitted fact that Scheppers Brothers had only a few weeks before issued them the accommodation notes for $100,000, this receipt can mean anything but this: "So far as we use these notes for the purchase of wool for Scheppers Brothers they will pay them at maturity, and so far as we may use them for our own benefit as accommodation paper they are to be protected by us."

There is no inconsistency in the idea that Scheppers Brothers so trusted them. They had done so to the extent of $100,000. They were still buying wool for them under the contract. Of this large sum of $150,000, Bullock's Sons could be trusted to use some of the notes for their own benefit, on their promise to protect the notes so used, while they would probably use some of them, possibly all of them, in purchase of wool under the contract, in which case Scheppers Brothers must pay them as they matured. In no other way can any meaning be given to the alternative words at the close of the receipt, "*or to be protected by us at maturity.*"

This view is not varied by the oral testimony of two witnesses, who state that the notes in this receipt were given to be used for the purchase of wool, as they understood it, but neither of these is the person who signed the receipt, and neither of them says that there was no permission to use some of the notes for the accommodation of Bullock's Sons.

To say they were to be used for purchase of wool is to repeat what the receipt says, and is in accord with it. To deny that some of them might be used for the benefit of Bullock's Sons is to contradict the receipt, and no one does deny it in express terms.

If, however, any witness had so sworn who was present when the receipt was signed and the notes were delivered, it was a question for the jury whether his statement or the writing produced was the most credible, and this question the judge took from them by his peremptory instruction, three times repeated, that there was no right in Bullock's Sons to pledge the notes as collateral for their own debt, and to do so was to break faith with Scheppers Brothers.

For this error, important in the narrow point in issue,

The judgment of the Circuit Court is reversed, and the case remanded for a new trial.

QUINN *v.* CHAPMAN.

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

Submitted March 28th, 1884.—Decided April 21st, 1884.

Public Lands.

The facts in this case show no reason why the equitable claim of the plaintiff in error to a tract of public land patented to the defendant should prevail over the legal title.

A rule formerly prevailing in the Land Office forbidding the filing of a declaratory statement based upon an alleged right of pre-emption, having its origin subsequent to the commencement of a contest between other parties for the same land, is not ground for rejecting the claim if it is otherwise equitable.

Mr. Barclay Henley for plaintiff in error.

Mr. George A. Nourse for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of California.

The foundation of the writ is, that that court, in a controversy which involved the ownership of land, decided, adversely to plaintiff in error, a right or claim set up by him under the laws of the United States concerning the sale and pre-emption of public lands.

The facts on which this question arises are not much con-

troverted in the record, nor are they very complicated; and they are these:

George Hollingsworth made a settlement on the land in question in 1853, and built a house thereon, and died in possession, and was buried there in 1854. His wife and children, all of whom were minors, were then in Missouri, where she died, two years later. At that time the land in question was claimed as part of a Mexican grant to Joseph De Haro. The final survey of the confirmed grant of De Haro was made and filed in the local land office, March 19th, 1868, by which it was ascertained that the land in question was not a part of that grant, and, under the decisions of this court, in the cases of *Newhall* v. *Sanger*, 92 U. S. 761, and *Van Reynegan* v. *Bolton*, 95 U. S. 33, it then became subject to entry and pre-emption for the first time.

Chapman, defendant in error, having been appointed administrator of Hollingsworth, for the purpose of perfecting the title of Hollingsworth's heirs to the land, filed in their name the declaratory statement, which the law requires for pre-emption, on the 8th day of April, just twenty days after the filing of the maps of the survey in the local office, and the next day after his appointment as administrator.

He prosecuted this claim vigorously, his right being contested before the land department by a man named Bepler, who claimed a superior right as pre-emptor, and by the State of California, which claimed it as a part of the school-section grant by act of Congress. He was successful, and by order of the Secretary of the Interior, to whom this case had been appealed, a patent for the land was issued, May 20th, 1872, to the heirs of Hollingsworth. By a conveyance from part of these heirs Chapman became owner of one undivided half of this property, on which he recovered judgment against Quinn in the present action of ejectment.

In that suit Quinn, by way of defence and cross-complaint, set up that he had a superior equity to the land, and prayed a conveyance from Chapman of the legal title. Several matters are set forth as grounds of this equity which are not proved, such as frauds practised by Chapman on the land department,

and that Hollingsworth made his settlement and improvement for his brother, and not for himself.

But the point on which his case turns is his own settlement and efforts to secure a pre-emption right to the same land. It appears that he was a foreigner, and a few days after he had filed his declaration of intention to become a citizen he went upon the land in question, on February 5th, 1869, which is about ten months after Chapman's declaratory statement was filed, and built a house and made other improvements, and within three months thereafter tendered to the register of the land office his declaratory statement to pre-empt the land. This officer refused to receive it, because the contest for the land between Chapman, Bepler, and the State of California, for the right to it, was then far advanced before the register and receiver. On appeal by him to the Commissioner, and thence to the Secretary of the Interior, this action of the register was confirmed.

The only reason given by the department for refusing to permit Quinn to file his declaratory statement was the existence of a rule of its own establishment forbidding the filing of a declaratory statement, based upon an alleged right, having its origin subsequent to the commencement of a contest between other parties for the same land; and the Supreme and inferior courts of California seem to have held that this was a sufficient answer in this case to the claim of plaintiff in error.

We are not prepared to say, however, that if Quinn had a right to make a pre-emption of this land, otherwise valid, the existence of this rule, or its enforcement against him, would defeat that right. The rule, we are told by counsel, has been rescinded, and is of no further consequence except as to its effect upon the present case; and if Quinn had been able to show a superior equity to that which arises out of the patent in this case, we should not feel inclined to reject it because of the rule referred to.

But he has had a hearing before the court in regard to that equity, in which he has been permitted to prove, or, at least, to offer all the evidence he has of such equity, and taking everything he has proved, or offered to prove, we are not able to see

any equity in him superior to that of the heirs of Hollingsworth. Unless he has shown this, the legal title must prevail.

The claimants under the patent are prior to him in every point. Hollingsworth settled on the land, built a house on it, lived on it, and was buried on it, while Quinn was yet a foreigner, and incapable of making a valid claim. It is true that the land not being then open to pre-emption, Hollingsworth gained no legal right to it, but he had a right to believe that if, when the De Haro claim was surveyed, it was found the land on which he lived was open to pre-emption, he would have the prior right if he came in time. He died in that belief, and the lawful representative of his minor children, at the earliest moment after the land became subject to pre-emption, asserted their right, paid the price of the land, and after an expensive contest with others, received the title from the United States. We do not think their equity in the matter can be disputed.

What is Mr. Quinn's equity? He has never paid a dollar for the land, has received no title nor any recognition of his claim from the government or any one else.

Perceiving that no one was in the actual occupancy of the land, but knowing that the claim of the heirs had been recognized at the land office months before, he hastily prepared himself by declaration of intention to become a citizen, went boldly upon land on which Hollingsworth lived and died, and because there was no one there to defend the possession, built his cabin and asserted a right superior to the heirs of Hollingsworth. In this also he was a year later than Chapman, representing the heirs of Hollingsworth. His claim has been denied by the land office from the beginning; he has paid nothing, received no recognition, acquired no vested right.

We see no equity in him equal to that of the heirs of Hollingsworth. There is no justice in taking the title which they had fairly acquired and vesting it in him; and the judgment of the Supreme Court of California is accordingly

Affirmed.

Syllabus.

AMES *v.* KANSAS *ex rel.* JOHNSTON, Attorney-General.

KANSAS PACIFIC RAILWAY COMPANY *v.* KANSAS *ex rel.* JOHNSTON, Attorney-General.

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

Argued March 7th, 10th, and 11th, 1884.—Decided April 21st, 1884.

Constitutional Law—Quo Warranto—Removal of Causes—Statutes.

The remedy by information in the nature of *quo warranto*, though criminal in form, is in effect a civil proceeding.

A statute abolishing the common-law proceeding by information in the nature of *quo warranto*, and authorizing an action to be brought in cases in which that remedy was applicable, makes the proceeding a civil action for the enforcement of a civil right, subject to removal from State courts to the courts of the United States when other circumstances permit.

Proceedings by a State against a corporation created under its own laws, in the nature of *quo warranto* for the abandonment, relinquishment and surrender of its powers to another corporation with which it has been consolidated under a law of the United States, and proceedings against the directors of said consolidated company for usurping the powers of such State corporation are, when in the form of civil actions, suits arising under the laws of the United States within the meaning of the acts regulating the removal of causes.

When a suit brought by a State in one of its own courts against a corporation amenable to its own process, to try the right of the corporation to exercise corporate powers within the territorial limits of the State, presents a case arising under the laws of the United States, it may be removed to the Circuit Court of the United States if the other jurisdictional conditions exist.

In view of the practical construction put upon the Constitution by Congress and the courts in the statutes and decisions cited in the opinion, the Court is unwilling to say that it is not within the power of Congress to grant to inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction.

The judiciary act of March 3d, 1875, 18 Stat. 470, does not confer upon Circuit Courts jurisdiction over causes in which the jurisdiction of the Supreme Court is made exclusive by § 687 Rev. Stat.

Suits cognizable in the courts of the United States on account of the nature of the controversy, and which are not required to be brought originally in the Supreme Court, may be brought in or removed to the Circuit Courts from State courts without regard to the character of the parties. The reasoning and language in *Cohens* v. *Virginia*, 6 Wheat. 397, concerning appellate jurisdiction of the Supreme Court, adopted and applied to the jurisdiction of Circuit Courts over causes in which a State is a party, commenced in a State court and removed to a Circuit Court.

Statement of Facts.

Each of these writs of error brought up for review an order of the Circuit Court remanding a case to the State court from which it had been removed, and the two cases were considered together. The material facts were these:

The Leavenworth, Pawnee and Western Railroad Company was incorporated by the Legislature of the Territory of Kansas in 1855, to build a railroad from the west bank of the Missouri River, in the town of Leavenworth, to or near Fort Riley, and from thence to the western boundary of the Territory, which was the east boundary of Utah on the summit of the Rocky Mountains. 10 Stat. 283, c. 59, sec. 19. In 1857 this act was amended so as to authorize the construction of a branch from some favorable point on the main line to some point on the southern boundary of the Territory, where an easy connection could be made with a line of road extending to the Gulf of Mexico, and also of a branch to the northern boundary of the Territory. The company was organized under these acts in 1857, and before January 1st, 1862, had located its line from Leavenworth to Fort Riley, and had, to a large extent, secured its right of way and depot grounds.

On the 1st of July, 1862, the first Pacific Railroad act was passed by Congress, incorporating the Union Pacific Railroad Company, and providing for government aid in the construction of the several roads brought into the system, which was then inaugurated to establish a railroad connection between the Atlantic and Pacific coasts. 12 Stat. 489, c. 120. By sec. 9 of this act the Leavenworth, Pawnee and Western Railroad Company of Kansas was authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the point in the Territory of Nebraska, then established as the eastern terminus of the Union Pacific Road. Provision was made for government aid to this company in all repects like that to the Union Pacific. Sec. 16 is as follows:

"That at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two

or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act."

The Leavenworth, Pawnee and Western Company accepted the provisions of this act, and was thereafter designated as the Union Pacific Railroad Company, Eastern Division. By the act of July 2d, 1864, c. 216, sec. 12, 13 Stat. 361, the company was required to build its railroad from the mouth of the Kansas by way of Leavenworth, or, if that was not deemed the best route, to build a branch from Leavenworth to the main stem at or near Lawrence. This act also made provision, by sec. 16, for the consolidation of any two or more corporations embraced in the system, upon such terms and conditions as they might agree upon not incompatible with the laws of the States in which the roads of the companies might be. On the 3d of July, 1866, c. 169, 14 Stat. 80, the company was permitted to make its connection with the Union Pacific at any point not more than fifty miles westerly from the meridian of Denver. By another act passed March 3d, 1869, c. 324, 15 Stat. 324, the company was authorized to extend its road to Denver, in the Territory of Colorado, and from there to make its connection with the Union Pacific at Cheyenne, over the road of the Denver Pacific Railway and Telegraph Company, a Colorado corporation, power being given to contract with the last named company for that purpose. On the same day a joint resolution was passed by Congress, No. 23, 15 Stat. 348, authorizing the Union Pacific Railroad Company, Eastern Division, by a resolution of its directors, filed in the office of the Secretary of the Interior, to change its name to the Kansas Pacific Railway Company.

Under this authority the road was built from its junction with the Missouri Pacific Railroad in Kansas City, Missouri, through Fort Riley, in Kansas, to Denver, in Colorado, and government aid was furnished it under the acts of Congress.

From Denver it formed its connection with the Union Pacific road at Cheyenne, over the road of the Denver Pacific Company. It also built a branch from Leavenworth to Lawrence, but the road from Fort Riley to the original eastern terminus of the Union Pacific was never constructed.

On the 24th of January, 1880, the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, acting under the authority of sec. 16 of the Pacific Railroad act of July 1st, 1862, and sec. 16 of the act of July 2d, 1864, entered into an agreement for the consolidation of the three corporations into one, by the name of the Union Pacific Railway Company, and from that time the road of the Kansas Pacific Company, including that portion which lies in Kansas, has been operated and managed as the Kansas Division of the Union Pacific Railway Company.

At the first session of the legislature of Kansas after this consolidation was effected, a resolution was passed directing the Attorney-General to inquire into its legality, and to report whether in his opinion the consolidated company was amenable to the laws of the State; whether the Union Pacific Railroad Company had usurped or was exercising rights and franchises within the State not authorized by law, or had in any manner failed to comply with or had violated any of the laws of the State; whether the Kansas Pacific Company was in law an existing corporation of the State; and whether the State had lost jurisdiction over the property of the corporation. At the next session another resolution was passed, directing the Attorney-General to institute proper proceedings in the Supreme Court of the State, "in the nature of *quo warranto*, against the Kansas Pacific Railway Company for an abandonment, relinquishment, and surrender of its powers as a corporation to such consolidated company, and also to institute like proceedings against the consolidated company, the Union Pacific Railway Company, for usurping, seizing, holding, possessing, and using the franchise and privileges, powers and immunities of the Kansas Pacific Railway Company in the State of Kansas."

Under these instructions the present suits were brought in

the Supreme Court of the State. The petition against the Kansas Pacific Company set forth the acts of the Territorial legislature of Kansas incorporating the company and extending its powers, passed in 1855 and 1857; the organization of the company under its charter; the acts of Congress, passed July 1st, 1862, and July 2d, 1864, granting aid to the company; and the construction of the road. It then averred

"That on the 24th of January, 1880, the said Kansas Pacific Railway Company wrongfully and unlawfully attempted to consolidate its said corporation with the Union Pacific Railroad Company, a corporation chartered under the said acts of Congress of 1862 and 1864, whose line runs from the Missouri River at or near Omaha, Nebraska, to Ogden, in Utah Territory, and the Denver Pacific Railway and Telegraph Company, whose line begins at the city of Denver, in the State of Colorado, and runs in a westward direction to a junction with the Union Pacific Railroad Company, at a place called Cheyenne, in the Territory of Wyoming. And the said Kansas Pacific Railway Company unlawfully and wrongfully attempted to confer upon the said consolidated company all of its franchises, immunities, liberties and privileges granted by virtue of its charter aforesaid, and to merge the same into a pretended corporation, not created by the laws of the Territory or State of Kansas, nor owing any duty to the Territory or State of Kansas, but a pretended corporation, created, if at all, by acts of Congress, and amenable only to federal control, and subject only, as to its rights and the causes of action which might thereafter exist against it, to the jurisdiction of the federal tribunals. And the said Attorney-General gives the court further to understand and be informed, that the said Kansas Pacific Railway Company unlawfully and wrongfully entered into articles of consolidation with said Union Pacific Railroad Company and the said Denver Pacific Railroad and Telegraph Company, which were expressly in violation of its charter, and in conflict with the duties and obligations owing by it to the State of Kansas under the provisions and terms of its charter aforesaid; and further, that said articles were in conflict with the laws of the State of Kansas respecting railroad corporations and the right of railroad companies to consolidate, and were not compatible with such laws."

The bill then set forth a copy of the articles of consolidation, from which it appeared that the sole and only authority relied on for the consolidation was that contained in the several acts of Congress, and that the intent of the parties was to organize the company thereby formed "under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company, as fully as if the same were incorporated herein at large." The contract then appointed directors of the new company, and the place for holding the annual meeting of stockholders, until otherwise ordered, was fixed at the company's office in the city of New York. The then existing by-laws of the Union Pacific Railroad Company were also provisionally adopted and made applicable to the new company.

The bill then averred that it was the duty of the Kansas Pacific Company to make certain reports to the Secretary of State of Kansas, which it had wholly failed to do, and that it held "its general offices and all accounts of its operations, at the general offices of said pretended consolidated company, at the city of Omaha, in the State of Nebraska, and alleges and pretends that the said corporation, the Kansas Pacific Railway Company, no longer owes any duty under its charter as aforesaid to the State of Kansas, but that it is controlled as to its chartered obligations by the acts of Congress creating the Union Pacific Railroad Company, and by the unlawful articles of consolidation aforesaid." It then charged that the company had violated the laws of the State by failing to keep its general offices for the transaction of business within the State, and removing them to Omaha and placing "the same under the absolute order, control and disposal of the said pretended consolidated company." Then it alleged that the road of the Kansas Pacific Company was run as the "Union Pacific Railway Company, Kansas Division," and managed by the new corporation; that "since the pretended consolidation as aforesaid the said Kansas Pacific Company has wholly failed and neglected to designate some person residing in each county into which its said line of railroad runs, or in which its said business is transacted, on whom all process and notices issued

by any court of record, or justices of the peace of such county, may or might be served," and that it had also failed from the same time "to file a certificate of the appointment or designation of such person in the office of the clerk of the District Court of the county in which such person resides."

The consolidation was afterwards attacked because the roads were originally competing roads, and did not connect at the State line so as to form a complete and continuous line of railway. The next allegation was that the Kansas charter was forfeited by the diversion of the road "to the use of a foreign corporation, outside of the jurisdiction of the State of Kansas, and beyond the reach of her authorities, with the declared intent that it shall be operated, and used, and worked, not according to the laws of Kansas, made or to be made to protect the rights of her people, but under and according to the provisions of other laws, alleged to have been enacted by the legislature of another government, for the regulation of another railroad, lying in another State."

The prayer was that the

"Kansas Pacific Railway Company . . . be made to answer to the State of Kansas by what warrant it claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid; and further, by what warrant it claims and has exercised the right to put said railroad and its appurtenances into the possession and under the control of the above mentioned foreign railroad company, and by what right it claims to maintain such foreign corporation in such possession, or in the enjoyment and exercise of the franchises and privileges bestowed by the State of Kansas exclusively on said Kansas Pacific Railway Company; and that . . . the said respondent company be adjudged to have forfeited all its rights, liberties, and franchises, and to be ousted from the same, and that the corporation be thereupon dissolved; and that it be further adjudged that the said franchises granted to the defendant by the State have become relinquished, abandoned, and forfeited to the State of Kansas, and that the same be resumed to the State, and that the State take possession of the said railroad, with all its appurtenances and fixtures, as public property, and make such disposition thereof as may be thought

necessary to secure the rights of the State, saving the just interests of creditors and other third parties guiltless of the frauds, wrongs, and injuries herein charged against the corporation and the members thereof."

The answer of the defendant, which, for the purposes of the suit, appeared in the name of the Kansas Pacific Railway Company, admitted the consolidation and set up the authority for that purpose under the laws of Congress. All violations of the laws of Kansas were denied, and the position was distinctly assumed that the Kansas Pacific Company became, under the legislation of Congress, a corporation of the United States, and as such had full authority to enter into the agreement of consolidation which is complained of.

The petition against the individuals who, as was alleged, called themselves the board of directors of the Union Pacific Railway Company, charged them with using, without warrant, charter, or grant, the liberties, privileges, and franchises of being a railroad company to use and operate the railroad of the Kansas Pacific Company, and averred that that road was built under the Kansas charter of the Leavenworth, Pawnee and Western Company. The prayer was that they might be made

"To answer to the State by what warrant they claim to have, use, and enjoy the liberties, privileges, and franchises aforesaid; and that upon a due hearing hereof the said defendants and said pretended railroad company be adjudged to have unlawfully and wrongfully usurped and appropriated the rights, liberties, privileges, and franchises aforesaid, and to be wrongfully and unlawfully using, enjoying, and exercising the same, and that they be ousted therefrom."

The answers of the defendants set up the legislation of Congress affecting the original Kansas corporation and the consolidation of that company with the Union Pacific and Denver Pacific Companies under that authority. They asserted their right and that of the Union Pacific Railway Company, whose directors they were, to exercise within the State of Kansas all

the powers, and to enjoy all the franchises and privileges, of the old Kansas Pacific Company, and this by reason of the consolidation of that company, under the authority of Congress, with the other two companies.

The directors were all citizens of States other than Kansas.

As soon as the answers were put in, petitions were filed by the defendants in each case for the removal of the suit against them respectively, to the Circuit Court of the United States for the District of Kansas. The petition of the railroad company alleged as ground for removal, 1, that the suit was one arising under the Constitution and laws of the United States; and, 2, that the defendant was a corporation, other than a banking association, organized under a law of the United States, and that it had a defence arising under the laws of the United States. That of the directors was also put on the ground, 1, that the suit was one arising under the Constitution and laws of the United States; and, 2, that the directors were sued as members of a corporation, organized under an act of Congress, for an alleged liability of the corporation, and that their defence arose under and by virtue of the laws of the United States.

Each suit was duly docketed in the Circuit Court of the United States, and, on motion of the State, remanded to the Supreme Court of the State.

From these orders to remand the railway company and the directors, respectively, took a writ of error to this court.

Mr. John F. Dillon and *Mr. Wager Swayne* for plaintiffs in error.

Mr. Clarence Seward, *Mr. W. A. Johnston*, Attorney-General of the State of Kansas, and *Mr. W. H. Rossington* for defendant in error, contended that the original jurisdiction given by the Constitution to the Supreme Court in cases in which a State shall be a party excluded a Circuit Court from such jurisdiction. They supported the contention by an elaborate historical argument which cannot be condensed within permissible limits. They also cited the following decisions

in this court and by judges of this court in circuit. *Chisholm* v. *Georgia*, 2 Dall. 419, 425; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 720; *Osborn* v. *United States*, 9 Wheat. 738, 820; *Gittings* v. *Crawford*, Taney's Dec. 1; *Wisconsin* v. *Duluth*, 2 Dill. 406, 412; *Olmstead's Case*, Brightly, 25; *Georgia* v. *Madrazo*, 1 Pet. 110, 124; *Ex parte Juan Madrazzo*, 7 Pet. 627; *Alabama* v. *Wollfe*, 18 Fed. Rep. 836; *Railroad* v. *Harris*, 12 Wall. 65, 86; *Hepburn* v. *Ellzey*, 2 Cranch, 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *Barney* v. *Baltimore*, 6 Wall. 280, 287. Before the passage of the act of 1875, Circuit Courts had no jurisdiction of a controversy between a State and citizens thereof. *Iowa Homestead Company* v. *Des Moines Navigation Company*, 8 Fed. Rep. 97; *Walsh* v. *Memphis*, 6 Fed. Rep. 797; *Dormitzer* v. *Illinois Bridge Company*, 6 Fed. Rep. 217; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Removal Causes*, 100 U. S. 457; and the fact that a State railway corporation had had similar corporate powers conferred upon it by another State was not cause for removal, and did not give jurisdiction to a Circuit Court in a suit brought by the State in one of its own courts against such corporation. *Memphis & Charleston Railroad Company* v. *Alabama*, 107 U. S. 581. An act of consolidation did not so destroy the existence of the consolidated corporations as to withdraw them as separate legal entities from the jurisdiction of the States by which they were originally created. *Tomlinson* v. *Branch*, 15 Wall. 460; *Johnson* v. *Philadelphia, Wilmington & Baltimore Railroad Company*, 9 Fed. Rep. 6, and note; *Horne* v. *Boston*, 18 Fed. Rep. 50; *Graham* v. *Boston, Hartford & Erie Railroad*, 14 Fed. Rep. 753; *Muller* v. *Dows*, 94 U. S. 444, 447; *Central Railroad & Banking Company* v. *Georgia*, 92 U. S. 665. As Circuit Courts had no jurisdiction of a cause to which a State was a party, such a cause, if removed from a State court to a Circuit Court, would be remanded by the latter court even after it had been docketed. *Den ex dem. the State of New Jersey* v. *Babcock*, 4 Wash. C. C. 344. This line of decisions rests upon the Constitution, and that provision in the Judiciary Act of 1789 which is codified in § 687 Rev. Stat. that "The Supreme Court shall have exclusive jurisdiction of

all controversies of a civil nature where a State is a party, except between a State and its citizens," and those codified in § 711. Before the act of 1875, the jurisdiction of the Supreme Court in all civil cases in which a State was a party was exclusive and not to be meddled with by any inferior tribunal. That practical interpretation put upon the Constitution by legislation is in accordance with the interpretation put upon it by its framers. The act of 1875, properly construed, does not repeal these provisions of previous legislation. As to repeals of jurisdictional statutes by implication, the counsel cited *Pryse* v. *Pryse*, L. R. 15 Eq. 86; *National Bank* v. *Harrison*, 8 Fed. Rep. 721; *United States* v. *Mooney*, 11 Fed. Rep. 476; *Venable* v. *Richards*, 105 U. S. 636.

Mr. Chief Justice Waite delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The right of removal under section 640 of the Revised Statutes, because the Kansas Pacific Railway Company was a corporation organized under the laws of the United States, is not insisted upon in this court, and the only questions presented for our consideration are:

1. Whether the suits are of a civil nature at law or in equity, arising under the laws of the United States; and,

2. Whether, if they are, they can be removed under the act of March 3d, 1875, c. 137, 18 Stat. 470, inasmuch as they were brought by a State to try the right of a corporation and its directors to exercise corporate powers and franchises within the territorial jurisdiction of the State.

Under the first of these questions it is claimed, in behalf of the State, 1, that the suits are not of a civil nature, because they are proceedings in *quo warranto;* and, 2, that they do not arise under the laws of the United States.

In Kansas the writ of *quo warranto*, and the proceeding by information in the nature of *quo warranto*, have been abolished, and the remedies which were obtainable at common law in those forms are had by civil action. Dassler's Comp. Laws, sec. 4192; Code, sec. 652. Such an action may be brought in the Supreme Court when "any person shall usurp, intrude

into, or unlawfully hold or exercise any public office, or shall claim any franchise within this State, or any office in any corporation created by authority of this State," or "when any association or number of persons shall act within this State as a corporation without being legally incorporated," or when any corporation do or admit [omit] acts which amount to a surrender or a forfeiture of their rights as a corporation, or when any corporation abuses its power, or exercises powers not conferred by law. Id. sec. 4193; Code, sec. 653.

By the Code of Civil Procedure, id. sec. 3525; Code, sec. 4, "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." Sec. 3527; Code, sec. 6: "Actions are of two kinds, *first*, civil; *second*, criminal." Sec. 3528; Code, sec. 7: "A criminal action is one prosecuted by the State as a party, against a person charged with a public offence, for the punishment thereof." Sec. 3529; Code, sec. 8: "Every other action is a civil action." Sec. 3531; Code, sec. 10: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be known as a civil action."

The original common-law writ of *quo warranto* was a civil writ, at the suit of the crown, and not a criminal prosecution. *Rex* v. *Marsden*, 3 Burr. 1812, 1817. It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them (Com. Dig. Quo Warranto A), and the first process was summons. Id. C. 2. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a *quo warranto*, which, in its origin, was "a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown." 3 Bl. Com. 263. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was "applied to the mere purposes of

trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only." 3 Bl. Com. *supra; The King* v. *Francis*, 2 T. R. 484; Bac. Ab. Tit. Information D; 2 Kyd on Corp. 439. And such, without any special legislation to that effect, has always been its character in many of the States of the Union. *Commonwealth* v. *Browne*, 1 S. & R. 385; *People* v. *Richardson*, 4 Cow. 102, note; *State* v. *Hardie*, 1 Iredell Law, 42, 48; *State Bank* v. *State*, 1 Blackf. 267, 272; *State* v. *Lingo*, 26 Mo. 496, 498. In some of the States, however, it has been treated as criminal in form, and matters of pleading and jurisdiction governed accordingly. Such is the rule in New York, Wisconsin, New Jersey, Arkansas, and Illinois, but in all these States it is used as a civil remedy only. *Attorney-General* v. *Utica Insurance Company*, 2 Johns. Ch. 370, 377; *People* v. *Jones*, 18 Wend. 601; *State* v. *West Wisconsin Railway Company*, 34 Wis. 197, 213; *State* v. *Ashley*, 1 Ark. 279; *State* v. *Roe*, 2 Dutcher, 215, 217. This being the condition of the old law, it seems to us clear that the effect of legislation like that in Kansas, as to the mode of proceeding in *quo warranto* cases, is to relieve the old civil remedy of the burden of the criminal form of proceeding with which it had become encumbered, and to restore it to its original position as a civil action for the enforcement of a civil right. The right and the remedy are thus brought into harmony, and parties are not driven to the necessity of using the form of a criminal action to determine a civil right. This has been the construction put upon similar laws in other States. *State* v. *M'Daniel*, 22 Ohio St. 354, 361; *Central & Georgetown Railroad Company* v. *Taylor*, 5 Colorado, 40, 42; *Commercial Bank of Rodney* v. *State*, 4 Sm. & Marsh. 439, 490, 504. These suits are therefore of a civil nature.

That the records present cases arising under the laws of the United States we do not doubt. The attorney-general was instructed by the legislature to institute proceedings against the Kansas Pacific Company "for an abandonment, relinquishment and surrender of its powers and duties as a corporation to the consolidated company," and against the consolidated company "for usurping, seizing, holding, possessing, and using

the franchises and privileges, powers and immunities of the Kansas Pacific Railway Company of Kansas." The whole purpose of the suits is to test the validity of the consolidation. The charge is of an unlawful and wrongful consolidation, and from the beginning to the end of the petition against the Kansas Pacific Company there is not an allegation of default that does not grow out of this single act. It is, indeed, alleged that the company has not, since the consolidation, made its proper reports, and has not appointed agents on whom process can be served, and has established its general offices out of the State, but no such averments are made as to the consolidated company, and it is apparent that these specifications are relied on only as incidents of the main ground of complaint.

That the validity of the consolidation, so far as the State is concerned, rests alone on the authority conferred for that purpose by the acts of Congress is not denied. If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under these acts of Congress, for, to use the language of Chief Justice Marshall in *Osborn* v. *United States Bank*, 9 Wheat. 825, an act of Congress "is the first ingredient in the case—is its origin—is that from which every other part arises." The right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States. *Cohens* v. *Virginia*, 6 Wheat. 264, 379; *Gold Washing & Water Company* v. *Keyes*, 96 U. S. 201; *Railroad Company* v. *Mississippi*, 102 U. S. 140.

We come now to the question whether a suit brought by a State in one of its own courts, against a corporation amenable to its own process, to try the right of the corporation to exercise corporate powers within the territorial limits of the State, can be removed to the Circuit Court of the United States, under the act of March 3d, 1875, c. 137, if the suit presents a case arising under the laws of the United States. The language of the act is "any suit of a civil nature . . brought in any State court, . . arising under the Constitution or laws of

the United States," may be removed by either party. This is broad enough to cover such a case as this, unless the language is limited in its operation by some other law, or by the Constitution. The statute itself makes no exception of suits to which a State is a party.

Art. 3, sec. 1 of the Constitution provides, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Sec. 2. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls, . . to controversies between two or more States; between a State and citizens of another State, . . and between a State, or the citizens thereof, and foreign States, citizens, or subjects. . . In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Within six months after the inauguration of the government under the Constitution, the Judiciary Act of 1789, c. 20, 1 Stat. 73, was passed. The bill was drawn by Mr. Ellsworth, a prominent member of the convention that framed the Constitution, who took an active part in securing its adoption by the people, and who was afterwards Chief Justice of this Court. Sec. 13 was as follows: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law

of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party." The same act also, by section 9, gave the District Court jurisdiction exclusively of the courts of the several States of suits against consuls or vice-consuls, except for certain offences, and by section 25 conferred upon the Supreme Court appellate jurisdiction for the review, under some circumstances, of the final judgments and decrees of the highest courts of the States in certain classes of suits arising under the Constitution and laws of the United States.

It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

Acting on this construction of the Constitution, Congress took care to provide that no suit should be brought *against* an ambassador or other public minister except in the Supreme Court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the District Courts, and suits of a civil nature could be brought against them in either tribunal.

With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and except, also, between a State and citizens of other States or aliens, in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a State begun without its consent, and to allow the State to sue for itself in any tribunal that could entertain its case. In this way States, ambassadors, and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose.

The Judiciary Act was passed on the 24th of September, 1789, and at the April Term, 1793, of the Circuit Court of the United States for the District of Pennsylvania, an indictment was found against Ravara, a consul from Genoa, for a misdemeanor in sending anonymous and threatening letters to the British minister and others with a view to extort money. Objection was made to the jurisdiction for the reason that the exclusive cognizance of the case belonged to the Supreme Court on account of the official character of the defendant. The court was held by Wilson and Iredell, Justices of the Supreme Court, and Peters, the District Judge. Mr. Justice Wilson, who had been a member of the convention that framed the Constitution, was of opinion "that although the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction in such inferior

courts as might by law be established." Mr. Justice Iredell thought "that, for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation that the word original means exclusive jurisdiction." The district judge agreed in opinion with Mr. Justice Wilson, and consequently, the jurisdiction was sustained. *United States* v. *Ravara*, 2 Dall. 297.

On the 18th of February, 1793, just before the indictment against Ravara in the Circuit Court, the case of *Chisholm* v. *Georgia*, 2 Dall. 419, was decided in the Supreme Court, holding that a State might be sued in that court by an individual citizen of another State. The judgment was concurred in by four of the five justices then composing the court, including Mr. Justice Wilson, but Mr. Justice Iredell dissented. This decision, as is well known, led to the adoption of the eleventh article of amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to a suit against a State by a citizen of another State, or by a citizen or subject of a foreign State.

It is a fact of some significance, in this connection, that although the decision in Chisholm's case attracted immediate attention and caused great irritation in some of the States, that in Ravara's case, which in effect held that the original jurisdiction of the Supreme Court was not necessarily exclusive, seems to have provoked no special comment. The efforts of the States before Congress assembled, and of Congress afterwards, were directed exclusively to obtaining "such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any court of the United States." Resolve of the Legislature of Mass. Sept. 27th, 1793.

In *Marbury* v. *Madison*, 1 Cranch, 137, decided in 1803, it was held that Congress had no power to give the Supreme

Court original jurisdiction in other cases than those described in the Constitution, and Chief Justice Marshall, in delivering the opinion, used language, on page 175, which might, perhaps, imply that such original jurisdiction as had been granted by the Constitution was exclusive; but this was not necessary to the determination of the cause, and the Chief Justice himself afterwards, in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, referred to many expressions in that opinion as *dicta* in which (p. 401), "the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle." In concluding that branch of the case, he said, "the general expressions in the case of *Marbury* v. *Madison* must be understood with the limitations which are given to them in this opinion; limitations which, in no degree, affect the decision of that case or the tenor of its reasoning."

In *Cohens* v. *Virginia*, the question was whether the Supreme Court had appellate jurisdiction for the review of the final judgment of the highest court of a State in a suit between a State and one of its own citizens arising under the laws of the United States, and the language of the opinion in that case is to be construed in connection with the general subject then under consideration. The same is true of *Osborn* v. *United States Bank*, 9 Wheat. 737, where the question was whether the Circuit Courts of the United States had jurisdiction of suits by and against the United States Bank. In *United States* v. *Ortega*, 11 Wheat. 467, the question was for the first time directly presented to this court whether our original jurisdiction was necessarily exclusive, but it was not decided, because the suit was found not to be one affecting a public minister. In *Davis* v. *Packard*, 7 Pet. 276, the Court of Errors of New York had decided that the character of consul did not exempt Davis, the plaintiff in error, from a suit in a State court; and in reversing a judgment to that effect this court said, speaking, in 1833, through Mr. Justice Thompson, all the other justices concurring, that, "as an abstract question, it is difficult to understand on what ground a State court can claim jurisdiction

of civil suits against foreign consuls. By the Constitution the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, &c. And the Judiciary Act of 1789 gives to the District Courts of the United States, *exclusively of the courts of the several States*, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act." In *Cohens* v. *Virginia*, 6 Wheat. 397, Chief Justice Marshall said: "Foreign consuls frequently assert, in our prize courts, the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this court has frequently been exercised in such cases, and it has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is the party on the record."

Such having been the action of the courts of the United States in construing this provision of the Constitution, the question of the exclusiveness of the jurisdiction in cases affecting consuls was, in 1838, directly presented to Chief Justice Taney on the circuit in the case of *Gittings* v. *Crawford*, Taney's Decisions, 1, and, after reviewing all the cases in an elaborate opinion, he says, p. 9: "The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation in which the grant of jurisdiction over a certain subject matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject matter."

Afterwards, Mr. Justice Nelson, in the case of *St. Luke's Hospital* v. *Barclay*, 3 Blatch. 259, 265, in 1855, and in *Graham* v. *Stucken*, 4 Blatch. 50, in 1857, decided the same question in the same way. In the course of his opinion in the last case, p. 52, he uses this language, pertinent to the particular phase of the question which we are now considering: "Again, the grant of original jurisdiction to the Supreme Court is the same in the cases . . . 'in which a State shall be a party,' as in the case of a consul. Those cases are controversies, 1, between two or more States; 2, between a State and citizens of another

State; 3, between a State and foreign States; and 4, between a State and citizens or subjects of foreign States, that is, aliens. Now, if the grant of original jurisdiction be exclusive in the Supreme Court in the case of a consul, it is equally exclusive in the four cases above enumerated; for the grant is in the same clause and in the same terms. And yet in the 13th section of the Judiciary Act, already referred to, it is provided that the Supreme Court shall have exclusive jurisdiction, &c., where a State is a party, &c., except between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. According to the argument, the whole of the exception would be unconstitutional, as the cases mentioned should have been vested exclusively in the Supreme Court." Following these decisions, we have held at the present term, in *Börs* v. *Preston*, *ante*, 252, that consuls may be sued in the Circuit Courts of the United States in cases where the requisite citizenship exists.

In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist.

It remains to consider whether jurisdiction has been given to the Circuit Courts of the United States in cases of this kind. As has been seen, it was not given by the Judiciary Act of 1789, and it did not exist in 1873, when the case of *Wisconsin* v. *Duluth*, 2 Dill. 406, was decided by Mr. Justice Miller on the circuit. But the act of March 3d, 1875, ch. 137, 18

Stat. 470, "to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," does, in express terms, provide, "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law, or in equity, . . . arising under the Constitution or laws of the United States;" and also that suits of the same nature begun in a State court may be removed to the Circuit Courts. And here it is to be remarked, that there is nothing in this which manifests an intention to interfere with the exclusive original jurisdiction of the Supreme Court as established by the act of 1789, and continued by section 687 of the Revised Statutes. The only question we have to consider is, therefore, whether suits cognizable in the courts of the United States on account of the nature of the controversy, and which need not be brought originally in the Supreme Court, may now be brought in or removed to the Circuit Courts without regard to the character of the parties. All admit that the act does give the requisite jurisdiction in suits where a State is not a party, so that the real question is, whether the Constitution exempts the States from its operation.

The same exemption was claimed in *Cohens* v. *Virginia*, 6 Wheat. 294, to show that the appellate jurisdiction of this court did not extend to the review of the judgments of a State court in a suit by a State against one of its citizens; but Chief Justice Marshall said, "the argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his State, but is not entitled to the same force, when urged to prove that this court cannot inquire whether the Constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. . . . It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and, therefore, the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object, was the

preservation of the Constitution and laws of the United States, so far as they can be preserved by judicial authority; and, therefore, the jurisdiction of the courts of the Union was expressly extended to all cases arising under the Constitution and those laws. If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the Constitution and laws? After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the Constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties," pp. 391–2.

The language of the act of 1875 in this particular is identical with that of the Constitution, and the evident purpose of Congress was to make the original jurisdiction of the Circuit Courts co-extensive with the judicial power in all cases where the Supreme Court had not already been invested by law with exclusive cognizance. To quote again from Chief Justice Marshall, in *Cohens* v. *Virginia*, p. 379, "the jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows, that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." This rule is equally applicable to the statute we have now under consideration. The judicial power of the United States extends to *all* cases arising under the Constitution and laws, and the act of 1875 commits the exercise of that power to the Circuit Courts. It rests, therefore, on those who would withdraw any case within that power from the cognizance of the Circuit

Courts to sustain their exception "on the spirit and true meaning of the" act, "which spirit and true meaning must be so apparent as to overrule the words its framers have employed." To the extent that the words conflict with other laws giving exclusive original jurisdiction to the Supreme Court this has been done, but no more. The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that power among courts.

We conclude, therefore, that the cases were removable under the act of March 3d, 1875.

The order to remand in each case is reversed, and the Circuit Court directed to entertain the cases as properly removed from the State court and proceed accordingly.

ALLEY *v.* NOTT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Submitted March 24th, 1884.—Decided April 21st, 1884.

Jurisdiction—Pleading—Removal of Causes—Statutes.

It is within the discretion of the court, after overruling a general demurrer to a declaration or complaint as not stating facts which constitute a cause of action, to enter final judgment on the demurrer; and such judgment if entered may be pleaded in bar to any other suit for the same cause of action.

As a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action raises an issue which involves the merits, a trial of the issue raised by it is a trial of the action within the meaning of § 3 of the act of March 3d, 1875, 18 Stat. 471, relating to the time within which causes may be removed from State courts. *Vannevar* v. *Bryant*, 21 Wall. 41; *Insurance Company* v. *Dunn*, 19 Wall. 214; *King* v. *Worthington*, 104 U. S. 44; *Hewitt* v. *Phelps*, 105 U. S. 393, distinguished from this case. *Miller* v. *Tobin*, 18 Fed. Rep. 609, overruled.

The only question argued and decided in this case was whether the cause was properly removed from the State court under the Removal Act after a general demurrer to the complaint for showing no cause of action had been heard and over-

ruled with leave to answer and answers had been filed. The facts appear more at length in the opinion of the court.

Mr. Albert A. Abbott for appellant, cited on the point that trial means the investigation of fact only: Stephen on Pleading, 77; Same, note 29, Appendix, citing Braxton, 105 *a* and Britton, c. 92; 3 Blackstone, 330; 2 Bouvier's Law Dict. 611, Trial; *Ward* v. *Davis*, 6 How. Prac. N. Y. 274; *Vannevar* v. *Bryant*, 21 Wall. 41; *Lewis* v. *Smythe*, 2 Woods, 117; Dillon on Removals, etc., 2d ed. 78; *Miller* v. *Tobin*, 18 Fed. Rep. 609; *Hewitt* v. *Phelps*, 105 U. S. 393; 94 Eq. Rule; *Hawes* v. *Oakland*, 104 U. S. 450.

Mr. George F. Betts and *Mr. Horatio F. Averill* for appellee.

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

This is an appeal from an order of the Circuit Court remanding a case removed from a State court. The suit was begun on the 2d of March, 1883, in the Supreme Court of New York, by Eliphalet Nott, a citizen of New York, for himself and all others who should come in and be made parties to the action, and contribute to the expenses, against Las Neuve Minas de Santa Maria Gold and Silver Mining Company, a New York corporation, John B. Alley, a citizen of Massachusetts, and certain other persons, some of whom were citizens of Illinois, and others citizens of New York. Nott was the holder of three hundred shares of the stock of the mining company, and the several individual defendants were trustees and directors. The prayer of the complaint was, in substance, that the individual defendants might be adjudged to be trustees as to the amount in money represented by one million shares of the capital stock of the company, and collectively and severally decreed to account concerning the same, and that they might also be severally adjudged to account for the gains and profits received by each of them from the sale of the stock.

The summons required an answer to the complaint within twenty days after its service. Two of the defendants were

never served and they have never appeared. Four of the individual defendants, including Alley, appeared on the 29th of March, and filed separate demurrers to the complaint on the ground "that it did not state facts sufficient to constitute a cause of action." On the 9th of June, during a special term of the court begun on the first of that month, "the issues of law raised by the demurrers of the defendants . . . having been brought on for trial," and argued by counsel, it was "ordered that the said demurrers be overruled, and that the plaintiff have judgment thereon accordingly for costs, with leave to said defendants demurring, within twenty days to withdraw said demurrer and answer the complaint upon payment of costs;" and that if the defendants fail to withdraw their demurrers and answer within the time allowed, a final judgment be entered against them for the relief to which the plaintiff is entitled, the form of the judgment to be settled by the judge. On the 13th of June, all the defendants who had demurred gave notice of appeal to the general term of the court. On the 23d of June, the defendants gave notice that they would move on the first of July for a stay of execution on the interlocutory judgment until the appeal could be heard, and on the 29th of June the time for answering the complaint was extended until ten days after the determination of this motion. On the 13th of July another of the defendants appeared and filed a demurrer to the complaint. On the first of August the defendants who had appealed withdrew their appeals and also their respective demurrers, and paid the costs awarded to the plaintiff by the interlocutory decree, and the costs of the appeal. Separate answers were filed on the same day by each of the several individual defendants whose demurrers had been overruled, and on the next day, August 2d, Alley presented to the court a petition for the removal of the suit to the Circuit Court of the United States for the Southern District of New York. In this petition the citizenship of Nott, the company, and Alley are stated, and it is then averred "that the controversy in this suit or action, so far as it respects or is between the plaintiff individually, or as representing the said mining company and this petitioner, is wholly between citizens

of different States, and that the same can be fully determined and a final determination of the controversy in said action can be had, so far as concerns the plaintiff and this petitioner, without the presence of either of the other defendants or parties in said cause." It is then stated "that since the service of said answer there has been no term of the court at which this action could have been tried."

The suit was docketed in the Circuit Court at once, and on the 11th of October a motion was made to remand. This motion was granted on the 21st of December, and from an order to that effect the appeal was taken.

In our opinion, the petition for removal was not filed in time. The statute requires the filing to be "at or before the term at which said cause could be first tried, and before the trial thereof." By the New York Code of Civil Procedure, issues are of two kinds: 1, of law; 2, of fact. Sec. 963. An issue of law arises only on a demurrer. Sec. 964. A demurrer to a complaint may be, among other things, because "the complaint does not state facts sufficient to constitute a cause of action." Sec. 488. Upon the decision of a demurrer, either at a general or special term, or in the Court of Appeals, the court may, in its discretion, allow the party in fault to plead anew or amend on such terms as may be just. Sec. 497. An issue of law in the Supreme Court must be tried at a term held by one judge. Sec. 976. At any time after the joinder of issue either party may serve a notice for trial. Sec. 977.

A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, the trial

of an issue raised by a demurrer which involves the merits of the action is, in our opinion, a trial of the action within the meaning of the act of March 3d, 1875. To allow a removal after such a trial would be to permit "a party to experiment on his case, in the State court, and, if he met with unexpected difficulties, stop the proceedings, and take the suit to another tribunal." This, as was said in *Removal Cases*, 100 U. S. 473, could not have been the intention of Congress. In effect, when this case was heard on the demurrer, the issue made by the pleadings, and on which the rights of the parties depended, was submitted to the court for judicial determination. This issue the court decided, but, before entering final judgment, granted a new trial, with leave to amend pleadings. The situation of the case at this time, for the purposes of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after verdict. We can hardly believe it would be claimed that a removal could be had in the last case, and, in our opinion, it cannot in the first.

The case of *Vannever* v. *Bryant*, 21 Wall. 41, 43, arose under the act of March 2d, 1867, c. 196, which allowed a removal at any time "before the final hearing or trial of the suit," and what is there said is to be construed in connection with that fact. The same is true of *Insurance Company* v. *Dunn*, 19 Wall. 214. In *King* v. *Worthington*, 104 U. S. 44, and *Hewitt* v. *Phelps*, 105 U. S. 393, 395, the questions were as to the time when a case could be removed that was begun before the act of 1875 was passed. In *Lewis* v. *Smythe*, 2 Woods, 117, the question here presented was not involved, and the removal was decided to be too late because it was not applied for until after a trial on the issues of fact had begun. In *Miller* v. *Tobin*, 18 Fed. Rep. 609, the experienced district judge for the District of Oregon did hold that a removal, applied for after hearing upon a demurrer to complaint because it did not state facts sufficient to constitute a cause of action, could be had; but, on full consideration, we are unable to reach that conclusion.

Without deciding whether Alley would have been entitled

to a removal if his petition had been filed in time, we affirm the order to remand on the ground taken by the circuit judge, that the application for removal was not made "before the trial" within the meaning of the term as used in the act of 1875.

Affirmed.

UNITED STATES *v.* BELL & Another.

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

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

Evidence.

A transcript from the books of the treasury, certified to by the Fourth Auditor, showing the account of the Treasury Department with a paymaster of the navy, accompanied by a certificate of the Secretary of the Treasury that the certifying officer was the Fourth Auditor at the time of the certificate, is competent evidence in a suit upon the paymaster's bond.

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

Mr. Charles F. Benjamin and *Mr. Richard M'Allister, Jr.*, for defendants in error.

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

This was a suit upon the bond of a purser in the navy, and at the trial a transcript from the books and proceedings of the Treasury Department was offered in evidence, authenticated in the following form:

"Treasury Department, Fourth Auditor's Office,
"Washington, D. C., *Feb'y* 11, 1881.

"Pursuant to section 886 of the Revised Statutes of the United States, I, Charles Beardsley, Fourth Auditor of the Treasury Department, do hereby certify that the annexed is a transcript of the books and proceedings of the Treasury Department in account with Miles H. Morris, late paymaster in the U. S. Navy, under bond of April 9, 1858.

"Charles Beardsley, *Auditor.*

"Be it remembered that Chas. Beardsley, Esq., who certified the annexed transcript, is now, and was at the time of doing so, Fourth Auditor of the Treasury of the United States, and that full faith and credit are due to his official attestations.

"In testimony whereof, I, John Sherman, Secretary of the Treasury of the United States, have hereunto subscribed my name and caused to be affixed the seal of this department, at the city of Washington, this eleventh day of February, in the year of our Lord 1881.

"[Seal of Department.] "JOHN SHERMAN,
"*Secretary of the Treasury.*"

An objection to the admission of the evidence on the ground that the "transcript was not certified as required by law," was sustained by the court, and that is assigned for error here.

In our opinion the certificate was sufficient. Sec. 886 of the Revised Statutes provides that "when suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register and authenticated under the seal of the department, or, when the suit involves the accounts of the War and Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly."

This suit involved the accounts of the Navy Department. The fourth auditor is charged by law with the duty of examining all accounts accruing in that department. Rev. Stat., sec. 277, subdivision fifth. He has certified under his hand that the paper offered in evidence "is a transcript of the books and proceedings of the Treasury Department in account with" the purser whose bond is in suit, and the Secretary of the Treasury has certified, under the seal of the department, to the official character of the auditor, "and that full faith and credit are due to his official attestations." What more need be done to authenticate the transcript under the seal of the

department we are at loss to determine. The certificate of the proper auditor is attached and his certificate attested by the Secretary of the Treasury under the seal of the department. The form of the certificates and the mode of affixing the seal correspond exactly with what appears in *Smith* v. *United States*, 5 Pet. 292, where it was held, more than half a century ago, that the seal affixed in this way was sufficient for the purposes of evidence under a statute, of which sec. 886 is a re-enactment. The transcript is certified by the auditor, and authenticated under the seal of the Treasury Department affixed by the Secretary, its lawful custodian.

The judgment is reversed and the cause remanded, with instructions to set aside the verdict and grant a new trial.

ANDERSON, Receiver, *v.* PHILADELPHIA WAREHOUSE COMPANY.

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

Argued April 3d, 4th, 1884.—Decided April 21st, 1884.

National Banks.

A pledgee of shares of stock in a national bank who in good faith and with no fraudulent intent takes the security for his benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure.

This suit was brought by the receiver of the First National Bank of Allentown, an insolvent national bank, to recover an assessment made by the Comptroller of the Currency on the shareholders to pay debts, and the only question presented for determination is whether, upon the facts the Philadelphia Warehouse Company was in law a shareholder of the bank at the time of its failure, and as such liable to creditors. The facts, as shown by the undisputed testimony, or found by the jury, are these:

Statement of Facts.

From the 17th of April, 1864, until December 27th, 1871, William Kern was the registered holder of 490 shares of the stock of the bank. Kern was one of the partners in the banking and business firm of W. H. Blumer & Co., composed of himself, William H. Blumer, and Jesse Line. Blumer was the president of the bank, and the other two partners in the firm directors. A son of the president was cashier and also a director.

In the latter part of the year 1871 Blumer & Co., through William H. Blumer, arranged with the Philadelphia Warehouse Company in Philadelphia for a loan or banker's credit, to be secured by a deposit of collaterals. The account was opened and the first drafts paid upon a deposit of gas stocks as security. On the 27th of December, 1871, Kern transferred 450 of the shares of the stock standing in his name on the books of the bank, and had a new certificate issued in the name of T. Charlton Henry, president. This certificate was receipted to the bank by Blumer, its president, and by him either taken or sent to the Warehouse Company as further security for the credit extended to Blumer & Co. The certificate came into the hands of Henry, the president of the company, on the 28th of December, and soon after another draft of Blumer & Co. for $10,000 was paid. On or before the second of January the fact of the transfer of the stock to the name of Henry, president, was brought to the attention of some of the directors and members of the executive committee of the Warehouse Company. At once it was deemed inadvisable to have the stock stand in the name of the president, and the certificate was, on the 3d of January, transferred, under the seal of the company and the signatures of its president and secretary, to Dennis McCloskey, an irresponsible person, and a porter in its employ. The certificate with the transfer upon it was sent the same day by the secretary of the company to Blumer & Co., with a request that the stock might be transferred and a new certificate issued in the name of McCloskey and returned. To this request Blumer replied as follows:

Statement of Facts.

"Wm. H. Blumer, President. J. A. Blumer, Cashier.
"The First National Bank of Allentown.
"Allentown, Penn'a, *Jan'y 4th*, 1872.
"T. Charlton Henry, Esq., President.

"To-day I received one remittance from your L. S. Maderia, to wit, certificate of stock for four hundred and fifty shares of the capital stock of the First National Bank of Allentown, with a request to assign the same and make a new certificate to Dennis McCloskey. I do not understand the nature of this transaction, and would respectfully ask you to give me explanation why the stock is to be transferred to a third party; and if it would be better to place other securities with you, such as gas stock, in cases where you pledge them with outsiders.

"If my remarks seem improper, pardon me, for I only ask questions to gain wisdom. Very respectfully,
"Wm. H. Blumer,
"for W. H. Blumer & Co."

To this letter the company sent the following answer:

"*January 6th*, 1872.
"Wm. H. Blumer, Esq., Pres't.

"Dear Sir: I am in receipt in your favor of the 4th inst., and in reply would say that I am not surprised at your inquiry, since you were requested to have the certificate made out in my name. We have no need to borrow any money, nor do we expect or intend to put this stock out of our hands, but the failure of one or two national banks lately led our directors to consider the clause in the national bank act which renders all stockholders liable, in case of failure, to pay up to the receiver the full amount of the stock in their name; and on this account we determine to have the certificates of national bank stock put in the name of Dennis McCloskey, who is the boy in our office, taking his power of attorney to transfer the same. Hoping this explanation will prove satisfactory, I am yours respectfully,
"T. C. Henry, *Pres't.*"

Upon the receipt of this letter the stock was transferred in due form, January 10th, to McCloskey on the books of the bank, and a new certificate issued in his name. The certificate was receipted for McCloskey by W. H. Blumer and forwarded

to the Warehouse Company as an inclosure in the following letter:

"Office of the Allentown Gas Company.

"W. H. Blumer, President. J. M. Line, Treasurer.

"ALLENTOWN, PA., *January 10th*, 1872.

"T. C. HENRY, ESQ.

"Dear Sir: Inclosed I hand you certificate of 450 shares First National Bank of Allentown. It is never out of the way if you are cautious, but in this case I presume there would have been no danger. I would not sell the gas stock for $50,000.

"Truly, W. H. BLUMER."

McCloskey never had possession of the certificate, and, at the request of the Warehouse Company, executed in blank, as of the date of January 3d, an irrevocable power of attorney for the sale and transfer of the stock. He died in 1875. After his death the stock was transferred on the books of the bank, at the request of the company, to Francis Ferris, another employé and also an irresponsible person. This certificate was delivered to the company, and Ferris indorsed thereon an irrevocable power of attorney for its transfer. The stock stood in his name at the time of the failure of the bank in 1878, the company holding the certificate.

Dividends were paid regularly on this stock to Kern or Blumer & Co. from the time of the original transfer up to and including December, 1876. The Warehouse Company never received any dividends and never acted as a shareholder. Blumer & Co. failed in 1877, largely indebted to the Warehouse Company, which still held as security the stock standing in the name of Ferris. The failure of Blumer & Co. crippled the bank so that it never afterwards paid a dividend, and on the 15th of April, 1878, it was put into insolvency by the Comptroller of the Currency and a receiver appointed. On the 10th of May following the Comptroller assessed the shareholders twenty per cent. of the par value of their shares to pay the debts, and this suit was brought to collect that assessment on the 450 shares in question. The jury, under instructions applicable to the foregoing state of facts, rendered a verdict

for the defendant, and to reverse a judgment on that verdict this writ of error was taken.

Mr. P. K. Erdman, for plaintiff in error.

Mr. R. C. McMurtrie, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. *National Bank* v. *Case*, 99 U. S. 628; *Bowden* v. *Johnson*, 107 U. S. 251. It is, also, undoubtedly true, that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner.

There is in this case no evidence of actual fraud or bad faith. The Warehouse Company never was the owner of the stock in question, and never held itself out as such. The transfer of Kern and Blumer & Co., was only by way of pledge, and the company was bound to return the stock whenever the debt, for which it was held, should be paid. From the verdict of the jury, under the instructions of the court, it must also be accepted as a fact, that the company never consented to a transfer of the stock to its name on the books, or to that of its president, and it is undisputed that for seven years before the failure of the bank, and at least five years before its embarrassments were known to the company or the public, the stock had been standing, with the assent of Kern, Blumer & Co. and the officers of the bank, in the name of McCloskey or Ferris. During all that time, neither the registered holders nor the Warehouse Company claimed dividends or in any way acted as shareholders.

On the contrary, either Kern or Blumer & Co. took the dividends as they were paid, and to all intents and purposes controlled the stock. There was no concealment on the part of the Warehouse Company, and no effort to deceive. It had possession of the certificates which represented the stock, with full power to control them for all the purposes of its security, but there was never a time, from the date of the original transfer by Kern on the books, until the failure of the bank, that it was or pretended to be anything else than a mere pledgee. Those who examined the list of shareholders would have found the name of McCloskey or of Ferris as the registered holder of four hundred and fifty shares. There was nothing on the books of the bank to connect them, or either of them, with the Warehouse Company, and, therefore, no credit could have been given on account of the apparent liability of the company as a shareholder. If inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. Blumer & Co. and the bank were fully advised who McCloskey was, and of his probable responsibility, when they allowed the transfer to be made to him, and they undoubtedly knew who Ferris was when the stock was put in his name after McCloskey's death. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee, without making itself liable as an apparent owner. Kern or Blumer & Co. still remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt. They consented to the transfer, not to escape liability as shareholders, but to save the company from a liability it was unwilling to assume, and at the same time to perfect the security it required for the credit to be given. As between Blumer & Co. and the Warehouse Company, Blumer & Co. or Kern were the owners

of the stock and the company the pledgee. As between the company and the bank, or its creditors, the company was a pledgee of the stock and liable only as such. The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co. who were always the real owners.

To our minds the fact that the stock stood registered in the name of Henry, President, from December 27th to January 10th, is, under the circumstances of this case, of no importance. The Warehouse Company promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose. It asked that the transfer might be made to McCloskey. To this the owners of the stock and the bank assented, and from that time the case stood precisely as it would if the transfer had originally been made to McCloskey instead of Henry, President, or if Henry had retransferred to Kern or Blumer & Co., and they had at the request of the company made another transfer to McCloskey. The security of the Warehouse Company was perfected without imposing on the company a shareholder's liability. All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment. So far as the company was concerned, the transfer was not made to escape an impending calamity, but to avoid incurring a liability it was unwilling to assume, and which it was at perfect liberty to shun.

It follows that the judgment of the Circuit Court was right, and it is consequently

Affirmed.

Mr. Justice Miller, with whom Mr. Justice Matthews concurred, dissenting.

I do not concur in this judgment.

I think if in any case between private persons, one of them had placed property in the hands of minors, servants, or other irresponsible persons, for the purpose of escaping the responsibility attaching to the ownership of such property, while

securing all the advantages of such ownership, it would be held to be a transaction which could not be supported on any legal or equitable principle.

It does not remove this case from the control of that principle, that the parties to be injured are the unknown creditors of the bank, who are, by this means, deprived of the right which they have to resort to a responsible shareholder for the contribution which the law gives for their benefit.

If not an actual fraud, it is a fraud upon the banking law, and was so intended to be by both the original holders of the bank shares, and the officers of the Warehouse Company, by which the latter could control the shares without the responsibility which the law attaches to the owner.

It is an easy devise to make the right which the law gives to creditors of a failing bank ineffectual, and to evade it in all cases.

Justice Matthews agrees with me in this dissent.

TEXAS & PACIFIC RAILWAY COMPANY *v.* KIRK.

IN ERROR TO THE SUPREME COURT OF TEXAS.

Submitted April 3d, 1884.—Decided April 21st, 1884.

Amendment—Error—Practice.

Under authority conferred upon the court by § 1005 Rev. Stat., a writ of error bearing a wrong teste, signatures of justice and of clerk, and seal of court, may be amended as to teste and signature of justice by order of court, and as to seal and signature of clerk by directing them to be affixed.

Motion to dismiss, with which was united motion to affirm.

Mr. A. H. Garland and *Mr. W. Hallett Phillips* for motion.

Mr. John F. Dillon, *Mr. John C. Brown*, *Mr. Wager Swayne*, and *Mr. W. D. Davidge* opposing.

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

The defendant in error moves to dismiss this case for want of a sufficient writ of error, and with this motion is united one

to affirm under sec. 5 of Rule 6. The plaintiff in error moves for leave to amend the writ.

In our opinion the motion to amend should be granted. The writ is in every respect in accordance with the form transmitted by the clerk of this court to the clerks of the Circuit Courts, under the authority of the act of May 8th, 1792, c. 36, sec. 9, now sec. 1004 of the Revised Statutes, except that it is made returnable on a wrong day, bears the teste of the Chief Justice of the Supreme Court of Texas, and is signed by the chief justice and the clerk, and sealed with the seal of that court. It commands the Justices of the Supreme Court of Texas, in the name of the President of the United States, to transmit to this court for review their record and proceedings in a certain suit, which is properly described, and the return has been made and the cause duly docketed here. In *Bondurant* v. *Watson*, 103 U. S. 278, relied on in support of the motion to dismiss, the writ did not purport to be issued in the name of the President, or under the authority of the United States. It was in reality nothing more than an order of the Supreme Court of Louisiana to its clerk to transmit the record and proceedings of that court in a certain cause to this court for review.

By sec. 1005 of the Revised Statutes, we are authorized to allow an amendment of a writ of error, when there has been a mistake in the teste, or a seal is wanting, or the writ is made returnable on a wrong day, "and in all other particulars of form." This writ is signed by the clerk of the Supreme Court of Texas; and in *McDonough* v. *Millaudon*, 3 How. 693, 707, the question whether that was not sufficient was left open. But however that may be, we think all the defects which are complained of are such as come within the remedial provisions of the statute, and the amendments asked for may be made, save only that the seal and the signature of the clerk of this court, instead of the Circuit Court of the Western District of Texas, may be affixed to the writ. If the amendments are made on or before Monday next, the motion to dismiss will be denied, otherwise it will be granted.

The case upon the merits is not of a character to be disposed of on a motion to affirm. *That motion is overruled.*

TEXAS & PACIFIC RAILWAY COMPANY *v.* MURPHY.

IN ERROR TO THE SUPREME COURT OF TEXAS.

Submitted April 3d, 1884.—Decided April 21st, 1884.

Error—Jurisdiction—Limitations, Statute of—Supersedeas.

If a petition for a rehearing is presented in season and entertained by the court, the time limited for a writ of error does not begin to run until the petition is disposed of.

A supersedeas will not be vacated when the writ of error is sued out and served within twenty days after the decision of a motion for rehearing, presented in season and disposed of by the court.

This was a motion to dismiss a writ of error, united to a motion to affirm.

Mr. W. Hallett Phillips and *Mr. A. H. Garland*, for defendant in error, moving.

Mr. W. D. Davidge for plaintiff in error, opposing.

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

The defendant in error moves to dismiss this writ on the ground that it is brought to review an order of the court below refusing a rehearing, and not the final judgment. With this motion he unites another to affirm under sec. 5, Rule 6. If these motions are denied he asks that the supersedeas may be vacated. The facts are these:

On the 29th of May, 1883, a judgment was entered by the Supreme Court of Texas affirming a judgment of the District Court of Harrison County. The following entry appears in the record under date of December 21st, 1883:

"Appeal from Harrison.

"The Texas Pacific Railroad Company *v.* James Murphy. } No. 422. Case 1111.

"Opinion of the court delivered by Mr. Justice Slayton. Mr. Chief Justice Willie not sitting in this cause.

"Motion of the appellant for a rehearing in this cause came on

to be heard, and the same having been considered by the court, it is ordered that the motion be overruled and the rehearing refused; that the appellant, the Texas Pacific Railway Company, pay all the costs of this motion."

On the 3d of January, 1884, the chief justice of the State indorsed his allowance on a petition presented to him for a writ of error from this court for a review of the record and proceedings in the suit, properly describing it, "in which a final judgment was rendered against the Texas and Pacific Railway Company on the 21st of December, A. D. 1883." The writ was issued on the 9th of January, describing the suit and the parties properly, but not giving the date of the judgment. The objection now made is that as the judgment entered on the 21st of December was only an order overruling a motion for a rehearing, which is not reviewable here, we have no jurisdiction.

In *Brocket* v. *Brocket*, 2 How. 238, it was decided that a petition for rehearing, presented in due season and entertained by the court, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show in express terms when the motion for a rehearing was made, but it was entertained by the court and decided on its merits. The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any order that might be made. This presumption has not been overcome.

The writ of error as issued is on its face for the review of the final judgment, not of the order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of opinion, therefore, that the judgment as entered on the 29th of May is properly before us for consideration. The motion to dismiss is overruled.

It was expressly ruled in *Brocket* v. *Brocket*, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the court, the time lim-

ited for an appeal or writ of error does not begin to run until the petition is disposed of. *Slaughter House Cases*, 10 Wall. 273, 289; *Memphis* v. *Brown*, 94 U. S. 715, 717. The motion for rehearing in this case was not decided until December 21st, and the writ of error was sued out and served within sixty days thereafter. This was in time to secure the superedeas.

The motion to vacate is, therefore, overruled.

The questions arising on the merits are not of a character to be disposed of on a motion to affirm.

That motion is also denied.

EAGLETON MANUFACTURING COMPANY *v.* WEST, BRADLEY & CAREY MANUFACTURING COMPANY & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued April 15th and 16th, 1884.—Decided May 5th, 1884.

Patent.

Letters patent No. 122,001, granted to the Eagleton Manufacturing Company, December 19th, 1871, for an "improvement in japanned furniture springs," as the alleged invention of J. J. Eagleton, *held* to be invalid, and the following points ruled :

(1.) The patent is for steel furniture springs protected by japan, and tempered by the heat used in baking on the japan ;

(2.) Such springs, so protected and tempered, were known and used by various persons named in the answer, before the date of the patent ;

(3.) The specification which accompanied the original application by Eagleton, July 6th, 1868, did not set forth the discovery that moderate heat, such as may be applied in japanning, will impart temper to the springs, but set forth merely the protection of the springs by japan ;

(4.) Not only does the evidence fail to show that Eagleton, who died in February, 1870, in fact made and used, prior to such other persons the invention covered by the patent as issued, but it shows that he did not, and that, probably, it never came to his knowledge while he lived ;

(5.) Japanning, by itself, was not patentable, and Eagleton, in the specification which he signed and swore to, did not describe any mode of japanning which would temper or strengthen the steel, and did not even mention that

the japan was to be applied with heat, and it now appears that the temper and strength are produced by the heat altogether, and not at all by the japan.

(6.) The only invention to which the application and oath of Eagleton were referable was that of merely japanning steel furniture springs; the authority given to his attorneys was only to amend that application, and ended at his death; the amendments made were not mere amplifications of what had been in the application before; the patent was granted upon them without any new oath by the administratrix; and this defence is not required, by statute, to be specifically set forth in the answer, and can be availed of under the issues raised by the pleadings, as showing that the plaintiff has no valid patent.

The case is stated in the opinion of the court.

Mr. F. H. Betts for appellant.

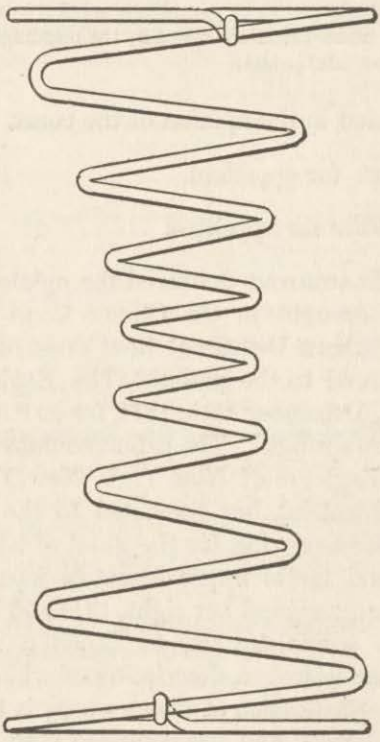
Mr. W. C. Witter for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States for the Southern District of New York, on letters patent No. 122,001, granted to the plaintiff, The Eagleton Manufacturing Company, December 19th, 1871, for an "improvement in japanned furniture springs." The patent contains these recitals: "Whereas J. J. Eagleton of New York, New York (Sarah N. Eagleton, administratrix), has presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in japanned furniture springs (she having assigned her right, title and interest in said improvement, as administratrix, to Eagleton Manufacturing Company, of same place), a description of which invention is contained in the specification of which a copy is hereto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law." The specification of the patent is as follows:

"Be it known, that I, J. Joseph Eagleton, of New York, in the county of New York, and State of New York, have invented a new and useful improvement in furniture springs; and I do hereby

declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawing, forming part of this specification, in which the drawing represents a furniture spring provided, according to my improvement, with a japan covering. [The helical springs heretofore employed



for furniture-seats, mattresses, &c., have generally been made of iron wire, brass, or copper; but steel wire, although a far superior material for such springs, has not been commonly employed, owing

to the lack of means for protecting such springs from corrosion and the lack of means for imparting to them the necessary stiffness or temper. The object of this invention is to produce steel furniture springs that shall not only be protected from corrosion, but shall also be suitably tempered and stiffened. The drawing is a perspective view of one of my improved springs. In carrying out my invention, I provide a suitable quantity of steel wire of the size of which the spring is to be made, and this I wind upon blocks in the usual manner, giving the wound spring the ordinary pressing or set. I then provide a suitable bath containing the ordinary preparation of japan varnish, in which I dip or place the springs, so as to cover them with japan. They are then removed and strung on wires, or put on pegs, to drain, after which they are placed in a baking oven of the ordinary kind suitable for the baking of japanned articles, in which oven the springs are subjected to a temperature sufficient to bake and harden the japan; after which the springs are removed from the oven and allowed to cool, when they are ready for use. The treatment of the springs in this manner imparts to them two important and valuable qualities: First, the springs, when they come from the oven and are cooled, have firmly attached to their exterior surface a water-proof covering or coating, which perfectly protects them from corrosion and fits them for service in all kinds of climates, hot or cold, dry or damp. Second, the springs thus prepared are strengthened or stiffened, the application of heat to the springs in the oven having the apparent effect to temper the steel of which they are composed, making the springs stronger and more elastic. As between a steel spring not japanned, as I have described, and a steel spring japanned, as described, both being of the same size and made from the same piece of wire, the japanned spring will be found to be much stronger than the spring not japanned. The spring not japanned is, therefore, not only lacking in strength, but it is also practically useless, for want of a protecting covering. But the improved article, produced substantially in the manner I have described, forms a strong and durable spring, and no article like it has, so far as I am aware, ever been known or used. While I do not claim broadly, the making of furniture springs of steel wire, I wish it to be understood I do not limit or confine myself to the exact order or method of operation here described, in producing my im-

proved springs, as the order or method may be varied without departing from my invention."]

There are two claims, namely: "1. The method, herein described, of strengthening metal springs. 2. As an improved article of manufacture, a spring made substantially as herein described."

Eagleton, as inventor, filed in the Patent Office, on the 6th of July, 1868, a petition for a patent for an "improvement in furniture springs," accompanied by an affidavit, a specification, a drawing, and a model, and the proper fee, and, in the petition, appointed Munn & Co. "to act as his attorneys in presenting the application and making all such alterations and amendments as may be required, and to sign his name to the drawings." The affidavit, that Eagleton verily believed himself to be "the original and first inventor of the within described improvement in furniture springs," was sworn to by him June 26th, 1868. The specification then filed was as follows: "Be it known that I, J. Joseph Eagleton, of New York, in the county of New York, and State of New York, have invented a new and useful improvement in furniture springs, and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings forming part of this specification, in which the drawing represents a furniture spring provided, according to my improvement, with a japan covering. [The nature of this invention relates to improvements in helical furniture springs, such as are used for mattresses, sofas, &c., the object of which is to provide steel springs which will not be so liable to injury from corrosion as those now in use. It consists in providing steel springs, such as are commonly used, with a japan outer covering. Steel springs, as is well known, possess in a much higher degree the requisite qualities of strength, flexibility, and elasticity than iron, copper, or brass, and, by reason of the susceptibility of steel to be tempered, and thereby regulated to any degree of elasticity, it is much more preferable to use; but, owing to its great liability to de-

terioration from corrosion, it is but little used for such springs. To obviate this difficulty, I propose to provide steel springs coated with japan, which I find to be of great advantage in resisting the corrosive action of the atmosphere on the steel, and whereby steel springs are made very much more durable than any other. To some extent, the same purpose may be accomplished by coating the spring with tin or zinc or other similar metal, which will not suffer by corrosion, but the process of coating with such metals requires the use of acids for cleaning and preparing the steel, which, adhering to the steel, and being to some extent inclosed within the said coating and maintained in contact with the steel, have an injurious effect thereon. I have, therefore, found that when the springs are protected by japanning they are much more durable and give more satisfactory results, the same being applied by the common japanning process. Having thus described my invention, I claim as new, and desire to secure by letters patent, japanned furniture springs, as a new article of manufacture, substantially as and for the purpose described."]

The application was rejected on the 10th of July, 1868, the following reasons being assigned by the examiner: "The application above referred to has been examined, and is rejected for want of patentable invention. The japanning of metal is an old process, and no invention is shown in applying it to a spring for a bed bottom. It is a common right, possessed by every one, to galvanize, paint or japan any metal that he may use." The specification was returned to the applicant. Eagleton died in February, 1870. On December 29th, 1870, the application for the patent was renewed on the same specification, it being returned to the Patent Office, and received there January 4th, 1871, and a reconsideration requested, the letter being signed "J. J. Eagleton, per Munn & Co., attorneys." Nothing further appears to have been done until, on October 19th, 1871, the specification filed was amended by erasing the part above put in brackets, and substituting what is in brackets in the specification of the patent as issued, and by substituting the following as the claim: "Having thus described my invention, I claim as new, and desire to secure by letters patent, as

an improved article of manufacture, a japanned steel furniture spring, made substantially as set forth." On the 20th of October, 1871, the application was rejected, the examiner saying: "The above named application has been examined on the amended specification, but no reason can be seen for changing the action of the Office in rejecting the same July 10th, 1868. The applicant is referred to the Commissioner's decision in the case of Osborn and Drayton, November 5th, 1870. The application is again rejected." On the 31st of October, 1871, Munn & Co. wrote thus to the Office: "In the matter of the application of J. J. Eagleton, for letters patent for furniture springs, filed July 6th, 1868, we respectfully request a specific reference, on which the rejection of the case may be based, as provided in Rule 34 of Office Rules of Practice." On November 3d, 1871, this answer was returned: "The applicant's letter of the 31st of October has been duly considered. His application has been twice rejected for want of patentable invention, and not for want of novelty. Sufficient reasons, it was deemed, were given for its rejection, and that Rule 34 of Office Rules of Practice is not applicable in the case. The process of japanning is so old that it is not probable that any person ever before applied for a patent for it. Furniture springs have been painted, galvanized, varnished, and probably japanned, as they are found coated with material that would require a chemical analysis to determine of what it was composed. The former action is affirmed." On the 7th of November, 1871, by a letter to the Office, signed "J. J. Eagleton, per Munn & Co., attorneys," the specification was amended by erasing the claim last presented and inserting, in lieu thereof, the two claims which are in the patent as issued. The application was again examined, and, on November 17th, 1871, the patent was ordered to issue. The specification annexed to the patent purports to be signed "J. J. Eagleton," and also to be signed by the two witnesses who signed the specification originally filed.

The bill avers that Eagleton, having invented the improvement, died intestate, and Sarah N. Eagleton was appointed his administratrix, and the invention was assigned to the plaintiff, and afterwards the administratrix applied for a patent, and

complied with all the necessary conditions and requirements of the statute, and the patent was issued. The answer states, that, as to whether or not the patent was applied for or issued in the manner and with the formalities set forth in the bill, the defendants leave the plaintiff to proof thereof. It denies that Eagleton was the first inventor of what is patented by the patent, and avers that, before the time of any invention thereof by Eagleton, it was known to and used by various persons named, at various places mentioned; that the description in the patent is obscure and not sufficient to enable one acquainted with the art to use the alleged process therein attempted to be described, and for that reason the patent is void; that the description and specification of the patent are not in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it appertains to temper steel wire, but, if the description and specification be followed out, there will not be produced a tempered steel furniture spring; that, if the desired effect be to temper or strengthen a steel furniture spring, then, for the purpose of deceiving the public, the description and specification filed by Eagleton were made to contain less than the whole truth relative to his invention or discovery, and the patent is, therefore, null and void; that any representation contained in the patent or the specification, that treating a spring as described therein tempers it, is false; and that treating a steel furniture spring as described in the patent does not temper it. Infringement, also, is denied.

The Circuit Court dismissed the bill, assigning its reasons in an opinion which is found in 18 Blatchford, 218. The court decided the following points: (1.) The patent is for steel furniture springs protected by japan, and tempered by the heat used in baking on the japan. (2.) Such springs, so protected and tempered, were known and used by various persons named in the answer, before the date of the patent. (3.) The specification which accompanied the original application did not set forth the discovery that moderate heat, such as may be applied in japanning, will impart temper to the springs, but set forth merely the protection of the springs by japan. (4.) Not only does the evidence fail to show that Eagleton in fact made and

used, prior to such other persons, the invention covered by the patent as issued, but it shows that he did not, and that, probably, it never came to his knowledge while he lived. (5.) Japanning, by itself, was not patentable, and Eagleton, in the specification which he signed and swore to, did not describe any mode of japanning which would temper or strengthen the steel, and did not even mention that the japan was to be applied with heat, and it now appears that the temper and strength are produced by the heat altogether, and not at all by the japan. (6.) The only invention to which the application and oath of Eagleton were referable was that of merely japanning steel furniture springs; the authority given to his attorneys was only to amend that application, and ended at his death; the amendments made were not mere amplifications of what had been in the application before; the patent was granted upon them without any new oath by the administratrix; and this defence is not required by statute to be specifically set forth in the answer, and can be availed of under the issues raised by the pleadings, as showing that the plaintiff has no valid patent.

We are satisfied with the conclusions arrived at by the Circuit Court, and with the reasons assigned by it therefor. The copy of the file wrapper and its contents in the matter of the patent, from the Patent Office, giving the history of the application, was put in evidence by the plaintiff. It shows beyond doubt, that there was no suggestion, in the specification signed and sworn to by Eagleton, of the invention described in the amendment filed October 19th, 1871. Prior to that time the process practised by the defendants, which is the process described in letters patent No. 116,266, granted to Alanson Cary, June 27th, 1871, for an "improvement in modes of tempering springs," was invented and put in use; and there is no sufficient evidence that Eagleton had any knowledge, prior to the invention by Cary of the Cary process, of either that process or of the process described in the patent in suit. The plaintiff's patent shows, on its face, that it was granted on the petition of Eagleton, and the allegation of the bill that the patent was granted on the application of his administratrix is not established. In view of the entire change in the specification, as to

the invention described, the patent, to be valid, should have been granted on an application made and sworn to by the administratrix. (Act of July 8th, 1870, ch. 230, § 34, 16 Stat. 202.) The specification, as issued, bears the signature of Eagleton and not of the administratrix, and it is sufficiently shown that the patent was granted on the application and oath of Eagleton, and for an invention which he never made. The renewed application of December 29th, 1870, was made in the name of Eagleton, though he was dead. The letter of Munn & Co. of October 31st, 1871, treats the matter under consideration as the application of Eagleton, though the amendment of October 19th, 1871, had been made. The amendment of November 7th, 1871, was not only made in the name of Eagleton, but the letter of that date, in his name, to the office, states that what is amended is the specification in his application. Although at some time before the issuing of the patent evidence was produced to the office of the appointment of the administratrix and of her assignment to the Eagleton Company, yet it is very clearly shown that there was no application or oath by the administratrix.

The decree of the Circuit Court is affirmed.

UNITED STATES *v.* BRYANT & Another.

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

Submitted April 15th, 1884.—Decided May 5th, 1884.

Action—Practice—United States.

Under §§ 2942 and 2943 of the Code of Alabama, of 1876, which provide for the bringing of a suit for the recovery of personal chattels in specie, and for the making of an affidavit by "the plaintiff, his agent or attorney," that the property sued for belongs to the plaintiff, and for the giving by the plaintiff of a bond for costs and damages, as prerequisites to the making of an order for the seizure of the property, an affidavit, in such a suit by the United States, in the Circuit Court of the United States, made by a special agent of the General Land Office, in which he swears, "to the best

Statement of Facts.

of his knowledge, information and belief," that the property sued for belongs to the United States, is sufficient.

Under § 1001 of the Revised Statutes of the United States, the United States are not required to give the bonds provided for by the Code of Alabama, as a condition precedent to the right to avail themselves of said provisions of that Code.

Where, in such suit, the Circuit Court, after the seizure of the property, vacated the order for its seizure, on the ground of the insufficiency of the affidavit and for the want of a bond, but the United States had a judgment, and brought a writ of error, this court reversed the order of the Circuit Court vacating the order of seizure.

This was an action at law brought by the United States, in the Circuit Court of the United States for the Southern District of Alabama, against Henry Bryant and J. V. Weekley, the complaint in which, filed August 8th, 1879, states that the plaintiffs claim of the defendants 2,740 pine logs, with the use thereof during the detention. The bark-marks and stamps and sizes and value of the logs were set forth, and the times when and places where they were cut.

With the complaint there was filed an affidavit in these words:

"United States of America, Southern District of Alabama, ss.: On this the 8th day of August, A.D. 1879, before me, Henry S. Skaats, a commissioner of the Circuit Court of said district, personally appeared J. J. Gainey, special agent General Land Office, who, being first sworn, deposes and says, that, to the best of his knowledge, information, and belief, the property sued for in the case of the United States against Henry Bryant and J. V. Weekley, for the recovery of two thousand seven hundred and forty pine logs, of the value of one dollar and twenty-five cents each, is the property of the plaintiffs, the said United States. J. J. Gainey. Sworn and subscribed before me this 8th day of August, A.D. 1879. Henry Skaats, U. S. Commissioner Sou. Dist. of Ala."

Thereupon, the clerk of the court issued the following order for seizure:

"United States of America: Circuit Court of the United States for the Southern District of Alabama. J. J. Gainey,

special agent to the Commissioner of the General Land Office, having made affidavit, to the best of his knowledge, information, and belief, that the property sued for in the annexed complaint, namely, two thousand seven hundred and forty pine logs or sticks of timber, belongs to the plaintiff in said suit, the marshal of the United States for the Southern District of Alabama is required to take the property mentioned in the said complaint into his possession, unless the defendants give bond, payable to the said plaintiffs, with sufficient surety, in double the amount of the value of the property, with condition that if the defendant is cast in the suit he will within thirty days thereafter deliver the property to the plaintiffs, and pay all costs and damages which may accrue from the detention thereof. N. W. Trimble, Clerk U. S. Circuit Court Sou. Dist. Ala."

A summons having been issued, the marshal, on the 15th of January, 1880, made a return that he had served the summons and complaint on Bryant and had seized 858 of the logs described.

On the 22d of January, 1880, the defendants moved the court for an order dissolving the order of seizure, and directing the restoration of the property, on the ground that the record showed "that no affidavit or bond was given by the plaintiff, as required by law in detinue suits, to authorize the seizure by the marshal of the property sued for." This motion was founded on the following provisions of the statute of Alabama (Code, 1876):

"§ 2942 (2593). When a suit is brought for the recovery of personal chattels in specie, if the plaintiff, his agent or attorney, make affidavit that the property sued for belongs to the plaintiff, and execute a bond in such sum and with such surety as may be approved by the clerk, with condition that if the plaintiff fail in the suit he will pay the defendant all such costs and damages as he may sustain by the wrongful complaint, it is the duty of the clerk to indorse on the summons that the sheriff is required to take the property mentioned in the complaint into his possession, unless the defendant give bond payable to the plaintiff, with sufficient surety, in double the amount of the value of the property, with condition that if the defendant is cast in the suit, he will,

within thirty days thereafter, deliver the property to the plaintiff and pay all costs and damages which may accrue from the detention thereof.

"§ 2943 (2594). If the defendant neglect for five days to give such bond, the property sued for must be delivered to the plaintiff, on his giving bond, with sufficient surety, in double the value of the property, payable to the defendant, with condition to deliver the property to the defendant within thirty days after judgment, in case he fail in the suit, and to pay damages for the detention of the property and costs of suit. If the plaintiff fail for five days to give such bond, after the expiration of the time allowed the defendant, the property must be returned to the defendant."

Before the motion was decided, the court, on the application of the United States, made an order, *ex parte*, on the 16th of February, 1880, directing the marshal to sell the logs at public auction. The sale was advertised for March 10th, but on March 8th the court stayed the execution of the order of sale till the pending motion to dissolve the order of seizure should be determined. On June 9th, 1880, the court made an order granting the motion to dissolve the order of seizure, and directing the marshal to restore the property seized. The United States excepted to such ruling. On January 10th, 1881, the case was tried by a jury, which found for the plaintiffs 500 logs and assessed their value at $150, and a judgment was entered that the plaintiffs recover of the defendants said 500 logs, or their alternate value, $150. On the same day, the United States moved the court to vacate the order dissolving the seizure of the logs, on the ground that the defendants had no property which was not exempt from execution by the laws of Alabama, other than the logs seized. On the 13th of January, the motion was denied, and the plaintiffs excepted. They then brought this writ of error, to review the judgment and proceedings.

Mr. Solicitor-General for plaintiff in error, submitted on his brief.

No appearance for defendants in error.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

This is not the case of an attachment against the property of a defendant, under § 915 of the Revised Statutes, but is a case where, under § 914, the forms and modes of proceeding are to conform, "as near as may be," to the forms and modes of proceeding existing at the time, in a like cause, in the courts of record of Alabama.

The suit is one for the recovery of personal chattels in specie, under section 2942 of the Code of Alabama. The affidavit for seizure is made by the special agent of the General Land Office, who swears that, "to the best of his knowledge, information, and belief," the property sued for is the property of the United States. The statute authorizes the affidavit to be made by "the plaintiff, his agent or attorney." The making of an affidavit by an agent or attorney necessarily implies that he may not be able to make it on positive knowledge; and where, in such a suit as this, the agent is the special agent of the General Land Office, an affidavit "to the best of his knowledge, information, and belief" is sufficient, till controverted. The United States can act only by agents, and the language of this statute does not require that such an agent as the special agent of the General Land Office should swear in any stronger form that the property belongs to the United States, or should set forth the grounds of his knowledge, information, or belief. The conformity in this case was one "as near as may be" to the mode of proceeding in Alabama.

We are not aware of any case in Alabama holding the contrary. The Alabama statute in regard to attachments at law, Code, § 3252, *et seq.*, provides for issuing attachments against property in specified cases, and § 3255 for an affidavit to be made by "the plaintiff, his agent or attorney" of the amount of the debt or demand, and that it is justly due, and as to other matters. In *Mitchell* v. *Pitts*, 61 Ala. 219, in 1878, an affidavit for an attachment was made, under this statute, by an attorney for the plaintiffs, who swore "that he is informed and believes, and therefore states," that the debt was due, that the debtor and creditors resided out of the State of Alabama, and that,

"according to the best of affiant's knowledge and belief," certain facts existed which the statute required to be shown by the oath of "the plaintiff, his agent or attorney." It was objected by the defendant, that the recital in the affidavit, that the deponent was informed and believed that the defendant was indebted, &c., impaired the efficiency of his averment, thereupon made, of such indebtedness. But the court held otherwise, saying, that it was almost impossible that an attorney residing in the State could, where the parties resided out of it, absolutely know that the debt was still due and unpaid; that other causes for which attachments might issue, and which, under the statute, must be as positively sworn to by affidavit as the indebtedness of defendants, were of a nature which prevented it from being positively known whether they were true or not; and that, if the person who by law might make the oath, must positively know them to be true before he could swear to them, it could hardly ever happen that such causes would be available in any instance. These views properly apply to the case of a special agent of the General Land Office who is making oath to the property of the United States in pine logs.

A like ruling was made by the Supreme Court of Louisiana, in *Bridges* v. *Williams*, 1 Martin, N. S., 98. The statute allowed an agent, in an attachment case, to swear to the debt. He swore to it "to the best of his knowledge." The court held, that, to give effect to the statute, the agent must be allowed to swear in the only manner in which he could safely swear, except in some few particular cases, namely, to the best of his knowledge and belief.

As to the bond, it is provided by § 1001 of the Revised Statutes, that whenever any process issues from a Circuit Court, by the United States, no bond, obligation, or other security shall be required from the United States, either to prosecute the suit, or to answer in damages or costs. The adoption of the State practice "as near as may be" does not have the effect to abrogate the provision of § 1001, so as to require the United States to give a bond for costs and damages, as a condition of obtaining the order of seizure, or to require them to give the

bond provided in § 2943 of the Alabama Code. It has been held that the United States are relieved by § 1001 from giving the undertaking required from a plaintiff by § 782 of the Revised Statutes of the District of Columbia, on issuing an attachment. *United States* v. *Ottman*, 23 Int. Rev. Rec. 294.

The order made by the Circuit Court, June 9th, 1880, dissolving the order for the seizure of the property and directing the marshal to restore the property seized, and its order of January 13th, 1881, denying the motion to vacate the order of June 9th, 1880, are reversed, and

The case is remanded with direction to vacate the order of June 9th, 1880, and to take such further proceedings in the suit as may be according to law and not inconsistent with this opinion.

PACIFIC RAILROAD OF MISSOURI *v.* MISSOURI PACIFIC RAILWAY COMPANY & Others.

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

Argued April 23d, 24th, 1884.—Decided May 5th, 1884.

Equity—Fraud—Laches—Pleading.

In 1876, K brought a suit, in a Circuit Court of the United States in Missouri, to foreclose a mortgage on a railroad, making the railroad corporation (a citizen of Missouri) and others defendants. There was a decree of sale, and a sale, and it was confirmed in October, 1876. In February, 1877, the corporation appealed to this court. The case was affirmed here in April, 1880. In June, 1880, the corporation filed a bill in the same court against another Missouri corporation (a citizen of Missouri) and other citizens of Missouri, alleging fraud in fact in the foreclosure suit, in the conduct of the solicitor and directors of the corporation defendant in that suit, and praying that the decree in the K suit be set aside. On demurrer to the bill, *Held:*

(1.) The record in the K suit, not being made a part of the bill or the record in this suit, could not be referred to:

(2.) The charges of fraud, in the bill, were sufficient to warrant the discovery and relief based on those charges;

(3.) The case set forth in the bill, being one showing that no real defence was

made in the K suit, because of the unfaithful conduct of the solicitor and directors of the defendant in that suit, was one of which a court of equity would take cognizance :

(4.) There was no laches in filing the bill, as the time during which the appeal to this court was pending could not be counted against the plaintiff ;

(5.) As the bill showed hostile control of the corporate affairs of the plaintiff by its directors during the period covered by the K suit, mere knowledge by, or notice to, the plaintiff, or its directors, or officers, or stockholders, of the facts alleged in the bill during that period, was unimportant, a case of acquiescence, assent, or ratification, or of the intervention of the rights of innocent purchasers, not being shown by the bill, and the corporation having acted promptly when freed from the control of such directors ;

(6.) It did not follow that parties who became interested in the plaintiff's corporation, with knowledge of the matters set forth in the bill, were entitled to the same standing as to relief with those who were interested in the corporation when the transactions complained of occurred ;

(7.) The Circuit Court had jurisdiction of the bill, although the plaintiff and some of the defendants were citizens of Missouri.

On the 26th of June, 1880, the Pacific Railroad (of Missouri), a Missouri corporation, filed a bill in equity, in the Circuit Court of the United States for the Eastern District of Missouri, against the Missouri Pacific Railway Company, another Missouri corporation, and various individual defendants, citizens of Missouri, Massachusetts and New York, and a New York corporation. The main object of the bill was to impeach and vacate, for alleged fraud in fact, a decree made by that court, June 6th, 1876, foreclosing a mortgage on railroad property of the plaintiff and ordering its sale. The sale was made September 6th, 1876, it was confirmed by the court October 7th, 1876, and a deed was given October 24th, 1876, by the master, to the purchaser, who was James Baker. The decree was made in a suit brought November 11th, 1875, by one Ketchum, a citizen of New York, against the present plaintiff, and various citizens of Missouri and New York, to foreclose a mortgage given by the present plaintiff, July 10th, 1875, on its railroad and other property, to Henry F. Vail and James D. Fish, trustees, called the "third mortgage," to secure a proposed issue of bonds of $4,000,000. On the 1st of February, 1877, the present plaintiff took an appeal to this court from the decree of June 6th, 1876, and from the order confirming the sale. The case was returnable at October Term, 1877, was heard here in January,

1880, was decided in April, 1880, the decree below being affirmed, and a rehearing was applied for and was denied May 10th, 1880. See *Pacific Railroad* v. *Ketchum*, 101 U. S. 289. This bill was then promptly filed.

Copies of the bill in the Ketchum suit and of the decree and the deed of the master and the order of the court approving the deed, were annexed to and made a part of the bill in this suit. The material allegations of the latter were these: C. K. Garrison, James Seligman and Pierce (three of the defendants in this suit), were made co-plaintiffs in the Ketchum suit, before the decree was entered, and their solicitors were directed to receive their instructions from and be advised by said Baker, who was the solicitor of this plaintiff, and they did follow Baker's instructions. The decree was procured to be made by the court by false and fraudulent representations made by the defendants herein. The decree and the master's deed designedly and fraudulently embraced more and other property of this plaintiff than was embraced in the mortgage being foreclosed, in the following language, which was interpolated without the knowledge of this plaintiff, viz.: "Including among other things, the track on Poplar street, and the levee in the city of St. Louis, commonly known as the 'Poplar street track'" the value of which property is more than $200,000. All of the defendants in this suit (only three of whom, Baker, Vail and Fish, were defendants in the Ketchum suit, and four others, of whom Ketchum, C. K. Garrison, James Seligman and Pierce, were plaintiffs in the Ketchum suit), had knowledge of and were parties to the frauds herein complained of, either at their inception or by "subsequent subrogation." The Atlantic and Pacific Railroad Company (which will be called the Atlantic Company), was the lessee of this plaintiff's railroad, under a lease, a copy of which was annexed to the bill as an exhibit, and which this plaintiff asked leave to refer to with the same effect as if it were set out at length in the bill, and was in possession of the property of this plaintiff. By the terms of said lease the Atlantic Company assumed certain obligations, including the payment of a rental to this plaintiff, being unable to pay which its managers sought to evade its obligation by destroying this

plaintiff. On and before June, 1872, the chief officers and directors of the Atlantic Company, who were Andrew Pierce, Jr., Joseph Seligman, A. V. Stout, and others unknown, procured the ownership or control of a majority of this plaintiff's stock, for the avowed purpose of procuring control of all its assets and road; and, in execution of such purpose, said directors and officers procured the execution of said lease between the two roads, on June 29th, 1872. Upon the execution of the lease, the Atlantic Company became possessed of all the property and franchises of this plaintiff, and at all times since this plaintiff has not been in control of any of its property, except to receive rents under the lease, from June, 1872, to July, 1875. Since the making of the lease the stockholders of this plaintiff have been paid all dues under the lease, to July, 1875. All interest on its bonds was also paid, and this plaintiff was not in default on any mortgage liability which existed when the lease was made. During the lease the Atlantic Company, by false and fraudulent representations that this plaintiff was indebted to it for improvements made on this plaintiff's property, procured the execution by this plaintiff of three issues of bonds, namely, income bonds, for $1,500,000; improvement bonds, for $2,000,000; third mortgage bonds, so called, for $4,000,000. The proceeds of all of said issues of bonds went to the Atlantic Company or the persons by whose false and fraudulent action their issue was procured. At or before November 11th, 1875, when the Ketchum foreclosure suit was begun, the Atlantic Company was indebted to various persons and corporations, whose names were set forth. C. K. Garrison, on his examination in the Ketchum suit, said that he was one of the complainants in that suit, and the owner of over $1,500,000 of the third mortgage bonds, and represented the owners of the rest. By the terms of the lease the Atlantic Company undertook to pay all the debts of this plaintiff, as well as all operating and repairing expenses, and all interest on bonds to be issued after the date of the lease, for extending its lines, buying rolling stock, and rentals. The pretended increase of mortgage debt of $4,000,000, between July 1st, 1871, and July 10th, 1875, was fictitious, fraudulent, without consideration, and con-

trary to the laws of Missouri. The net income of this plaintiff's road from the date of the lease to December 31st, 1874, was $739,172.68. The recitals in the third mortgage bonds that they were issued to procure additional rolling stock for this plaintiff's road, were false. This plaintiff had no legal capacity to execute the third mortgage or to issue $4,000,000 of bonds. The law of Missouri only authorized mortgages of railroad property for certain stated purposes, and no issue of bonds was valid without the vote of the stockholders. The only pretended authority for making the third mortgage (a copy of which was annexed to the bill) was shown by a circular and form of proxy issued to the stockholders by Mr. Hays, President, of which copies were attached to the bill. The circular and proxy did not authorize the mortgage of $4,000,000 or of any amount whatever. The Atlantic Company did not negotiate absolutely any of the $2,000,000 of improvement bonds, but used them to aid its own credit, and several of its directors and officers of this plaintiff were indorsers on obligations of the Atlantic Company secured by said bonds. The third mortgage was procured to be executed fraudulently, to be used as additional security for said indorsements, and $2,500,000 of the third mortgage bonds were used to secure the payment of obligations of the Atlantic Company; and said Garrison and Seligman and the defendant Sage, with full knowledge of these facts, bought at heavy discount the past-due obligations of the Atlantic Company, with the accompanying third mortgage bonds. Some of the directors and former officers of this plaintiff were interested in the bonds or the obligations, and vigorously prosecuted the foreclosure suit, to the destruction of the interests of the stockholders of this plaintiff. The defendants Stout, Fish, D. R. Garrison, Samuels, W. R. Garrison and C. K. Garrison were, during all these transactions, up to the commencement of the foreclosure suit, either directors of the Atlantic Company, or of this plaintiff, or creditors of, or otherwise interested in, the Atlantic Company, and benefited by said frauds, and were fully cognizant of the creation of said fraudulent bonds and of said fraudulent acts, and are not holders in good faith of said third mortgage bonds. The defendant C.

K. Garrison agreed with Andrew Pierce, Jr., Baker and D. R. Garrison, that, if they, controlling, as they did, the defence to the Ketchum suit, would consent to a decree therein in the manner and form in which consent to the entry of said decree was given, he would pay all their liabilities in connection with the Atlantic Company. Pursuant to such agreement, said Garrison did pay said liabilities and took the improvement or third mortgage bonds which were held as collateral, and thereupon said Pierce, Baker and D. R. Garrison caused said decree to be entered, and falsely set forth that this plaintiff consented to the decree and authorized the action of Baker in the premises. Prior and subsequent to November 1st, 1875, Baker, one of the directors of this plaintiff and its general attorney, with Andrew Pierce, another director, and others unknown, confederated with some of the defendants herein, to institute proceedings to foreclose the third mortgage for the entire $4,000,000, in order to obtain the entire property for themselves for greatly less than its real value. In execution of this scheme, they procured the bill of foreclosure in the Ketchum case to be printed prior to November 1st, 1875, and filed in the Circuit Court of the United States for the Eastern District of Missouri, and procured the complainant, Ketchum, to allow his name to be used therein, and the bill was sworn to before the coupons were in default, and, without waiting the six months required by the trust deed, or procuring the request of the requisite number of bondholders, they began suit. Baker admitted service of subpœna in the name of this plaintiff, without authority, and without authority filed the answer of this plaintiff, falsely admitting the due and lawful execution of the mortgage and the liability of this plaintiff to pay the bonds, well knowing the said facts invalidating the bonds. As a part of the fraudulent schemes of the defendants, no replications were ever filed to put the cause at issue; no reference was ever made to a master, so as to truly inform the court of the character and amount of the debt; the cause was hurriedly disposed of, without waiting for the three months allowed by the rules of that court, in equity; no defence was ever undertaken to be interposed at any stage of the proceedings by Baker, who pretended

to act as solicitor for this plaintiff, but who really acted for Andrew Pierce, W. R. Garrison, C. K. Garrison, Russell Sage, James Seligman, and others unknown, in procuring the decree of foreclosure and the sale thereunder; the trustees, who alone had any right to foreclose the mortgage, never filed any cross-bill or prayed any relief; the recital in the decree, that the cause was heard on "proofs," was wholly false and fraudulent, and there never was any judicial hearing whatever; no proofs were ever taken or offered, but the decree was prepared and entered entirely by consent of, and collusively between, the complainants and the counsel and officers of this plaintiff, who were both carrying out the common purpose of procuring the speediest decree of foreclosure, for which the action was originally instituted, and in fraud of the rights and property of this plaintiff, and without any authority from it; it was false that Garrison, Pierce, and Seligman were the owners of the bonds, as recited in the decree, and the complainants and Baker, counsel for them, and the officers of the corporation, consenting to said decree, knew of all the facts invalidating the bonds, and wrongfully concealed all such facts from the court; no decree was entered decreeing what debt was due under the mortgage, or ordering the payment thereof, or giving any time or opportunity for redemption; the third mortgage bonds, neither by their face nor by any provision of the mortgage, were due at the time the decree was made, and no interest thereon was unpaid, except the coupons which matured on the 1st of November, 1875; well knowing that there was cash in the hands of the receivers appointed by the court in the case, and valuable real estate in the city of St. Louis which could be separately sold, which was far more than sufficient to pay the entire amount of interest justly due on the mortgage debt, even if valid, the complainants and the attorney for this plaintiff, jointly, and for the purpose of defrauding this plaintiff, procured the entry of a decree to sell the entire property of this plaintiff to pay the principal and interest of the bonds; and the whole amount of the third mortgage bonds were not then and have not since been issued, and, in any event, were not, to the full sum of $4,000,000, a

lien upon the premises. Baker, in pursuance of said fraudulent understanding, purchased the property at the sale, not for this plaintiff, his clients, and received a pecuniary reward from the defendant the Missouri Pacific Railway, for doing the same. He bought the property upon secret agreements, and in trust for C. K. Garrison and his associates, for $3,000,000, payable in third mortgage bonds, a sum greatly less than its actual cash value. C. K. Garrison was surety for Baker, as purchaser. Baker transferred his interest in the purchase to the defendant the Missouri Pacific Railway Company, which had since held it. It had issued to the holders of the third mortgage bonds of this plaintiff, bonds of itself for an equal amount, the third mortgage bondholders receiving accrued interest in cash, and purchasing an equal amount of the stock of the Missouri Pacific Company. The principal holders of the third mortgage bonds were and had been C. K. Garrison, Sage, James Seligman and others, who confederated to procure the decree. On November 1st, 1876, the Missouri Pacific Company made a mortgage for $4,500,000, to secure a pretended and fraudulent indebtedness, in which mortgage the defendant the Central Trust Company is now mortgagee. The defendants the Missouri Pacific Company, C. K. Garrison, Sage, and James Seligman, owned and controlled, or the same were held for their use, nearly the whole amount of the third mortgage bonds, and all took them with full knowledge of the want of authority to issue them and of their fraudulent character. As part of said fraudulent scheme, the Atlantic Company, in 1872, procured the passage of an act of the legislature, to enable the directors of this plaintiff to retain control of the company against the will of the stockholders. From the passage of said act to December, 1876, the Atlantic Company, through the directors of this plaintiff, who were false to their trust, had, by means of said law, controlled the organization and management of this plaintiff's corporation. The directors of this plaintiff did not properly represent the interests of its stockholders, but used their position to strip it of its property. The stockholders of this plaintiff, in writing, requested said directors to resign, that others might be appointed in their place, who would properly attend to the duties of their

office, and requested them to employ other counsel than Baker to defend the Ketchum suit, but said directors allowed Baker, who had caused the Ketchum complaint to be prepared before any cause of action arose, and had caused the subpœna to be served on himself, to put in the answer of this plaintiff in said suit, when said directors and Baker knew that the averments admitted were many of them false in fact. The defendants C. K. Garrison, W. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuels and Joseph L. Stephens, with others unknown, were then, or had been, directors of the defendant the Missouri Pacific Railway Company, and in the receipt of its income, and had knowledge of all the matters complained of, and were parties to said frauds, and had been, from October, 1876, to the present time, in possession of this plaintiff's property.

Answers on oath to interrogatories in the bill were required from all the defendants except Baker (Stout not being made a defendant in the prayer for process).

The prayer of the bill was, that the improvement bonds, and the third mortgage bonds, and the two mortgages securing them, and the mortgage to the Central Trust Company be declared void; that the decree of foreclosure in the Ketchum suit be set aside; and that proper accounts be taken, and this plaintiff be allowed to redeem, and its property be restored to it.

The decree in the Ketchum suit stated that this plaintiff, as defendant, appeared by James Baker, as its solicitor, and that he appeared as defendant, in his own proper person, and as solicitor for five other defendants, who were not defendants in the present suit. It also stated that the "court, being fully advised in the premises, and by the consent of the parties to this suit, through their solicitors of record, thereupon and in consideration thereof" decreed, but the terms of the consent are not otherwise set forth in the decree.

There were two demurrers to the bill—one by the Missouri Pacific Railway Company, O. Garrison, D. R. Garrison, Samuels and Baker; the other by Ketchum, C. K. Garrison,

Pierce and Stephens. The two demurrers were substantially identical, except that, in the first one, O. Garrison, D. R. Garrison, and Samuels alleged that they were not proper or necessary parties, and in the second one it was alleged that the Circuit Court had no jurisdiction over the suit. In other respects, each demurrer was as follows:

"The defendants, ... by protestation, not confessing all or any of the matters or things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show, that the said complainant has not, by its said bill, made such a case as entitles it, in a court of equity, to any discovery from these defendants respectively, or any of them, or any relief against them, as to the matters contained in said bill, or any such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. And for further and more specific grounds of demurrer these defendants aver as follows, to wit: (1.) If, or in so far as, the said bill of complaint is to be treated and regarded as a bill of review for errors apparent in the record, then it clearly appears that the time limited by law for the bringing of such a bill of review had elapsed long prior to the bringing of the present suit; and also that said decree has been affirmed, on appeal, by the Supreme Court of the United States. If, or in so far as, the said bill of complaint is to be regarded and treated as a bill of review instituted upon the discovery of new matter, or based upon errors not apparent of record, then it appears that no leave of this court has been obtained for the filing of such a bill of review. It does not appear in the bill of complaint, or otherwise, that the matters of complaint therein set forth were not known to the complainant at the time of the pendency of the foreclosure, or that they could not have been therein set forth or determined; and the bill of complaint discloses such negligence and laches in the institution of the suit as destroys complainant's right to the relief prayed for. (2.) The bill of complaint contains

no description of the property mortgaged or covered by the decree, and in reference to which relief is sought to be had. (3). The bill of complaint fails to set forth the bill of complaint or the decree in the proceeding sought to be assailed, or the tenor or purport thereof, all of which things should appear in the body of the bill of complaint, in order to entitle the complainant to any relief or discovery. (4.) The averments of the bill of complaint show that the complainant, even if its bill is to be treated as an original one and not a bill of review, should be precluded by its own laches and neglect from now instituting the present proceeding; for, it is nowhere averred that the complainant or its stockholders were at any time ignorant of the various alleged frauds complained of; and, on the other hand, it does appear that the complainant and its stockholders were all along aware of all the facts now sought to be assigned as grounds for relief and discovery in the bill, and that the complainant could have instituted its suit under the authority of the officers now representing it, as early as March, 1877, and that the stockholders of complainant had the means and remedies to have averted the alleged wrongs, as well as the rendering of the decree and the foreclosure of the property now complained of, in so far as they may have had any just defences thereto. (5.) It affirmatively appears, by said bill of complaint, in conjunction with the exhibits sought to be made a part thereof, that the said stockholders of the complainant, having full knowledge of all the matters now sought to be set up as grounds of relief and discovery in this case, were allowed full opportunity to interpose any and all objections they might have to the rendering of said decree, and not only failed to do so, but actually assented to said decree in manner and form as it was rendered, and that the said stockholders actually assented to and ratified the sale of the property which was made under and by virtue of the foreclosure proceedings. (6.) The bill of complaint fails to aver that its stockholders were at the time ignorant of the various facts alleged as occurring and existing prior to the foreclosure suit, or during the pendency of said suit, or that they were in any way precluded from making any defences that they might have to said decree or foreclosure, all which averments, under the facts and circumstances of this case, should be made to appear by the bill of complaint, in order to entitle it to any relief or discovery. (7.) The said bill of complaint is altogether vague, uncertain,

and inconsistent in its various averments, and abounds in prolix, redundant, and impertinent matters, and it is not such a bill as, under the course of proceedings in chancery and of this court, these defendants ought to be called upon to make plea or answer to. (8.) There is a defect of material and necessary parties defendant in said suit; for it appears, from said bill of complaint, that, in order to the obtaining of the relief sought for, J. B. Colgate & Co., D. L. Caldwell, the National Bank of Commerce of New York, the National Shoe and Leather Bank, Andrew Pierce, as well as other corporations and individuals, and especially the officers of the Atlantic and Pacific Railroad Company at the time of the perpetration of the alleged frauds, and the former officers of the Pacific Railroad, are necessary and proper parties to the suit, in order to the obtaining of the relief sought to be had in the bill of complaint. (9.) The thirty-fourth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, and forty-second clauses of the bill of complaint contain matters and allegations that are entirely immaterial and irrelevant, and all of which have been adjudicated against the complainant, on appeal, by the Supreme Court of the United States."

The demurrers were brought to a hearing, and were, by consent, ordered to stand as demurrers for the Central Trust Company, and were sustained. 2 McCrary, 229. The plaintiff elected to abide by the bill, and it was dismissed, and the plaintiff has appealed.

Mr. N. H. Cowdrey and *Mr. D. H. Chamberlain* for appellant.

Mr. Melville C. Day and *Mr. Wager Swayne* for appellees.

Mr. Justice Blatchford delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The Circuit Court, in its opinion, regarded the bill as an original bill to impeach the prior decree for fraud, and not as a bill of review upon newly discovered facts and evidence. It held the bill to be insufficient, for want of an affirmative allegation that the plaintiff was ignorant, during the pendency of the original suit, of the facts set up in the bill, much less that it was unable, after due diligence, to ascertain and plead

them. The court added: "But the demurrer goes further, and raises the question whether the bill and exhibits do not show affirmatively, that the present complainant, through its stockholders, had notice of the foreclosure suit, knowledge of the defence now insisted upon against the third mortgage bonds, and ample opportunity to make that defence. It is, we think, very clear, that, in considering the question of notice, no distinction can be made between the corporation and its officers and stockholders. We cannot separate them and say the officers and stockholders knew of the fraud, but the corporation did not. If, therefore, the stockholders were advised of the foreclosure suit, and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on therein, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches. That the stockholders, as a body, were advised of the foreclosure suit, and took action looking to its defence, and that they did not rely upon the officers of the corporation, but distrusted and antagonized them, is clear from the allegations of the forty-fifth count of the bill, by which it is charged that the stockholders, in writing, requested the directors to resign, that others might be appointed in their place, who would properly attend to the duties of their office; also, that the stockholders requested said directors to employ counsel other than James Baker to defend the suit of Ketchum."

The court, in its opinion, then makes reference to various matters which, it states, appear in the record of the Ketchum case—that, at a meeting of stockholders held in March, 1876, at St. Louis, several months before the decree of foreclosure was made, a resolution was adopted requesting the directors to employ counsel to aid in the defence of the foreclosure suit; that the stockholders, or their managing committee, afterwards assented to the decree; and that the stockholders knew the facts now set up by way of defence.

The record in the Ketchum suit is not before us, on this appeal. The only allegation in the bill in regard to it is this: "Your orator prays liberty to refer to the files and records of said United States Circuit Court, in the case of *George E.*

Ketchum v. *Pacific Railroad et al.*, to show the collusive, irregular and fraudulent character of the legal proceedings instituted, with advice of said Baker, the counsel of your orator, to sell all its property for the enforcement of a security which your orator avers to be fraudulent and void, and for which your orator had received no valuable consideration." There is not, in the record on this appeal, any stipulation that the Ketchum record be considered as a part of the bill, nor is it identified in any way. It is no part of the transcript certified from the Circuit Court. The clerk of that court certifies that what is before us is "a true transcript of the record in case No. 1,677, of Pacific Railroad (of Missouri), plaintiff, against Missouri Pacific Railway *et al.*, defendants, as fully as the same remain on file and of record in said case in my office." It follows, that the record in the Ketchum case was never made part of the record in this case, so far as appears from the only record which is before this court, on this appeal. In regard to the bill in the Ketchum suit, and the decree, and the master's deed, and the order approving the deed, they are made a part of the bill in this suit, and identified by the annexing of copies. But the statement in the bill that the plaintiff prays liberty to refer to the files and records of the Circuit Court in the Ketchum suit, to show such and such things, can be of no force or effect to allow either party to claim, in this court, the right to produce or refer to anything, as answering the description of such files and records, which it may assert to be such, or as being what the Circuit Court considered as before it. One of the assignments of error, on this appeal, is that the Circuit Court considered matters outside of the record, and matters not embraced in the bill. We are of opinion that this court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and records of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill.

The decision of the Circuit Court was placed upon the ground that the stockholders, being dissatisfied with the action of the

directors and the attorney of the company in defending the foreclosure suit, were put on inquiry, and bound to do whatever it was in their power to do to protect their interests; that any individual stockholder was at liberty to apply to the court for leave to intervene and defend; that the stockholders were parties in interest, and, upon representing that fact to the court, and showing that the officers were not defending in good faith, they would, without doubt, have been allowed to defend; and that stockholders of a corporation, though not bound to intervene in a suit against the corporation, for the protection of their rights, cannot, after having notice that the officers are not faithfully defending a suit, neglect to intervene, or to take any steps in the way of endeavoring to do so, and permit a final decree to be entered, and a sale to take place, and then, after years have elapsed, be permitted to attack the validity of the proceedings.

The case, therefore, was made to turn on the question of laches. The decree was made June 6th, 1876, the sale September 6th, 1876, the report of sale September 15th, 1876, the confirmation of the sale October 7th, 1876, and the master's deed October 24th, 1876. The present plaintiff took an appeal to this court from the decree, and from the order confirming the sale, February 1st, 1877. It prosecuted that appeal in due form, and the case was heard here as soon as the court could hear it, as the bill states. It appears from the report of the case in 101 U. S. 289, that the present plaintiff contended here, that it had not consented to the decree, and sought to examine the question of the alleged fraud or unauthorized conduct of its solicitor and its officers, and also sought to defeat the jurisdiction of the Circuit Court, and to attack the propriety of the purchase by the solicitor. The conclusion of this court was, that it could not discover any error that could be corrected by appeal. But, in its opinion, it said: "The remedy for the fraud or unauthorized conduct of a solicitor, or of the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained." Thereupon, this bill was immediately filed.

The demurrers in this case are to the whole bill. If any part of the bill is good the demurrers fail. The charges of fraud in the bill, which are admitted by the demurrers for present purposes, are sufficient to warrant the discovery and relief based on such charges, leaving for consideration only the questions of laches and of jurisdiction.

On the admitted allegations of the bill, there was no real defence made in the Ketchum suit, and the present plaintiff was prevented from making that defence, by the unfaithful conduct of its solicitor and its directors, and the directors of the Atlantic Company. A case of that kind is one of which a court of equity will take cognizance. *United States* v. *Throckmorton*, 98 U. S. 61.

As to the question of laches, the pendency of the appeal taken in the Ketchum suit suspended the control of the Circuit Court, and of every other court, except this court, over that decree, in respect to the relief sought in this suit, of setting that decree aside and declaring it fraudulent and void, all the other relief asked being consequent on that. The appeal appearing to have been taken and prosecuted in good faith, in view of what appears in the bill herein, and in the report of the case in this court, we cannot hold, on this demurrer, that the time during which that appeal was pending can be counted against the plaintiff on the question of laches. *Ensminger* v. *Powers*, 108 U. S. 292.

As to the frauds alleged in the bill respecting the matters in the conduct of the suit, resulting in the decree, the right to relief is based on the view, that the corporation itself, the present plaintiff, speaking and acting now for its stockholders as a body, was powerless then, because it was misrepresented by unfaithful directors, who did what was done and refused to do otherwise, and through whom alone it could then speak and act. The allegations in the bill, of facts showing the existence of hostile control of the corporate affairs of the plaintiff by its directors, from before the bringing of the Ketchum suit till after the foreclosure sale, are entirely adequate as against a demurrer. Under such circumstances, mere knowledge by, or notice to, the plaintiff, or its directors or officers, or more or

less of its stockholders, is unimportant; and the plaintiff cannot be concluded by the failure of any number of its stockholders to do what unfaithful directors ought to have done, unless a case is shown of such acquiescence, assent or ratification as would make it inequitable to permit what has been done to be set aside, or unless the rights of innocent purchasers have subsequently intervened, to an extent creating an equitable bar to the granting of relief. The bill in this case does not show such a state of things. While stockholders, more or less in number, may be allowed to interpose, if they have the means or the inclination to take upon themselves the burden of such gigantic controversies as are involved in the railroad transactions of the present day, it would go far to legalize condonation of such transactions as are set forth in this bill, if mere knowledge by helpless stockholders of the fraudulent acts of their directors were to prevent the corporation itself from seeking redress, if it acts promptly when freed from the control of such directors. Fruitlessly requesting unfaithful directors to resign and to employ other counsel, so far from throwing on the stockholders the peril of losing their rights, represented by the company, if they do not personally assert them in place of the directors, operates of itself, without more, only to aggravate the wrong. At the same time, it by no means follows that parties who have become interested in the plaintiff's corporation with knowledge of the matters set forth in the bill, are entitled to the same standing, as to relief, with those who were interested in the corporation when the transactions complained of occurred.

As to the matters alleged which are extrinsic or collateral to the issues in the Ketchum suit, to what extent, greater or less, there is jurisdiction to examine them under this bill, is a question not to be decided on these demurrers to the whole bill. The bill is sufficient in regard to the other frauds alleged. But, in regard to one of those extrinsic matters, the bill states that specific property not covered by the mortgage was put into the decree without the knowledge of this plaintiff.

Upon the question of jurisdiction, there can be no doubt that the Circuit Court, as the court which made the Ketchum decree,

and had jurisdiction of the Ketchum suit, as this court, in *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, held it had, has jurisdiction to entertain the present suit to set aside that decree on the grounds alleged in the bill, if they shall be established as facts, and if there shall be no valid defence to the suit, although the plaintiff and some of the defendants are citizens of Missouri. The bill falls within recognized cases which have been adjudged by this court, and have been recently reviewed and reaffirmed in *Krippendorf* v. *Hyde*, 110 U. S. 276. On the question of jurisdiction the suit may be regarded as ancillary to the Ketchum suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in *Pacific Railroad* v. *Missouri Pacific Railway Co.*, 1 McCrary, 647. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633.

We do not see any force in the second and third grounds of demurrer, nor, at present, in the eighth. The seventh ground of demurrer alleges what is, if true, matter for exception, and so does the ninth, in part. As to the rest of the ninth, it is matter for an answer. All the demurring parties seem to be proper parties.

If, as has been strenuously argued for the defendants, there are complete defences, on the merits, to the bill, answers should have been put in and proofs taken. We can act only on what the bill brings before us, and all it alleges is admitted, for present purposes. The future proceedings in the case may show that the allegations of the bill are untrue, or may disclose perfect defences to the suit. But, as the suit now stands, the plaintiff is entitled to have the matters it alleges inquired into and adjudicated.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with direction to overrule the demurrers, with costs, and to take such further proceedings in the suit as shall be proper and not inconsistent with the opinion of this court.

BARRETT *v.* FAILING & Wife.

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

Argued April 16th, 17th, 1884.—Decided May 5th, 1884.

Conflict of Law—Dower—Divorce.

A divorce from the bond of matrimony bars the wife's right of dower, unless preserved by the *lex rei sitæ*.

Under § 495 of the Oregon Code of Civil Procedure, as amended by the statute of December 20th, 1865, providing that whenever a marriage shall be declared void or dissolved the party at whose prayer the decree shall be made shall be entitled to an undivided third part in fee of the real property owned by the other party at the time of the decree, in addition to a decree for maintenance under § 497, and that it shall be the duty of the court to enter a decree accordingly, a wife obtaining a decree of divorce in a court of another State, having jurisdiction of the cause and of the parties, acquires no title in the husband's land in Oregon.

This is a bill in equity, filed in the Circuit Court of the United States for the District of Oregon, by Mary E. Barrett, a citizen and resident of the State of California, against Charles D. Failing and Xarifa J. Failing, his wife, citizens and residents of the State of Oregon.

The bill alleged that on September 25th, 1866, the plaintiff was, and for more than two years theretofore had been, the wife of Charles Barrett, and was a citizen and resident of the State of California; that on that day she commenced a suit for divorce against him, for his misconduct, in a District Court of the State of California for the Fifteenth Judicial District, that court having jurisdiction thereof, and being authorized to grant divorces according to and by virtue of the laws of that State; that he was duly served with process and appeared and made defence; and that on April 18th, 1870, the plaintiff being still a citizen of that State, that court rendered a decree in her favor, dissolving the bond of matrimony between him and her.

The bill further alleged that at the time of the commencement of that suit Charles Barrett was not the owner of any real estate in the State of California, but was the owner in fee

simple of certain land (particularly described), in Portland, in the State of Oregon; that on February 4th, 1868, he fraudulently conveyed this land to his daughter, the female defendant, without consideration, and with intent to defraud the plaintiff of her just rights in it, and for the purpose of preventing her from asserting her claim thereto or interest therein; that at the time of the commencement of the suit for divorce the plaintiff did not know that he was the owner of this land; that he died in Oregon in July, 1870; and that by the laws of the State of Oregon, and under and by virtue of the decree of divorce, the plaintiff became and was entitled to one-third of this land.

The bill prayed for a decree that the plaintiff was the owner in fee simple of one-third of this land and that the defendants held it in trust for her, and for a conveyance, a partition, an account of rents and profits, and further relief.

The defendants filed a general demurrer to the bill, which was sustained by the Circuit Court, and the bill dismissed. See 6 Sawyer, 473. The plaintiff appealed to this court.

Mr. W. W. Chapman, *Mr. W. S. Beebee*, and *Mr. Sidney Dell* submitted for appellant on their brief.

Mr. J. N. Dolph for appellees.

Mr. Justice Gray delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

It is not doubted that the decree of divorce from the bond of matrimony, obtained by the plaintiff in California, in a court having jurisdiction to grant it, and after the husband had appeared and made defence, bound both parties and determined their status. The question considered by the court below and argued in this court is whether, by virtue of that decree, and under the law of Oregon, the wife is entitled to one third of the husband's land in Oregon.

Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties, dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to any right which either has

acquired by the marriage in the other's property, except so far as the court granting the divorce, in the exercise of an authority vested in it by the legislature, orders property to be transferred or alimony to be paid by one party to the other. In estimating and awarding the amount of alimony or property to be so paid or transferred, the court of divorce takes into consideration all the circumstances of the case, including the property and means of support of either party; and the order operates *in personam*, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated.

Accordingly, it has been generally held that a valid divorce from the bond of matrimony, for the fault of either party, cuts off the wife's right of dower, and the husband's tenancy by the curtesy, unless expressly or impliedly preserved by statute. *Barber* v. *Root*, 10 Mass. 260; *Hood* v. *Hood*, 110 Mass. 463; *Rice* v. *Lumley*, 10 Ohio St. 596; *Lamkin* v. *Knapp*, 20 Ohio St. 454; *Gould* v. *Crow*, 57 Missouri, 200; 4 Kent Com. 54; 2 Bishop Marriage & Divorce (6th ed.), §§ 706, 712, and cases cited. In each of the Massachusetts cases just referred to, the divorce was obtained in another State. The ground of the decision of the Court of Appeals of New York in *Wait* v. *Wait*, 4 N. Y. 95, by which a wife was held not to be deprived of her right of dower in her husband's real estate by a divorce from the bond of matrimony for his fault, was, that the legislature of New York, by expressly enacting that "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed," had manifested an intention that she should retain her right of dower in case of a divorce for the misconduct of the husband. See also *Reynolds* v. *Reynolds*, 24 Wend. 193. The decisions of the Supreme Court of Pennsylvania in *Colvin* v. *Reed*, 55 Penn. St. 375, and in *Reel* v. *Elder*, 62 Penn. St. 308, holding that a wife was not barred of her dower in land in Pennsylvania by a divorce obtained by her husband in another State, proceeded upon the ground that, in the view of that court, the court which granted the divorce

had no jurisdiction over the wife. And see *Cheely* v. *Clayton*, 110 U. S. 701.

Whether a statute of one State, securing or denying the right of dower in case of divorce, extends to a divorce in a court of another State, having jurisdiction of the cause and of the parties, depends very much upon the terms of the statute, and upon its interpretation by the courts of the State by the legislature of which it is passed, and in which the land is situated. In *Mansfield* v. *McIntyre*, 10 Ohio, 27, it was held that a statute of Ohio, which provided that in case of divorce for the fault of the wife she should be barred of her dower, was inapplicable to a divorce obtained by the husband in another State; and the wife was allowed to recover dower, upon grounds hardly to be reconciled with the later cases in Ohio and elsewhere, as shown by the authorities before referred to. In *Harding* v. *Alden*, 9 Greenl. 140, a wife who had obtained a divorce in another State recovered dower in Maine under a statute which, upon divorce for adultery of the husband, directed "her dower to be assigned to her in the lands of her husband in the same manner as if such husband was actually dead;" but the point was not argued, and in the case stated by the parties it was conceded that the demandant was entitled to judgment if she had been legally divorced. The statute of Missouri, which was said in *Gould* v. *Crow*, 57 Missouri, 205, to extend to divorces obtained in another State, was expressed in very general terms: "If any woman be divorced from her husband for the fault or misconduct of such husband, she shall not thereby lose her dower; but if the husband be divorced from the wife, for her fault or misconduct, she shall not be endowed."

The Oregon Code of Civil Procedure of 1862 contained the following section:

"SECT. 495. Whenever a marriage shall be declared void or dissolved, the real property of the husband or wife shall be discharged from any claim of the other to any estate therein, or right to the possession or profits thereof, except as in this section specially provided. If the marriage is declared dissolved on account of the adultery, or conviction of a felony, of either party,

the adverse party shall be entitled as tenant in dower or by the curtesy, as the case may be, in the real property of the other, the same as if the party convicted of felony or committing the adultery were dead."

But by the statute of Oregon of December 20th, 1865, § 11, that section was repealed, and the following enacted in place thereof:

"SECT. 495. Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the one undivided one-third part in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in section 497 of this act; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

By section 497, thus referred to, the court, upon declaring a marriage void or dissolved, has power to further decree "for the recovery of the party in fault such an amount of money, in gross or in instalments, as may be just and proper for such party to contribute to the maintenance of the other;" and "for the delivery to the wife, when she is not the party in fault, of her personal property in the possession or control of the husband at the time of giving the decree;" as well as for the future care and custody, nurture and education of the minor children of the marriage, and for the appointment of trustees to collect, receive, expend, manage or invest any sum of money decreed for the maintenance of the wife, or for the nurture and education of minor children committed to her care and custody.

The changes in the provisions of section 495 are significant. The section in its amended form substitutes, for the former provision that the innocent party, in the case of a divorce for adultery, or for conviction of felony, should be entitled as tenant in dower or by the curtesy in the real property of the guilty party as if the latter were dead, a provision that the party at whose prayer the decree is made shall in all cases be entitled

to an estate in fee in one-third of the real property owned by the other party at the time of the decree; it declares that this shall be "in addition to the further decree for maintenance provided for in section 497;" and it further provides that "it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

Considering that this enactment is contained in a code of civil procedure, and not in a statute regulating and defining titles in real estate; that the right conferred is a new title in fee, acquired only by virtue of this statute, and distinct from a tenancy in dower or curtesy, as at common law or under the former statute, which was only for life; that it is declared to be in addition to maintenance or alimony to be awarded by the court granting the divorce; and that it is made the duty of that court to enter a decree in accordance with this provision; we are clearly of opinion that the statute is limited, in intention and effect, to divorces granted by the courts of Oregon, which are the only courts within the control of the legislature which passed the statute.

To extend the provisions of this statute to the case of a divorce obtained in another State would be inconsistent with a series of decisions of the Supreme Court of Oregon, by which it has been held that, even where the wife obtains a decree of divorce in that State, the title in fee in one-third of the husband's real property, which the statute declares she shall have and that the court shall decree to her, cannot vest in her without a provision to that effect in the decree of divorce, with this single exception, that if the husband has made a fraudulent conveyance of his real estate with intent to defeat the right of his wife therein, and she does not know of his title, or of the fraud, until after the decree of divorce, she may assert her right by a bill in equity, which, although required by other provisions of the Code to be in the form of an original suit, brought in the county where the land lies, is in the nature of a bill of review for newly discovered evidence. *Bamford* v. *Bamford*, 4 Oregon, 30; *Wetmore* v. *Wetmore*, 5 Oregon, 469; *Hall* v. *Hall*, 9 Oregon, 452; *Weiss* v. *Bethel*, 8 Oregon, 522; Oregon Code of Civil Procedure, §§ 376, 377, 383.

Syllabus.

The other cases cited in behalf of the appellant are quite unlike the case at bar.

In *Barrett* v. *Barrett*, 5 Oregon, 411, the suit was not to assert a title in real estate, but to enforce, out of the land fraudulently conveyed by the husband to his daughter, payment of the alimony awarded to this appellant by the California decree of divorce, which was held, in accordance with the decisions of other courts, to be so far in the nature of a debt, that the wife might sue the husband for it in another State, and might contest the validity of a conveyance of property made by him with the fraudulent intent of preventing her from recovering the alimony. *Barber* v. *Barber*, 21 How. 582; *Livermore* v. *Boutelle*, 11 Gray, 217; *Bouslough* v. *Bouslough*, 68 Penn. St. 495.

In *De Godey* v. *De Godey*, 39 California, 157, and in *Whetstone* v. *Coffey*, 48 Texas, 269, the point decided was that land acquired by the husband or the wife during the marriage, the title in which by the local law vested in neither separately, but in both in common, continued to belong to both after the divorce, and that a division thereof between them, if not made by the decree of divorce, might be obtained by a subsequent suit for partition in the State in which the divorce was granted and the land was situated.

Judgment affirmed.

THOMPSON & Another, Administrator, *v.* FIRST NATIONAL BANK OF TOLEDO.

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

Submitted April 22d, 1884.—Decided May 5th, 1884.

Partnership—Trial—Exceptions.

A person sued as a partner, and whose name is shown to have been signed by another person to the articles of partnership, may prove that before the articles were signed, or the partnership began business, he instructed that person that he would not be a partner.

Statement of Facts.

An exception cannot be sustained to the exclusion of evidence which is not shown by the bill of exceptions to have been material.

A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out.

This action was brought by the First National Bank of Toledo, Ohio, a national banking association established at Toledo, against William H. Standley, William H. Whiteside, Josephus Atkinson, Edward R. Thompson and Joseph Uhl, as partners in the business of private bankers at Logansport, Indiana, under the name of the People's Bank, upon a draft for $5,000, drawn and accepted by the partnership on August 25th, 1877, payable in ninety days after date to the order of the plaintiff's cashier, and taken by the plaintiff in renewal of a like draft discounted by it for the partnership on May 5th, 1877.

Thompson filed a separate answer, denying that he was a member of the partnership, or liable to the plaintiff on the draft sued on. He died pending the suit, and it was revived against his administrators.

Upon a trial by jury, the plaintiff introduced evidence tending to show that about April 10th, 1871, a partnership known as the People's Bank was formed at Logansport, for the purpose of carrying on a private banking business there for one year, and the articles of partnership were reduced to writing and signed by Standley, Whiteside, Atkinson, Uhl and others in their own names, and in Thompson's name by Whiteside, who was his son-in-law and cashier of the partnership; that none of the partners other than Thompson and Whiteside were acquainted with the business of banking; that late in the previous winter, or early in the spring, Thompson, who resided at Delaware, Ohio, was at Logansport, engaged in promoting the scheme of forming the partnership, and urged Uhl to take stock in it to the amount of $2,000, and, for the purpose of inducing Uhl to do so, agreed himself to take an equal amount of stock, and represented that he had had experience in such a banking partnership, and that it was a money-making institu-

tion, that he was worth about $75,000, and would make Uhl safe if he would join them in forming the partnership, and that he wished to establish it, and Whiteside was to be its cashier; that Uhl, who was a man of means, then agreed to take the same amount of stock as Thompson; that thereupon Thompson, in the presence of Uhl, Standley and others, authorized Whiteside to sign his name to the partnership, and to act for him in the organization of the bank; that the partnership entered upon the business of banking at Logansport with Whiteside as its cashier; and that about April 1st, 1872, some of the partners sold out their interests to other members of the firm, and new articles of partnership were executed, to which Thompson's name was subscribed by Whiteside; but that Thompson was not present, on either occasion, when his name was subscribed to the articles.

The testimony introduced by the plaintiff also tended to show that before the bank commenced business Whiteside caused to be printed blank checks, certificates of deposit, and advertising circulars, bearing the names of the partners, and of Thompson as one of them, which were used in the business of the bank; that from that time until 1876 advertisements were published by Whiteside's direction in a newspaper of Logansport, stating that the partnership was engaged in the business of banking, the names of the partners, and of Thompson as one of them, and that all the persons so named were individually liable for the debts of the partnership; that the fact that Thompson was so advertised as a partner was brought to his knowledge, and he admitted the truth of the published statement; that he at different times during this period, in conversation with the partners and with third persons, admitted that he was a partner, and that he had received dividends upon his shares in the partnership; and on two or three occasions, when in the banking house, was introduced as a director and stockholder in the partnership, and did not deny the fact; that the partnership carried on the banking business at Logansport under the same name from its original formation until August 25th, 1877, when it failed in business, and its assets passed into the hands of a receiver, and that all its members except Uhl

and Thompson were insolvent; and that the plaintiff began to do business with the partnership in October, 1873, and continued to do so until its failure.

The bill of exceptions, after stating the evidence introduced by the plaintiff, added:

"But no testimony was given, showing that the plaintiff or any of its officers had knowledge, during said period, as to the persons who constituted said partnership, or of said advertisements published in the papers of Logansport as aforesaid, or of the fact that the name of Thompson appeared upon said checks and certificates of deposit, or in said circulars as aforesaid, as one of said partners; or that the plaintiff or any of its officers, servants or agents had knowledge of said conversations with Thompson concerning his said alleged connection with said firm, or of any of said alleged statements by him relative to said matters; or that said Thompson had ever held himself out to the plaintiff as a member of said firm."

The defendants introduced evidence tending to contradict the evidence introduced by the plaintiff, and to show that, although Thompson, before the partnership was formed, had a conversation with those who afterwards became partners, on the subject of forming a partnership for banking, he never authorized Whiteside to sign his name to the partnership articles, or to act for him in the organization of the bank, and never agreed to take stock in, or paid any money into the partnership, or participated in its proceedings, or received any dividends, or knew that his name was used in the checks, certificates of deposit, circulars or advertisements of the partnership; that his name nowhere appeared on the books of the partnership, except on the stock book; that, after the checks and certificates of deposit first printed had been used up, new ones were printed on which his name did not appear, and others on which none of the names of the partners appeared; that just before the partnership commenced business Thompson received a letter from Whiteside, enclosing a form of assignment from him to Whiteside of the stock in the partnership for which Whiteside had subscribed in Thompson's name, and that Thompson, after adding the words, "which

you took for me," signed the assignment, and enclosed it in a letter to Whiteside, which Whiteside received, and shortly afterwards posted in the stock book at the place where Thompson's name appeared; and that Whiteside, when he signed Thompson's name to the articles, expected that Thompson would take the stock so subscribed for, and, upon his failure to do so, procured the assignment aforesaid, and himself paid in the capital which he had agreed that Thompson should pay in, and himself received the dividends which would have gone to Thompson.

The defendant offered to prove, by the testimony of Whiteside and his wife, that Thompson, after the time when the evidence for the plaintiff tended to show that he authorized Whiteside to sign his name and to take stock for him as a partner, and before any partnership articles were signed, or the partnership commenced business, instructed Whiteside that he would not become a partner therein. The defendants also introduced evidence that Thompson's letter, enclosing the assignment aforesaid, had been lost after being received by Whiteside, and offered to prove its contents. But the court declined to permit the defendants to prove either of these matters, and excluded the testimony so offered, and the defendants excepted to each of the rulings.

After the testimony had been closed, the defendants requested the court to instruct the jury that "if they found from the testimony that Thompson was not in fact a member of said partnership, the plaintiff could not recover, unless it further appeared from the testimony that Thompson had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transactions with said partnership."

The court refused to instruct the jury as requested; and instructed them that the first question for them to determine was whether Thompson was a partner in the firm on August 25th, 1877, and if they found he was, they need not go further, but might, upon that finding, return a verdict for the plaintiff; and that, if they found he was not a partner, it was for them to determine whether he had held himself out, and permitted

the officers of the bank to hold him out to the world as a partner in the business; and upon this branch of the case instructed them, among other things, as follows:

"The defendants' counsel insist that no recovery can be had on this ground, unless the plaintiff shows by the evidence upon the trial of the cause that he gave credit to the bank, looking to the defendant as a part of it; in other words, that the credit was extended in part to the defendant Thompson. We entertain a different opinion. It is not necessary for the plaintiff to show here that at the time it discounted the acceptance sued on it especially relied upon the defendant Thompson for its payment. If Thompson had held himself out to the world in this public manner, through these advertisements and the other means brought to your attention, as an interested party, as liable for the obligations of the bank, the plaintiff is entitled to the benefit of that fact, without showing that it knew that Thompson was a partner in the bank, or without showing that it specially gave credit to this particular defendant. This publication is of such a character as to entitle the plaintiff to rely upon it, without such proof as the defendants' counsel insist ought to be made here; that is, that the plaintiff knew of these advertisements, etc., and relied upon Thompson for the payment of this debt."

"If he was not at any time a partner, but still permitted the officers of said bank to hold him out by advertisements and otherwise, as shown in the evidence, and permitted himself to be introduced as a director and stockholder, as is shown by the evidence, if he permitted that to be done, then, as between him and third parties such as the plaintiff, he is estopped from denying his liability as a partner."

The jury returned a general verdict for the plaintiff, upon which judgment was rendered. The defendants, having duly excepted to the refusal to instruct as requested, and to each of the instructions above quoted, sued out this writ of error.

The errors assigned were, 1st, the exclusion of the evidence of Whiteside and wife; 2d, the exclusion of the evidence of the contents of Thompson's letter to Whiteside; 3d, the refusal

to instruct the jury as requested; 4th, the instructions given and excepted to.

Mr. C. H. Scribner for plaintiff in error.

Mr. Edward Bissell and *Mr. Wesley S. Thuestin* for defendant in error, claimed that if Thompson so conducted himself as to justify the belief in the community that he was a partner, his estate was responsible for the partnership debts, and cited Colyer on Partnership, § 86; Story on Partnership, §§ 64, 65; *Poillon* v. *Secor*, 21 N. Y. 456; *Kelly* v. *Scott*, 49 N. Y. 595; 1 Green Ev., § 207; *Young* v. *Axtell*, cited in *Waugh* v. *Carver*, 2 H. Bl. 235; *Guidon* v. *Robinson*, 2 Campbell, 304.

Mr. Justice Gray delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The plaintiff at the trial sought to charge Thompson with liability as a partner upon two grounds: First, that he was actually a partner. Second, that if not actually a partner he had held himself out to the world as such. And the case was submitted to the jury upon both grounds.

The first and second assignments of error relate to the exclusion of evidence offered by the defendants bearing upon the first ground of action. The third and fourth assignments of error relate to the instructions given and refused as to the second ground of action.

The oral testimony offered by the defendants to prove that Thompson, before the partnership articles were signed, and before the partnership began business, instructed Whiteside that he would not become a partner therein, directly tended to contradict the testimony introduced and relied on by the plaintiff to prove that Thompson was actually a partner, and was erroneously excluded. The first assignment of error is therefore sustained.

From the connection in which the offer of evidence of the contents of the letter from Thompson to Whiteside appears in the bill of exceptions, it is quite possible that this evidence was equally admissible for the same purpose. But the bill of

exceptions is defective in not stating what the contents of the letter were, and not showing that they were material, or that the exclusion of the proof of them was prejudicial to the defendants. The second assignment of error therefore is not sustained. *Packet Company* v. *Clough*, 20 Wall. 528; *Railway Company* v. *Smith*, 21 Wall. 255.

The remaining and the principal question in the case is, whether the liability of Thompson, by reason of having held himself out as a partner, was submitted to the jury under proper instructions.

The court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transactions with the partnership. The court declined to give this instruction; and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out, and did not rely on him for the payment of the plaintiff's debt, or give credit to him, in whole or in part.

This court is of opinion that the Circuit Court erred in the instructions to the jury, and in the refusal to give the instruction requested.

A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons

dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership.

There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel in pais, a question of fact for the jury, and not of law for the court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same, that one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact.

The whole foundation of the theory that a person who, not being in fact a partner, has held himself out as a partner, may be held liable as such to a creditor of the partnership who had no knowledge of the holding out, and who never gave credit to him or to the partnership by reason of supposing him to be a member of it, is a statement attributed to Lord Mansfield in a note of a trial before him at *nisi prius*, in 1784, as cited by counsel in a case in which it was sought to charge as a partner one who had shared in the profits of a partnership. By so much of that note as was thus cited, which is the only report of the case that has come down to us, it would appear that in an action by Young, a coal merchant, against Mrs. Axtell and another person, to recover for coals sold and delivered, the plaintiff introduced evidence that Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same under an

agreement between them, by which she was to bring what customers she could into the business, and the other defendant was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers or were of her recommending; and that bills were made out in their joint names for goods sold to her customers; and that the jury found a verdict against Mrs. Axtell, after being instructed by Lord Mansfield that "he should have rather thought, on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." *Young* v. *Axtell*, at Guildhall Sittings after Hilary Term, 24 Geo. III., cited in *Waugh* v. *Carver*, 2 H. Bl. 235, 242. But as the case was not there cited upon the question of liability by being held out as a partner, it is by no means certain that we have a full and accurate report of what was said by Lord Mansfield upon that question; still less that he intended to lay down a general rule, including cases in which one, who in fact had never taken any part in or received any profits from the business, held himself out as partner.

In delivering the judgment of the Common Bench in *Waugh* v. *Carver*, Chief Justice Eyre said: "Now a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." 2 H. Bl. 246.

This statement clearly shows that the reason and object of

the rule by which one who, having no interest in the partnership, holds himself out as a partner, is held liable as such, are to prevent frauds upon those who lend their money upon the apparent credit of all who are held out as partners; and the later English authorities uniformly restrict accordingly the effect of such holding out.

In *McIver* v. *Humble*, in the King's Bench in 1812, Lord Ellenborough said: "A person may make himself liable as a partner with others in two ways: either by a participation in the loss or profits; or in respect of his holding himself out to the world as such, so as to induce others to give a credit on that assurance." And Mr. Justice Bayley said: "To make Humble liable, he must either have been a partner in fact in the loss and profit of the ship, or he must have held himself out to be such. Now here he was not in fact a partner, and the goods were not furnished upon his credit, but upon the credit of Holland and Williams." 16 East, 169, 174, 176.

In *Dickinson* v. *Valpy*, in the same court in 1829, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) said: "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement." 10 B & C. 128, 140. And see *Carter* v. *Whalley*, 1 B. & A. 11.

In *Ford* v. *Whitmarsh*, in the Court of Exchequer in 1840, a direction given by Baron Parke to the jury in substantially the same terms was held by Lord Abinger, Baron Parke, Baron Gurney and Baron Rolfe (afterwards Lord Cranworth) to be a sound and proper direction; and Baron Parke, in explaining his ruling at the trial, said: "I told the jury that the

defendant would be liable if the debt was contracted whilst he was actually a partner, or upon a representation of himself as a partner to the plaintiff, or upon such a public representation of himself in that character as to lead the jury to conclude that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief." Hurlstone & Walmsley, 53, 55.

In *Pott* v. *Eyton*, in the Common Bench in 1846, which was an action by bankers to recover a balance of account against Eyton and Jones, on the ground that either they were actual partners in the business carried on by Jones, or Eyton had by his own permission been held out as a partner, Chief Justice Tindal, delivering the judgment of the court, said: "There was no evidence to show that credit was in fact given to Eyton, or that the bankers knew that his name was over the door of the shop at Mostyn Quay, or that they supposed him to be a partner. One person who had been manager, and another who had been a clerk in the bank, were in court; and if they could have given such evidence, they would no doubt have been called as witnesses. We must assume, therefore, that credit was given to Jones alone; and, if Eyton is to be made liable, that must be on the ground of an actual partnership between himself and Jones." 3 C. B. 32, 39. In *Martyn* v. *Gray*, in the same court in 1863, Chief Justice Erle and Mr. Justice Willes expressed similar opinions. 14 C. B. (N. S.) 824, 839, 843. The decision of the Court of Exchequer in *Edmundson* v. *Thompson*, in 1861, is to the like effect. 31 Law Journal (N. S.) Ex. 207; *S. C.* 8 Jurist. (N. S.) 235.

Mr. Justice Lindley, in his Treatise on the Law of Partnership, sums up the law on this point as follows: "The doctrine that a person holding himself out as a partner and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct." "The expression in *Waugh* v. *Carver*, 'if he will lend his name as a partner he becomes as against all the rest of the world a partner,' requires qualification; for the real ground on which liability is incurred by holding oneself

out as a partner is, that credit has been thereby obtained. This was put with great clearness by Mr. Justice Parke in *Dickinson* v. *Valpy*." "No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either by him or by his consent, and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." Lindley on Partnership (1st ed.) 45–47; (4th ed.) 48–50.

The current of authority in this country is in the same direction. *Benedict* v. *Davis*, 2 McLean, 347; *Hicks* v. *Cram*, 17 Vermont, 449; *Fitch* v. *Harrington*, 13 Gray, 469; *Wood* v. *Pennell*, 51 Maine, 52; *Sherrod* v. *Langdon*, 21 Iowa, 518; *Kirk* v. *Hartman*, 63 Penn. St. 97; *Hefner* v. *Palmer*, 67 Illinois, 161; *Cook* v. *Penrhyn Slate Co.*, 36 Ohio St. 135; *Uhl* v. *Harvey*, 78 Indiana, 26. The only American case, cited at the bar, which tends to support the ruling below, is the decision of the Commission of Appeals in *Poillon* v. *Secor*, 61 N. Y. 456. And the judgment of the Court of Appeals in the later case of *Central City Savings Bank* v. *Walker*, 66 N. Y. 424, clearly implies that in the opinion of that court a person not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiffs gave credit to him.

The result is that, both upon principle and upon authority, the third and fourth assignments of error, as well as the first, must be sustained, the judgment of the Circuit Court reversed, and the case remanded to that court with directions to order a

New trial.

SPINDLE, Assignee, *v.* SHREVE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued April 1st, 1884.—Decided May 5th, 1884.

Bankruptcy—Deed—Equity—Trust.

A conveyance of specifically described real and personal estate to a trustee on the trust that he shall sell the same and any and all other property belonging to the grantor not exempt from execution, which by any oversight may have been omitted in the foregoing list, and apply the proceeds to the payment of the grantor's debts passes all the estates and interest in property which the grantor at the date held and could alien, or which were then liable at law or in equity for the payment of his debts.

Whether an equitable interest in real estate is liable to be appropriated by legal process to the payment of the debts of the beneficiary is to be determined by the local law where the property has its *situs*. *Nichols* v. *Levy*, 5 Wall. 433, cited and approved.

§ 49, ch. 22 of the Chancery Practice Act of Illinois (Hurd's Rev. Stat. Ill. 195), providing for creditors' bills of discovery, and to reach and apply equitable estates to the satisfaction of debts applies to all cases in which the creditor can obtain a lien only by filing a bill in equity for that purpose.

Mr. Gwynn Garnett for appellant submitted on his brief.

Mr. L. M. Shreeve (*Mr. Emory A. Storrs* was with him) for appellees.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity, filed by the appellant as assignee in bankruptcy of Charles U. Shreve, to subject an equitable interest in certain real estate, situated in Chicago, and its rents, issues, and profits, alleged to be the property of the bankrupt, and assets belonging to his estate. The appeal was from a decree dismissing the bill for want of equity.

The question to be determined arises upon these facts:

Thomas T. Shreve died at Louisville, Kentucky, his domicil, November 5th, 1869, leaving a last will, duly admitted to probate and record in that State.

By that will, after providing for certain special devises, he directed his estate to be divided into five equal parts, of which

he willed, that one-fifth part be allotted to his son, Charles U. Shreve, "subject to such conditions and restrictions as hereinafter named."

The 12th clause of the will was as follows:

"12. As soon after my death as it can be conveniently done I wish my executor hereinafter named, after first setting apart a fund sufficient to pay the above named special devises, and incidental expenses, to make out a full and complete list and schedule of all my estate of every character and description, real, personal, and mixed, in the State of Kentucky and elsewhere, and hand the same to the following named persons, to wit, James W. Henning, A. C. Badger, and A. Harris, who, or any two of whom, I desire to proceed to value it, and divide it into five equal shares upon the principles hereinbefore indicated; one-half of each share (which half I wish to be income paying real estate), I desire to be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life, and then descend to his or her heirs, without any power or right on the part of said child to encumber said estate, or anticipate the rents thereof, but said trustee shall collect said rents, and after paying taxes, insurances, and keeping the property in repair, pay the rent to the child in person quarterly, or as the same may be collected according to the terms of the lease; the other half of each share I wish conveyed to each child in fee, to do with as he or she may please.

"In placing these restrictions upon one-half of the estate I give my children, I do not wish it understood that I distrust their capacity to manage their own affairs, for I do not, but believe one-half of a share that each will receive will afford ample means to commence and conduct a respectable business, and as the other half will give them a comfortable living in the event they should be unfortunate in business or otherwise, and now having it in my power, it is my pleasure, as I believe it to be my duty, to shield and protect them against casualties and accidents as far as possible."

The trustee for each child was to be appointed by the Louisville Chancery Court, and after the division of the estate had been made and the report thereof by the commissioners re-

corded, the executor of the will was directed to make deliveries, transfers, and conveyances according to the report and the directions of the will.

In pursuance of these directions a division of the estate was made and the share allotted to Charles U. Shreve, embracing the premises described in the bill, was conveyed by the executor by deed executed on June 25th, 1870, to John M. Shreve, appointed to be trustee for Charles U. Shreve, to be held by him "for the use and benefit of said Charles U. Shreve during his life, and then to descend to his heirs, without any power or authority of said Charles U. Shreve to encumber said estate or anticipate the rents thereof; but said trustee shall collect said rents, and after paying taxes, insurance, and keeping the property in repair, pay the rent to the said Charles U. Shreve in person quarterly, or as the same may be collected, according to the leasing thereof, and with all other rights, duties, powers, and restrictions as are conferred and imposed by the will of said Thomas T. Shreve, deceased."

The trustee accepted the trust, and entered into possession of the property in execution of it.

On June 20th, 1876, at Louisville, Charles U. Shreve conveyed to J. M. Shreve "all the real, personal, and mixed property owned by said party of the first part not exempt from execution, and which is as follows," being certain specifically described lots and tracts of land, some in Cook county, Illinois, and some in Kentucky, and certain personal property, to have and to hold on certain trusts, viz.: that the party of the second part shall "immediately proceed, in such manner as to him shall seem best, either by public or private sale, or by instituting suit in the Louisville Chancery Court, to sell and have sold all the foregoing property, and any and all other property belonging to said first party not exempt from execution, which by any oversight may have been omitted in the foregoing list," &c., for the payment of the debts of the grantor—first, all such as were specifically secured by liens on the property conveyed; second, all unsecured debts equally, and any surplus to return to the grantor, "it being the object and intent of this conveyance to transfer to said second party all the property belonging to said

first party not exempt from execution for the benefit of all the creditors of said first party."

This deed did not describe any property held in trust for the grantor under his father's will, of which that named in the bill is a part; but the Court of Appeals of Kentucky in *Knefler* v. *Shreve*, 78 Kentucky, 297, had before it the very question, as to the construction of this deed, and decided that all the estate and interests in property, which at its date the grantor held, which he could alien, and which was liable at law or in equity for the payment of his debts, passed by its terms; and in that decision we concur. Such was the manifest intent of the grantor, and the language of the deed to which we have referred is broad enough to effect it. Subsequently, by appropriate judicial proceedings in Kentucky, James Buchanan was substituted for John M. Shreve, as trustee under this assignment. Buchanan, on August 16th, 1878, filed a bill in equity in the Superior Court of Cook County, Illinois, to enforce the trusts of this conveyance for the benefit of creditors, claiming under it the right to subject, for that purpose, the estate and interest of Chas. U. Shreve, under the trusts of his father's will described in the bill in this case. That suit was pending when the present was commenced. A decree was afterwards rendered dismissing the bill of Buchanan for want of equity, on the general demurrer.

In the mean time, on August 31st, 1878, Charles U. Shreve filed his petition in bankruptcy in the District Court for Kentucky, and was adjudicated a bankrupt, the appellant being appointed his assignee, to whom all the estate and effects of the bankrupt were duly assigned according to the act of Congress.

The bill in this case was filed February 27th, 1879, but, although it asserts a contradictory title to that set up and insisted upon by Buchanan, as trustee, under the conveyance to John M. Shreve for the benefit of creditors, and although Buchanan himself is made a party defendant, no notice is taken in the bill of his claim of title. And yet it is too clear for argument, that if the estate and interests of the bankrupt, sought to be subjected in this suit were assignable, and are liable to be taken at law or appropriated in equity, for the pay-

ment of his debts, they passed by the previous deed of assignment and are vested in Buchanan; for the conveyance under which he derives title was made more than two years before the bankruptcy, and has not, on any ground, been assailed as affected by the bankrupt law; so that the foundation of the case asserted in the bill is entirely taken away. It is shown that nothing of what is therein claimed could pass to the assignee in bankruptcy, because it had already passed to another.

On the other hand, if nothing passed by the deed under which Buchanan claims, affecting the estate and interests in controversy, it must have been because, under the law of Illinois, which, of course, governs in respect to interests in real estate situated in that State, those interests were not liable to be appropriated to the payment of the debts of the beneficiary, and were, therefore, not embraced in the description of the property conveyed. That such questions are determinable only by the local law where the property has its *situs*, was expressly decided in *Nichols* v. *Levy*, 5 Wall. 433, and was also intimated in *Nichols* v. *Eaton*, 91 U. S. 716–729. The Bankruptcy Act, sec. 5045 Rev. Statutes, expressly adopts the local law of the State as to such exemptions.

And in Illinois the subject is regulated by a special statutory provision. By § 49, ch. 22 (Hurd's Rev. Stats. Illinois, 195), of the Chancery Practice Act of that State, providing for creditors' bills of discovery and to reach and apply equitable estates and interests to the satisfaction of debts, property held in trust is made subject to that proceeding, "except, when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." The Tennessee statute, which was applied to the exoneration of the interests sought to be appropriated in *Nichols* v. *Levy*, 5 Wall. 433, was substantially the same as this; and both seem to be copies from that of New York, 2 Rev. Stat. 173, §§ 38, 39, although in the last named State, as appears from the decision of the Court of Appeals in *Williams* v. *Thorn*, 70 N. Y. 270, and *McEvoy* v. *Appleby*, 27 Hun, 44, another statute, 1 R. S. 729, § 57, limits the exemption in cases where income is payable under such a trust, to the principal

fund itself, and the beneficial interest of the *cestui que trust* in the income only to the extent of a fair support of the beneficiary out of the trust estate.

The statute of Illinois does not apply merely, as is argued, to cases where a technical discovery is sought, but to all cases where the creditor, or his representative, is obliged, by the nature of the interest sought to be applied, to resort to a court of equity for relief, as he must do, in all cases where the legal title is in trustees, for the purpose of serving the requirements of an active trust, and where, consequently, the creditor has no lien, and can acquire none, at law, but obtains one only by filing a bill in equity for that purpose. If the trust was merely passive, and, therefore, executed by the law of its locality, in the *cestui que trust*, so as to be subject to the levy of executions at law, and the present was such a case, then the bill would fail, because the remedy at law would be adequate and complete.

The case has been argued by counsel as if it depended upon, or at least involved the question, whether, upon general principles of equity jurisprudence, as administered in the courts of the United States, the terms of the trust in favor of Charles U. Shreve under his father's will, exceeded the limits fixed for restraints upon the alienation of property held for the beneficial use of the *cestui que trust*, and its exoneration from the liability to be taken for payment of his debts.

It cannot be doubted, that it is competent for testators and grantors, by will or deed, to construct and establish trusts, both of real and personal property, and of the rents, issues, profits and produce of the same, by appropriate limitations and powers to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part, or *in invitum*, by his creditors. The limits, within which such provisions may be made and administered, of course, must be found in the law of that jurisdiction which is the *situs* of the property, in case of real estate, and in cases of personalty, where the trust was created or is to be administered according to circumstances. And in determining

those limits, that law declares how far, and by what forms and modes, the institution of property may be permitted to accommodate itself to the will and convenience of individuals, without prejudice to public interest and policy; by what limitations and instruments its usual incidents may be affected and altered, so as to effectuate the intentions of parties; how far the dominion, implied in the idea of property, may be extended so as to limit the future dominion of those who succeed to its beneficial enjoyment.

It follows, therefore, that the judgment in each case must be determined by the positive provisions of the law of the locality which governs it, and the particular terms of the instrument by which the scheme is framed. And applied to the circumstances of the present case, the question would be merely, whether, according to the law of Illinois, the terms of the trust, established under the will of Thomas T. Shreve, created an interest or estate in the beneficiary, which, not having been previously conveyed to another, could be taken at law or in equity for payment of his debts, and which, therefore, vested in his assignee in bankruptcy.

That question, as we have already shown, so far as required by the case, is answered by the declaration that, as nothing has been assigned to the appellant, except what had not been previously conveyed and could lawfully be subjected to the payment of his debts; and, as the interest in question was either vested in Buchanan or could not be so subjected, by reason of the positive provisions of the statute of Illinois, to which we have referred, the appellant has shown no right to the relief for which, in his bill, he prayed.

The decree of the Circuit Court is accordingly

Affirmed.

THORWEGAN *v.* KING.

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

Submitted April 15th, 1884.—Decided May 5th, 1884.

Court and Jury—Deceit.

Where the complaint in an action on the case for deceit by false representations whereby a party was induced to enter into a contract, charged a positive misrepresentation of an existing fact, and all the evidence intended to establish fraud was directed to the proof of that specific misrepresentation, it was error in the presiding judge not to confine his instructions to the point in issue, and when requested by the jury for instruction as to the effect of withholding information concerning the subject of the contract, not to instruct them that there was no evidence in the case which authorized their request for instructions on that point.

Mr. Given Campbell for plaintiff in error.

Mr. James Carr for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This was an action at law brought by the defendant in error to recover damages for an alleged deceit. The cause of action, as set out, was substantially as follows: That Thorwegan, the defendant below, was the owner of a steamboat, called the Grand Republic; that, on or about October 1st, 1876, knowing the boat to be heavily encumbered with liens, claims, and debts to the amount of about $75,000, with a view and design to injure, cheat, and defraud the plaintiff, he falsely and fraudulently represented to the plaintiff that the boat was substantially free from all liens, claims, debts, and liability, except to a small amount, which he, the defendant, would forthwith pay off and cause to be discharged, as a preliminary to merging the title and ownership of said boat in a corporation to be organized by the defendant to receive such title and ownership, and to issue stock therein, representing the full value of said boat, free and clear of all encumbrances, debts, liens, and liabilities then existing, and that if plaintiff would advance to the defendant, at that time, $12,000, he should become interested

in said boat, and that the defendant would forthwith organize such corporation, and convey to it the title to said boat, free of all encumbrance and liability, and issue to the plaintiff one hundred and twenty-five shares of stock therein, representing one-eighth of the ownership of the boat, free of all encumbrance, and one-eighth of the capital stock of the corporation; that the plaintiff, relying on said representations and believing them to be true, and especially that the boat was at that time substantially free and clear of all debts, encumbrance, and liability, and that it would be wholly free and clear of the same when merged in and the title and ownership transferred to the corporation, did, on or about October 1st, 1876, advance to the defendant the said sum of $12,000 for the said interest in said boat and the stock of the corporation; that afterwards, about October 6th, 1876, the defendant caused said corporation to be organized under the name of the Grand Republic Transportation Company, with a capital stock of $100,000, in shares of $100 each, and conveyed to it the title to the said boat, but the same was at that time subject to encumbrances and liabilities, as aforesaid, to the amount of $75,000, and of the said capital stock caused to be issued to the plaintiff one hundred and twenty-five shares, being one-eighth of the whole number; that, in consequence of said encumbranees, said stock was, and continued to be, wholly without value, and thereby the said sum paid for the same was wholly lost to the plaintiff.

The defendant answered, denying all charges of fraud and misrepresentation, and pleading in bar of the action his subsequent discharge in bankruptcy. To this the plaintiff replied the fraud alleged in the complaint.

It is manifest that the case of the plaintiff below, as stated in the pleadings, turned upon the questions whether the defendant made the alleged representation as to the liabilities of the boat, existing at the time of the advance of money, made by the plaintiff, whether such representations, if made, were false and fraudulent, and whether the plaintiff acted on the faith of their truth. Everything else charged in the complaint —that the defendant would pay off the encumbrances and liabilities before transferring the boat to the corporation, and

would convey to it a title free and clear of all liability, on account of any existing debt—was promissory in its nature, related to the future, depended on contract merely, and could not be, of itself, the foundation of an action for deceit. At most, it would be but a warranty of the title against encumbrances and liability for debts, for breach of which an action on the agreement would accrue.

The only evidence adduced in support of the averments as to the representations made, and alleged to be false and fraudulent, was the testimony of the plaintiff himself as to the circumstances of the transaction.

From this, it appeared that the entire amount of $12,000 was not advanced in one sum, but in two, at different times. As to the first, of $5,000, it was clear, beyond dispute, that it was made before the transaction relating to the sale of the interest in the boat, and not even in contemplation of it, but as a loan, to meet an immediate necessity of the defendant, and without inquiry or security; although it was included in the verdict, the Circuit Court declined to enter a judgment for the full amount, and required the plaintiff to enter a *remittitur* of that sum, as the alternative of a new trial, and it was complied with.

The second advance of $7,000, it appears, was made a few days afterwards, and in pursuance of negotiations for a sale by the defendant to the plaintiff of an interest in the boat, to be consummated by the transfer to the proposed corporation and the issue of its stock.

It is perfectly clear, from the testimony of the plaintiff himself, that, at the time of the second advance of the sum of $7,000, he was informed and well knew that the boat was not free from encumbrances and liabilities. On the contrary, he himself says, that he made the advance to enable the defendant to pay debts then existing. He testified that Thorwegan said, "if he could get that much money it would pay out the debt and would have her clear of all debts; and that if he didn't get the money the boat would be tied up before he left here, and he wouldn't be able to turn a wheel." This is the strongest statement made by the plaintiff as to any representa-

tion of the defendant in reference to the amount of the boat's existing indebtedness. In the same connection, the witness stated, that nothing was said about the amount of the indebtedness. On cross-examination, the following questions and answers sum up the transaction:

"169 int. As I understand, you testify in your examination in chief that Thorwegan promised that he would pay off the debts due by the boat and all the demands against her?

"A. Yes, sir.

"170 int. And you relied on that promise?

"A. Yes, sir.

"171 int. And you let him have your money?

"A. Yes, sir.

"172 int. That's the way of it?

"A. Yes, sir.

"173 int. You didn't care about an interest in this boat particularly, but you wanted to help Thorwegan more than anything else; that was your motive?

"A. That was the motive. I saw he was in trouble, as he stated to me."

On re-examination, the following question and answer appear:

"179 int. At that time, in October, 1876, you placed full reliance on the representations that the boat was free and clear of all debts, didn't you?

"A. I did: that she was turned over (to) me clear of all debts due and demands up to that date. It was not on the 1st of October; the boat was to be turned over to me when she was at the wharf ready for receiving cargo. That was the understanding, and the captain will state that fact himself."

At the time of the transaction the boat was undergoing repairs. When these were finished the corporation was organized as proposed, and the boat transferred to it; but, as appeared from the testimony of the clerk, introduced as a witness on the part of the plaintiff, with an unpaid indebtedness at that time of $68,000, of which about $10,000 were liens upon the boat, the remainder being represented by notes, &c., on building account. The boat was worth from $160,000 to $175,000, in his

opinion, at that time. She was lost by fire in September, 1877. There was insurance on her, however, only for $50,250, which went to pay creditors.

On the part of the defendant, a writing obligatory was introduced as evidence, signed and sealed by the defendant, reciting the agreement with the plaintiff of October, 1876, for a sale of one-eighth interest in the boat, represented by one-eighth of the stock of the corporation, and containing a covenant to hold the plaintiff harmless from all claims, encumbrances, and liabilities existing on said steamer at that date, and agreeing to pay all claims and encumbrances existing on said boat on that day, as well as all maritime and other liens, so that no part thereof as against him should be chargeable to or paid by the new company, a copy of which was set forth in the original petition of the plaintiff.

The defendant was called on his own behalf, and denied making any representations as to the indebtedness of the boat at the time of the sale.

There was evidence, taking up much space in the record, consisting of accounts showing receipts and disbursements on account of the boat for sixteen trips, most of them made after the sale to King, and of the examination of the clerk in reference thereto, which, in our opinion, ought not to have been admitted. It was irrelevant, and tended to confuse and mislead the jury to the prejudice of the defendant by suggesting questions of good faith as to the management of the boat, after the transaction in question, which were not part of the issue, and which threw no light upon it.

In this state of the evidence, the defendant requested, among others, the following instruction to be given to the jury:

"The jury are instructed that unless the evidence clearly shows that defendant, with intent to defraud the plaintiff, falsely represented to him some material facts alleged in the petition, and relied on by the plaintiff, whereby plaintiff, to his damage, was induced to enter into the contract described in the petition, then they must find for the defendant."

This the court refused to give, and to this refusal exception was duly taken.

The proposition contained in the request is a correct statement of the law, and strictly applicable to the case. The defendant was entitled to have it given to the jury, if not in the precise form asked, at least in substance. It is not contested in argument as unsound; but the refusal to give it is met by the claim that it was given, substantially as prayed, in the charge of the court. This is set out in full in the bill of exceptions, and it becomes necessary, therefore, to examine it, to ascertain whether it properly covers the point of the instruction asked for and refused.

That examination satisfies us that it does not; but that, on the contrary, it contains directions to the jury, inconsistent with the instruction requested. Among other things, the court in its charge said:

"The complaint is that by fraudulent and false statements, a suppression of the truth on the part of the defendant, the deception was practised upon the plaintiff."

And: "The law will not permit any one to make fraudulent representation, and thus obtain from the party some valuable thing, money or otherwise. If any one commits a fraud of that kind, and thereby another loses his money, having trusted to what was said to him, why the individual who does it is still responsible to the party thus defrauded. And in this connection, gentlemen, you will view the whole case, not only what the party said, but if you shall come to the conclusion he left things unsaid that he ought to have said, that is, that there was a suppression of truth when it was demanded from him, or from other circumstances of the case, he ought to have disclosed the facts, that is just as bad as asserting a fact which does not exist, and in relation to that, you will have to view it with the acts of the other party also."

After the jury had retired they requested further instructions, as follows: "The jury desire to be instructed whether the withholding of the true financial condition of the boat constitutes a fraud?" And, in answer, the court said: "If the disclosing of it, as I have told you before, became a duty—that is, if the withholding was intentional for the purpose of accomplishing a fraud upon the individual—and it was necessary for it to be

disclosed, then such withholding would be a fraud. But if the individual advanced the money without any question, or any question concerning the financial condition of the boat, or if he took other guaranties, so as to secure himself against contingencies, then it might not be necessary. I can't answer the question by saying yea or nay, for the very question depends on the circumstances of the case. For instance, I am talking to an individual designing to accomplish an object. If I find that individual is desirous of obtaining certain information for the purpose of either denying or granting the request I make, and I withhold the information, that is a fraud, provided I do it with the intention of inducing him to do a thing that he would not otherwise do. That is a fraud or deceit, as the law calls it. . . . If you should come to the conclusion that it became necessary for this individual to know the financial condition of the boat, and it was withheld by the other party intentionally, for the purpose of misleading him, then you should solve this question as you think the testimony justifies."

This charge assumes that the plaintiff's case was based upon a fraudulent suppression of material facts, knowledge of which the defendant was under some legal duty to communicate, and that there was evidence before the jury tending to prove the allegation. The assumption is wrong in both its parts. No such averment is made in the pleadings, and there was nothing in the evidence tending to prove it. The whole case, as we have heretofore stated, as exhibited in the petition or complaint, rested upon an alleged positive misrepresentation of an existing fact; and all the evidence intended to establish the fraud charged was directed to the proof of that actual misrepresentation. There was no suggestion of any such relation between the parties, or of anything in the circumstances of the transaction, that imposed upon the defendant the legal obligation of making any disclosures, in respect to which he failed to speak. The whole charge was, that having undertaken to make a statement of a particular condition of facts, he had done so falsely and fraudulently.

The court therefore should have confined its instructions to the jury, to the point really involved in the issue, and, omitting

what was said in respect to fraudulent suppressions, informed them, that there was no evidence in the case that authorized their request for further instructions, upon the point involved in their inquiry.

It was error, therefore, to refuse to give the instruction asked for by the defendant, as set out above.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

CARROLL COUNTY *v.* SMITH.

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

Argued April 27th, 1884.—Decided May 5th, 1884.

Municipal Bonds—Construction of Statutes—Estoppel—Conflict of Law—State Courts.

A recital in a bond issued by a municipal corporation in payment of a subscription to capital stock in a railway company, that it is authorized by a statute referred to by title and date, does not estop the municipality in a suit on the bond from setting up that the issue was not authorized by vote of two-thirds of the voters of the corporation, as required by the Constitution of the State.

A provision in the Constitution of Mississippi, that the legislature shall not authorize a county to lend its aid to a corporation unless two-thirds of the qualified voters shall assent thereto at an election to be held therein, does not require an assenting vote of two-thirds of the whole number enrolled as qualified to vote, but only two-thirds of those actually voting at the election held for the purpose. *Hawkins* v. *Carroll Co.*, 50 Miss. 735, disregarded, and *St. Joseph's Township* v. *Rogers*, 16 Wall. 644, and *County of Cass* v. *Johnston*, 95 U. S. 360, followed.

The issuing of a temporary injunction, which was afterwards made permanent, by a State court, restraining municipal officers from issuing municipal bonds, does not estop a *bona fide* holder for value, who was no party to the suit, from maintaining title to such bonds issued after the temporary injunction.

The decision of the highest court of a State, construing the Constitution of the State, is not binding upon this court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this court, and when the rights which it affects here were acquired before it was made.

Statement of Facts.

This was an action at law brought to recover the amount of certain overdue interest coupons, upon municipal bonds, alleged to be obligations of the plaintiff in error, delivered and payable to the Greenville, Columbus and Birmingham Railroad Company or bearer, for $1,000 each. Each bond contained the following recital:

"The above mentioned sum being a part of a subscription to the capital stock of the Greenville, Columbus and Birmingham Railroad Company, authorized by the following styled acts of the State of Mississippi, viz.: An act entitled 'An act to incorporate the Arkansas City and Grenada Railroad Company,' approved March 5th, A. D. 1872, and an act entitled 'An act to amend an act entitled an act to incorporate the Arkansas City and Grenada Railroad Company, approved March 5th, 1872,' approved March 4th, A. D. 1873."

The act first referred to contained the following:

"Sec. 19. *Be it further enacted*, That upon application by the president or other authorized agent of said corporation to the constituted authorities of any county, city or incorporated town in the State of Mississippi, or adjacent to the main line and branch railroad of this corporation, for a subscription to a specified amount of the capital stock of said corporation, said constituted authorities are hereby required, without delay, to submit the question of 'subscription' or 'no subscription' to the decision of the qualified voters of said county, city or incorporated town, at a special or regular election to be held therein, and if two-thirds of said qualified voters be in favor of said subscription, the constituted authorities of said counties, cities or incorporated towns are hereby required, without delay, and are authorized and required to subscribe to the capital stock of said corporation to the amount agreed upon; and bonds of the county, city or incorporated town making the subscription, having such time to run and such rates of interest as may be agreed upon, shall be issued, without delay, by the authorities of the counties, cities, or incorporated towns, to the president and directors of said corporation, to the amount of said subscription to the capital stock." * * *

The second act recited had the effect merely to change the

name of the company to that of "The Greenville, Columbus and Birmingham Railroad Company."

The complaint alleged that the bonds and coupons described were delivered by the county of Carroll to the railroad company, for value, and that the plaintiff became a purchaser thereof for a valuable consideration before maturity, and was an innocent holder thereof without notice.

The defendant pleaded three pleas, of which the first in order is as follows:

"And for further plea in this behalf said defendant, by attorney, says *actio non*, because it says that on the 3d day of March, 1873, on the application of the president of the Greenville, Columbus and Birmingham Railroad Company, a corporation in this State, the board of supervisors of the county of Carroll ordered a special election to be held in said county on the 1st day of April, 1873, at which the question of subscription, or no subscription, by said county to the capital stock of said railroad company was to be submitted to the qualified voters of said county. And said defendant avers that said election was accordingly held, and said defendant avers that on the 1st day of April, 1873, the names of 3,129 registered voters were on the registration books of said county, and there were in fact on the 1st day of April, 1873, three thousand one hundred and twenty-nine qualified voters in said county, but that only 1,280 of said voters voted at said election, of whom 918 voted in favor of the proposition to subscribe for said stock and 362 voted against it, as fully appears by the returns of the three registrars of said county, filed with the clerk of said board of supervisors of said county. And said defendant says that, notwithstanding the refusal of two-thirds of the qualified voters of said county to vote in favor of the subscription for stock, the then board of supervisors of said county, in violation of their duty and the trusts reposed in them, and in violation of the Constitution of the State of Mississippi, subscribed to the capital stock of said railroad company, and issued the bonds and coupons in the declaration mentioned in fact, for said subscription for said capital stock in said railroad company, without any statement or recital in said bonds that two-thirds of the qualified voters of said county had assented thereto. And this the said defendant is ready to verify. Wherefore it prays judgment, &c."

Statement of Facts.

The second was like the first, with the additional averments that the said returns of the registrars of the county, filed and deposited with the clerk of the said board of supervisors of said county, was "at all times open to the inspection of all persons in the public office of the clerk of the Chancery Court of said county; and said defendant avers that the said registration of voters of said county was a book of record, deposited and kept in the public office of the clerk of the Chancery Court of said county as a record book and open for inspection to all persons, and exhibited the fact that there were 3,129 registered voters in said county at the time of the election."

The third plea was like the second, with the addition of the following:

"And said defendant avers that before the issuance of any of the bonds and coupons in the declaration mentioned, a bill was exhibited by citizens and tax-payers of said county against the said board of supervisors in the Chancery Court of the county of Carroll to restrain and enjoin said board of supervisors from the issuance and delivery of the bonds of said county upon a subscription of stock in said railroad company; and thereupon an injunction was ordered and issued, before the issuance and delivery of any of the bonds and coupons mentioned in the declaration, restraining and enjoining the said board of supervisors from the issuance and delivery of such bonds. And said defendant avers that the said bill of injunction was sustained and made perpetual by the judgment and decree of the Supreme Court of the State of Mississippi. And said defendant says that, notwithstanding the issuance and pendency of said injunction, and notwithstanding the refusal of two-thirds of the qualified voters of said county to vote for said subscription for stock in said railroad company, the said board of supervisors fraudulently and illegally issued and delivered the bonds and coupons in the declaration mentioned in fact, for a subscription for stock in said railroad company. And this the said defendant is ready to verify. Wherefore it prays judgment."

A demurrer to each of these pleas was sustained, and judgment rendered for the plaintiff below, to reverse which this writ of error was prosecuted.

Mr. J. Z. George for plaintiffs in error submitted on his brief. —The Supreme Court of Mississippi has held that the words "qualified voters" in the Constitution mean those who have been determined by the registrars as having the requisite qualification by enrolling their names, and that the words "two-thirds" mean that number of the whole number whose names have been enrolled as legal voters. *Hawkins et al.* v. *Carroll County*, 50 Miss. 735. This case settles the invalidity of the bonds as between the original parties. The mere issuing of the bonds does not estop the county from contesting their validity even in the hands of a *bona fide* holder. *Pendleton County* v. *Amy*, 13 Wall. 297; *Coloma* v. *Eaves*, 92 U. S. 484, 490; *Knox County Commissioners* v. *Aspinwall*, 21 How. 539, 544. The authority given by the legislature did not go into effect until the assent of two-thirds of the voters of the county had been obtained. Every purchaser of bonds was bound to know this, and was put upon his inquiry. *McClure* v. *Oxford Township*, 94 U. S. 429; *County of Warren* v. *Marcy*, 97 U. S. 96, 104. Nothing short of a distinct statement on the face of the bonds, that the precedent condition had been complied with, ought to estop the county. It is the rule that estoppels must be certain to every intent. Bigelow on Estoppel, 304. The issuance of the bonds pending an injunction, and in violation of it, was an illegal act from which no legal right can flow. *Williams* v. *Cammack*, 27 Mississippi, 209. The protection thrown around the holder of commercial paper, ceases when it is shown that it had its inception in illegality or fraud. The holder must then show that he is a holder *bona fide* and for a valuable consideration. 1 Smith Leading Cases, note to *Miller* v. *Race*, 250; *Smith* v. *Sac County*, 11 Wall. 139, 147; *Commissioners* v. *Clark*, 94 U. S. 278, 285; *Stewart* v. *Lansing*, 104 U. S. 505, 509; *Buchanan* v. *Litchfield*, 102 U. S. 278.

Mr. Charles B. Howry for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The provision in the charter of the railroad company

authorizing the issue of bonds in payment of subscriptions by municipal bodies to its capital stock, is based upon article 12, section 14, of the Constitution of the State, which declares that—

"The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regular election to be held therein, shall assent thereto."

It is claimed, on behalf of the plaintiff in error, that the qualified voters referred to in the Constitution of Mississippi and the charter of the railroad company, are those who have been determined by the registrars to have the requisite qualifications of electors, and who have been enrolled by them as such, and that it requires a vote of two-thirds of the whole number enrolled as qualified to vote, and not merely two-thirds of such actually voting at an election for that purpose, to authorize the issue of such bonds as those in suit.

That presents the single question for our decision, for the averment in the last plea, that "the board of supervisors fraudulently and illegally issued and delivered the bonds and coupons," has reference merely to their being issued without the alleged requisite assent of two-thirds of the registered voters, and there is nothing alleged in the plea from which it can be inferred that the injunction bill, pending which the bonds, it is charged, were issued and delivered, was based on any other infirmity.

We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of the bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is, that of a statement, that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may law-

fully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and appointed to determine and certify. They do not, therefore, within the rule of decision acted on by this court, constitute an estoppel, which prevents inquiry into the alleged invalidity of the bonds. *Northern Bank of Toledo* v. *Porter Township*, 110 U. S. 608; *Dixon County* v. *Field*, *ante*, 83; *School District* v. *Stone*, 106 U. S. 183.

On the other hand, we do not agree with the counsel for the plaintiff in error, that the pendency of the injunction bill, referred to in the last plea, affects the title of the defendant in error, as a *bona fide* holder of the bonds for value; or that this court is bound to follow and apply the judgment of the Supreme Court of Mississippi, in that case, reported as *Hawkins* v. *Carroll County*, 50 Miss. 735, perpetuating the injunction, on the ground that the Constitution and laws of the State required a majority of two-thirds of those qualified to vote to be cast at the election, to support the validity of the bonds.

The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality, by virtue of the doctrine of *lis pendens*. *County of Warren* v. *Marcy*, 97 U. S. 96. It is not alleged in the plea that the defendant in error had actual notice of the litigation, or of the grounds on which it proceeded, or that any injunction was served upon the board of supervisors; and, if he had, that notice would have been merely of the question of law, of which, as we have seen, he is bound to take notice, at all events, and which is now for adjudication in this case. There is nothing in the case of *Williams* v. *Cammack*, 27 Miss. 209, 224, to which we are referred by counsel on this point, inconsistent with these views.

The decision in *Hawkins* v. *Carroll County*, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a de-

cision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a federal tribunal. *Burgess* v. *Seligman*, 107 U. S. 20, 33.

We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of *Hawkins* v. *Carroll County*, with the respect which is due to the highest judicial tribunal of a State speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fulness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in *St. Joseph Township* v. *Rogers*, 16 Wall. 644, and adhere to the views expressed by this court in *County of Cass* v. *Johnston*, 95 U. S. 360, in deciding the same question upon the construction of a provision of the Constitution of Missouri, which is identical with that of the Constitution of Mississippi under consideration. It was there declared and decided, that "all qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed," page 369. In Missouri, as in Mississippi, there was

a constitutional provision requiring a registration of all qualified voters. *State* v. *Sutterfield*, 54 Missouri, 391.

Much stress in the argument was laid by the Supreme Court of Mississippi upon the registration record, as furnishing the standard by which to ascertain the proportion of qualified voters, whose assent was required by the Constitution. On this point, they say, 50 Miss. 761: "There exists, therefore, in each county a registration of the list of voters, which ought to show, with approximate accuracy, the names of those entitled to vote, 'at any election.' In ascertaining, therefore, the result of an election requiring two-thirds of the qualified voters of the county to assent thereto, we think that the registration books are competent evidence on the point of the number of qualified voters in the county. It would be open to proof to show deaths, removals, subsequently incurred disqualifications, &c. When the Constitution uses the term 'qualified electors,' it means those who have been determined by the registrars as having the requisite qualifications by enrolling their names, &c. It would be a fair construction of the 14th section to hold that the 'two-thirds' meant that number of the whole number whose names had been enrolled as legal voters. That furnished official evidence of those *prima facie* entitled to vote. But, in this case, in addition to the information contained in the registration books, it is admitted that there were from 2,000 to 2,500 qualified voters in Carroll County at the date of this election. The proposition submitted did not have the assent of two-thirds, as required by the Constitution. The difficulty of proving the number of voters in the county has been obviated by this admission."

But this reasoning, as it seems to us, does not meet, much less overcome, the difficulty of the argument. The Constitution of Mississippi, although it does not recognize any voters as qualified, except such as are registered, does not make all persons, registered as such, qualified. And yet, if it is to be construed, in the clause in question, as referring to the registration as conclusive of the number of qualified voters, then no proof is competent to purge the list of those who never were qualified, or have died, removed, or become otherwise disquali-

fied, thus obliterating the distinction between registered and qualified voters; and if, on the other hand, it is to be construed as meaning voters qualified, in fact and in law, without reference to the sole circumstance of registration, then the body of electors is as indefinite as though there were no registration, and the determination of the whole number, if an actual enumeration is required to determine how many are two-thirds thereof, is completely a matter *in pais*, and must be inquired of and ascertained, in each case, by witnesses. The difficulty, if not the impossibility, of reaching results by such methods, amounts almost to demonstration, that such could not have been the legislative intent, or the meaning of the Constitution. The number and qualification of voters at such an election, is determinable by its result, as canvassed, ascertained and declared by the officers appointed to that duty, or as subsequently corrected by a contest or scrutiny in a direct proceeding, authorized and instituted for that purpose; it cannot be contested in any collateral proceeding, either by inquiry as to the truth of the return, or by proof of votes not cast, to be counted as cast against the proposition, unless the law clearly so requires. In our opinion, the Constitution of Mississippi did not mean, in the clause under consideration, to introduce any new rule. The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words "qualified voters," as used in the Constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote.

We are consequently, of opinion, that there is no error in the judgment of the Circuit Court, and it is accordingly

Affirmed.

Statement of Facts.

COLT & Another *v.* COLT, Executrix.

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

Argued April 18th, 21st, and 22d, 1884.—Decided May 5th, 1884.

Estoppel—Executor and Administrator—Practice—Trust—Will.

When an infant, properly served in a suit pending before a State court, is before the court, the question whether to proceed by general guardian or by guardian *ad litem* is local to the law of jurisdiction; and when passed upon by the courts of that jurisdiction the proceedings are conclusive upon the Federal courts as there is no question of jurisdiction.

A court of competent jurisdiction may determine the proper distribution of vested bequests, even though the possession and enjoyment are deferred.

A bequest to the executors of the testator and their successors in office, with directions to apply the income and profits to the education of minor children, and to divide the gift and its accumulations among the children on the coming of the youngest to the age of twenty-one years, vests *virtute officii* in the executors who qualify, and on the death or removal of any one of them his successor succeeds to his title.

As long as personal property is held by executors as part of the estate of the testator, for the payment of debts or legacies, or as a residuum to be distributed, they hold it by virtue of their office, and are accountable for it as executors.

When there is a question as to the distribution of a residuum of personal property in the hands of executors, who are also trustees under the will for minors claimants to a part of it, the duty of the executors towards the minors is discharged when they are brought before the court with their guardian, and their interests are fairly placed under the protection of a court of equity.

This was a bill in equity to recover certain shares of the capital stock of Colt's Patent Fire-arms Manufacturing Company, a corporation of Connecticut at Hartford, in the hands of the executors of Samuel Colt, deceased, as a part of his residuary estate, under his will.

The complainants were children of the late Christopher Colt, a brother of the testator, and Mrs. Theodora G. Colt, their mother, who was assignee of the interest of a deceased son. The defendants were executors of the last will of Samuel Colt, and trustees, and others, legatees claiming interests under the same.

Statement of Facts.

The testator, Samuel Colt, made his last will and testament June 6, 1856, and thereafter two codicils, one on January 12, 1858, the other February 2, 1859. He died at his domicil, Hartford, Connecticut, in 1862, and his will and codicils were duly admitted to probate and record. A large part of his estate was comprised in 9,996 shares of the capital stock of the Colt's Patent Arms Manufacturing Company.

By his will he bequeathed 1,000 shares of this stock to his widow for life, with remainder to his after-born children, and to each of the latter also 500 shares; 100 shares to Samuel Caldwell Colt, a son of a brother, "when he shall have arrived at the age of twenty-one years;" to the children of his brother, Christopher, 100 shares each, "as they shall arrive at the age of twenty-one years," respectively. He gave other legacies of stock to other named persons, and provided means for the foundation and establishment of a school or institution for the instruction and education of young men in practical mechanics and engineering. It contained also the following:

"To my brother, James B. Colt, now of said city of Hartford, I give and bequeath the use and improvement during his life of five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, and after the death of my said brother, to his issue lawfully begotten, as an absolute estate. This bequest is on condition that the said James B. Colt shall waive and relinquish all claims and demands, actual or pretended, which he may have against me or against said Colt's Patent Fire-arms Manufacturing Company.

"I also give and bequeath to my executors and their successors in said office five hundred shares of the stock of said Colt's Patent Fire-arms Manufacturing Company, in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate."

He gave also a legacy in stock to each of his executors.

The residuary clause was as follows:

"All the rest and residue of my estate, of every kind and description, not herein disposed of, I give, bequeath, and devise as follows: All the remaining stock of said Colt's Patent Fire-arms Manufacturing Company, of which I shall die possessed, shall be divided amongst the several persons and parties to whom I have hereinbefore given legacies of stock, in the ratio and proportion in which said legacies of stock are hereinbefore given. All my other residuary estate shall be divided amongst the several persons to whom I have hereinbefore given pecuniary legacies in gross, in the ratio and proportion in which I have hereinbefore given such pecuniary legacies, meaning that my residuary estate in said stock shall be shared by the same persons to whom I have given specified legacies in stock, and in precisely the same ratable proportions, and that my other residuary estate shall be shared by the same persons to whom I have given gross pecuniary legacies, and in precisely the same ratable proportions."

The first codicil contained the following:

"I also revoke and cancel, for reasons growing out of his late unbrotherly conduct towards me, the legacy of five hundred shares of the stock of Colt's Patent Fire-arms Manufacturing Company, given in the aforesaid will to James B. Colt, for life, remainder to his children; and, in lieu thereof, I give and bequeath said five hundred shares of stock to the trustees named in said will for founding a school for practical mechanics and engineers, subject to the uses and trusts created in said will for that purpose."

By the second codicil, all the provisions previously made for founding and carrying on the school for mechanics were cancelled. It also contained the following:

"I hereby give and bequeath to each of the children of James B. Colt a legacy of one hundred dollars, and I hereby cancel and wholly revoke any and all other legacies or devises by me heretofore at any time made to or for the use and benefit of said children or any of them. I give to the eldest son of my brother Christopher Colt a legacy of one hundred dollars and no more,

and all legacies heretofore made in his favor are cancelled and revoked, and I hereby give, bequeath and devise to the other children of my said brother (said eldest son not being included herein) the property to wit: five hundred shares of the stock of the Colt's Patent Fire-arms Manufacturing Company, which in and by said original will is bequeathed to my executors in trust for the use of the children of said James B. Colt, to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my executors for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of said James B. Colt. And I hereby confirm and establish said original will as altered, changed and modified by this and the previous codicil, as and for my last will and testament."

Elizabeth H. Colt, the testator's widow, Richard D. Hubbard, and R. W. H. Jarvis were appointed and qualified as executors of the will.

After the death of the testator, his brother, James B. Colt, claimed that the cancellation by the first codicil of the specific legacy in the will to him for life, with remainder to his issue, of 500 shares of the stock, did not have the effect of cancelling his interest under the residuary clause, on the ground that that clause should be construed as an independent disposition of the remaining stock, to the very persons, only, described as those to whom specific legacies of stock had been thereinbefore, that is, in the will, given, as if they had been again named; and not, as a dependent legacy to those who, under the codicils as well as the will, became ultimately entitled as legatees to specific legacies of stock, although these legacies might be of the same stock which, in the will itself, had been originally given to others, and afterwards cancelled. This claim consisted of two parts, first, of a right in himself to share in the residuum, and second, to exclude from it those to whom by the codicils alone, and not by the will, specific legacies were given. This branch of the claim necessarily antagonized the right of the children of Christopher Colt to participate in the residuum by reason of the legacy given to them in the second codicil.

To assert his interest in the residuary estate, and to determine its amount, and the several interests of all entitled to share in it, James B. Colt, in July, 1864, filed his bill in equity in the Superior Court of Connecticut for Hartford County.

To that bill, parties defendant, among others, were made as follows: Mrs. Elizabeth Hart Colt, as claiming an interest under the will, and also as executrix, and as administratrix of Henrietta Colt, deceased, and as guardian of Caldwell Hart Colt, a minor; Richard D. Hubbard, as claiming an interest under the will, and as executor; Richard W. H. Jarvis, as claiming an interest under the will, and as executor; Isabella DeWolf Colt, LeBaron B. Colt, Edward D. Colt, and Samuel Pomeroy Colt, all the last three being minors; Theodore De Wolf Colt, their guardian; and were duly served with process.

A demurrer to this petition was filed on behalf of all the defendants, and was reserved for the advice of the Supreme Court of Errors, whose decision thereon was reported in *Colt* v. *Colt*, 32 Conn. 422. From that report, the case seems to have been fully argued and thoroughly considered. The demurrer was overruled. The court decided that the bequest of a share of the residuary stock to James B. Colt had not been revoked; that the language of the revocation was plainly limited to the first five hundred shares; and that the second legacy to him of a share in the residuary stock must be regarded as an independent legacy, the reference to him, as a person to whom the previous legacy has been given, being merely *designatio personæ*, not having the effect of attaching together the two bequests, as necessarily connected in the same ownership, and that the latter was, consequently, not affected by the revocation.

The cause thereupon came on again in the Superior Court, the respondents having been ordered to answer over, and where, as it was recited in its record, "the parties again appear and are at issue upon a general denial of the allegations in the plaintiff's bill," and thereupon the court made a finding of facts. Among other findings, after referring to the will and codicils of the testator, it was stated that "the parties in this cause are interested in the estate of the said Samuel, in man-

ner and form and to the extent and proportion in said will and codicils expressed, set forth and contained." It was also stated, that there were children of Christopher Colt, a brother of the testator, "to wit, the eldest son of the said Christopher, named in said will, and the said Isabella De Wolf Colt, and three children of the said Christopher, then minors under the age of twenty-one years, to wit, LeBaron B. Colt, Edward D. W. Colt and Samuel Pomeroy Colt, of which minor children the said Theodora De Wolf Colt was and is the legal guardian, all of whom are residents in Hartford, but the said Edward D. W. Colt has, since the last term of this court, arrived at his majority." It had been previously recited that when the parties appeared, the minors "were duly represented by their guardians." The Superior Court reserved, for the advice of the Supreme Court of Errors, the following questions arising upon the record of the case:

"1. Whether the interest taken in the residuum by James B. Colt is a life estate or an estate in fee?

"2. Whether said Colt shall receive interest upon the dividends made on his residuary stock; and if so, from what time?

"3. Have the legacies which the children of the testator, who deceased in his lifetime, would have taken had they survived him, lapsed, or are they to be considered and treated as intestate estate?

"4. Do the said children of Christopher Colt take any share in the residuum of stock in respect to their legacy of 500 shares given to them in the codicil to said will?

"5. Do the said R. W. H. Jarvis and H. C. Deming both take a legacy of stock under said will, or only one of them, or neither of them?

"6. What is the amount of the residuum of the stock, and who are entitled thereto, and in what proportions?

"This court also reserves all other questions arising upon the record, and also the questions as to what decree shall be passed in this suit."

These questions were decided by the Supreme Court of Errors, as found in the report of the case of *Colt* v. *Colt*, 33 Conn. 270.

In answering them, the court held that James B. Colt took an interest in the residuary stock for his life only. It said: "The revocation was not sufficiently broad to take away the interest of James B. in the residuum. It was broad enough to take away that of the children. But there is nothing whatever to show an intention to enlarge the interest of James B., and such could not be the legal effect of a mere revocation of the interest of the other parties. It is not material to inquire what disposition is to be made of that remainder."

In answer to the question, whether the children of Christopher Colt take any share in the residuum in respect of their legacy of 500 shares given to them in the codicil to the will, the court said:

"The fourth question must be answered in the negative. In giving a construction to the will, we held that the residuum was given independently to the *persons* and *parties* to whom stock was *thereinbefore given*. It follows logically that persons and parties to whom stock was not *thereinbefore given* cannot take under the residuary clause."

Finally the court declared that the amount of the residuum of stock was 5,346 shares, and proceeded to allot it to each person entitled by name, and among others, to Christopher's children $459\frac{27}{31}$ shares, and to J. B. Colt for life, $574\frac{26}{31}$ shares. In pursuance of these instructions, a final decree was entered in the Superior Court, adjudging the above amounts of stock, respectively, among others, to James B. Colt, for life, and to the children of Christopher Colt, "in the manner specified in the will."

It will be observed that this decree, which was entered in March, 1866, disposed of the title and right in the whole residuary stock, then in the hands of the executors for final distribution, except the remainder in $574\frac{26}{31}$ shares, set apart to James B. Colt for life.

In accordance with its terms, the distribution of the stock, and of its dividends and accumulations, was actually made to the parties respectively; the executors, however, continuing to hold the stock awarded to the children of Christopher Colt, as trustees under the will, until January 11th, 1873, when the

youngest having arrived at full age, and that being the period for division among them, final payment and division to each was made, and a full settlement had between them and the executors, as such, and as trustees. The executors also held the stock allotted to James B. Colt for life, from the entry of the decree of the Superior Court establishing his right, paying to him its income until death, which took place October 28th, 1878, and thereafter, for final distribution to those entitled.

The complainants, who were the appellants, thereupon, on January 4th, 1879, then being citizens of Rhode Island, filed the present bill, in which, as finally amended, they set out the various provisions of the will and codicils of Samuel Colt, heretofore recited, and their claims thereunder as the children of Christopher Colt, their mother joining with them, as assignee and representative of the share of one deceased.

They set out that, up to the time of filing the bill, they had only received from the estate of the testator the following, to wit: One hundred shares each of stock legacies given to them under the will; four hundred and sixty shares of the residuary stock in respect of said legacies of one hundred shares each and the accumulations thereon; $2,500 gross legacies and the residuum, thereon; said five hundred shares of stock and dividends thereon given in trust for them in the codicil; which last had been paid over to them on January 11th, 1873, excepting such portions of the accumulations thereon as had been included in payments made by the trustees to some of them for purposes of education during their minority.

But they claimed that in addition they were entitled to receive the $574\frac{26}{31}$ shares of stock, still in the hands of the executors, in which James B. Colt had a life estate, and so far as any of said residuary stock and the accumulations thereon rightfully belonging to them, under a proper construction of the will, had been transferred to the executors personally or distributed to others, parties defendant to the bill, that the equities between them should be adjusted by the court so as to make good and restore to them the amount of stock rightfully belonging to them under the will and codicils, with the accumulations thereon; and this they claimed to be such proportion of the

entire original residuary stock as the five hundred shares given them in the codicil bears to the whole amount of other legacies given in said will and codicils, and such proportion of the $574\frac{26}{31}$ shares which the executors held, subject to the life estate of James B. Colt, deceased, and now for distribution, upon the basis of their right therein as owners of the 500 shares, and of the 100 shares each, given them in the will, making 900 shares in all.

Referring to the proceedings and decrees of the Superior Court and Supreme Court of Errors of Connecticut, the bill insisted that the complainants were not bound or barred thereby, for these reasons:

1. Because they were minors under the age of twenty-one years, not represented by a guardian *ad litem*, their general guardian, although made a party for that purpose, having no power or authority to represent them.

2. Because the question as to their rights in respect of the legacy of five hundred shares given to the executors in trust for them, could not be considered or passed upon, until the period of payment and division, when the youngest became of age.

3. Because the said Elizabeth Hart Colt, Richard D. Hubbard, and Richard W. H. Jarvis, trustees, under the will and codicil for them, were not summoned to appear in said proceedings in their capacity as said trustees, and entered no appearance, in that capacity, in their behalf, and employed no counsel to appear in their behalf as such trustees, and no issues were made up by said trustees, involving the rights and interests of the children in and to the residuary stock.

4. Because, if the appearance of said persons, as executors, is deemed to be equivalent to their appearance as trustees, they in fact opposed and did not maintain the claim of the complainants, as they should have done.

5. Because Mrs. Theodora G. Colt, on account of her inexperience and ignorance of such matters, and her belief that the executors were charged with the duty of defending the rights of the children, and were doing so, neglected to employ counsel on their behalf to protect their interests.

Argument for Appellants.

For similar reasons the complainants also claimed that the settlements with the executors and trustees, by them, and in the Probate Court, were not conclusive; and prayed for an account and a transfer to them of the stock which they were entitled to under the will and codicils, with the accumulations thereon, and for general relief.

The case was put at issue by answers and replications, and was heard upon pleadings and proofs; the final decree, brought here by this appeal, denying all relief to the complainants, *Colt* v. *Colt*, 19 Blatchford, 399, to whom, however, was awarded the same proportion of the $574\frac{26}{31}$ shares, now fallen into the residuum for ultimate distribution by the death of James B. Colt, to that given to them in the residuum distributed by the decree of the Superior Court of Connecticut, viz., to each of the complainants, $\frac{100}{4150}$ of the said $574\frac{26}{31}$ shares. The decree declared:

"That the said plaintiffs, LeBaron B. Colt, Samuel P. Colt, Theodora G. Colt, assignee, Frank E. DeWolf, and Isabella D. W. Colt DeWolf, are not entitled to any other or further interest in the estate of said Samuel Colt, as claimed in and by their said bill of complaint, than their above proportions of said $574\frac{26}{31}$ shares of said stock and dividends, under the said will of said Samuel Colt.

"That especially the said plaintiffs are not entitled to any residuary stock of said company, or dividends thereon, under said will by virtue of the gift of five hundred shares of stock, as prayed in said bill, or to any interest in the dividends made upon the said $574\frac{26}{31}$ shares, which accrued during the life of said James B. Colt."

Mr. L. C. Ashley and *Mr. Benjamin F. Thurston* discussed the construction of the will and codicils, claiming that these questions were open: but in view of the opinion of the court only their points and authorities upon the force of the judgment in the State court are given. They contended that the trustees were not parties, as such, in the Connecticut case. They were (1) executors; (2) legatees; (3) trustees for minors; and were made parties to that suit only in the first and second

capacities. This is shown by their answer, in which they denied the title of the *cestuis*, which as trustees they could not have done. Story Eq. Jur. § 1275; *Williams* v. *Gibbs*, 20 How. 535. The trustees, as such, were absent from that suit, and no binding adjudication could take place. Estoppels must be mutual. Freeman on Judgments, §§ 154, 159; 1 Green. Ev. § 524, 2d ed.; *Simpson* v. *Pearson*, 31 Ind. 1; *Bradford* v. *Bradford*, 5 Conn. 127; *Wood* v. *Davis*, 7 Cranch, 271. The capacities of executors and trustees are distinct. *Wheatly* v. *Badger*, 7 Penn. St. 459; 1 Perry on Trusts, § 281, 2d ed.; *Parsons* v. *Lyman*, 5 Blatchford, 170; *Judson* v. *Gibbons*, 5 Wend. 224, 228; *Sims* v. *Lively*, 14 B. Mon. 433; *Williams* v. *Cushing*, 34 Maine, 370; *Perkins* v. *Lewis*, 41 Ala. 649; *Hayes* v. *Hayes*, 48 N. H. 219. Where different rights meet in the same person, they are to be treated as if they were different persons. *Ross* v. *Barclay*, 18 Penn. St. 179; *Conklin* v. *Edgerton's Adm.*, 21 Wend. 430; *Dominick* v. *Michael*, 4 Sandf. Sup. Ct. 374; *Dunning* v. *Ocean Bank*, 61 N. Y. 497. When the same persons are appointed trustees and executors of a will, a revocation or declination of their appointment as executors is not necessarily a revocation or declination of their appointment as trustees. This shows that the capacities are distinct. 3 Williams on Executors, 6th Am. ed. 1894, note h.; *Graham* v. *Graham*, 16 Beav. 550; *Cartwright* v. *Shepheard*, 17 Beav. 301; *Williams* v. *Cushing*, above cited; *Dunning* v. *Ocean Bank*, above cited; *Sheet's Estate*, 52 Penn. St. 257; *Garner* v. *Dowling*, 11 Heisk. 48. The trustees did not appear in the Connecticut suit in the same right in which they appear here. A party acting in one right can neither be benefited nor injured by a judgment for or against him when acting in some other right. Freeman on Judgments, § 156 and cases cited; Bigelow on Estoppel, 65, 2d ed.; *Robinson's Case*, 3 Rep. part V. 33 b; *Plant* v. *McEwen*, 4 Conn. 544; *Hollister* v. *Lefevre*, 35 Conn. 456; Wells on Res Adjudicata and Stare Decisis, § 21; *Leggett* v. *Great Northern Railway*, 1 L. R. Q. B. Div. 599; *Stoops* v. *Wood*, 45 Cal. 439; *Lewis* v. *Smith*, 11 Barb. 152. Trustees of an express trust are the real parties in interest in a suit affecting the trust property. *Western Railroad*

Company v. *Nolan*, 48 N. Y. 513; *Trustees of M. E. Church* v. *Stewart*, 27 Barb. 553; *Goddard* v. *Prentice*, 17 Conn. 546. Trustees and the *cestuis que trust* are independent and proceedings against one have no effect against the other. Both are essential to a complete determination of any action in reference to the trust estate. Freeman on Judgments, § 173; *Johnson* v. *Rankin*, 2 Bibb, 184; *Paton* v. *Murray*, 6 Paige Ch. 474; *Phipps* v. *Tarpley*, 24 Miss. 597; *Platt* v. *Oliver*, 2 McLean, 267; *McRea* v. *Branch Bank of Alabama*, 19 How. 376; *Caldwell* v. *Taggart*, 4 Pet. 190; *Rooke* v. *Kensington*, 39 Eng. L. & E. 76; *In re Chertsey Market*, 6 Price, 261, 278; *Jones* v. *Jones*, 3 Atk. 110; Perry on Trusts, § 873; *Wood* v. *Williams*, 4 Mad. 186; *Cope* v. *Parry*, 2 Jac. & W. 538; *Cassidy* v. *McDaniel*, 8 B. Mon. 519; *Upham* v. *Brooks*, 2 Story, 623. The trustees cannot take any other position in replying to this bill than that above stated. If they were in any sense parties and actors as trustees in the Connecticut suit, their opposition to the trust title and the rights of the *cestuis* was a constructive fraud, and good ground for restraining them from using the judgment as a defence here. The jurisdiction of Courts of Chancery to set aside decrees obtained by fraud on an original bill filed for that purpose is unquestioned. Freeman on Judgments, § 486; *Wright* v. *Miller*, 1 Sand. Ch. 103; *Pearce* v. *Olney*, 20 Conn. 544; *Dobson* v. *Pearce*, 2 Kernan, 156. Trustees cannot submit to a judgment so as to bind the trust estate. Freeman on Judgments, § 545; *Mallory* v. *Clark*, 20 How. Pr. 418; *Marks* v. *Reynolds*, 12 Abb. Pr. O. S. 403; Bigelow on Fraud, 174; *Story* v. *Norwich & Worcester Railroad Company*, 24 Conn. 113. If the trustees were in any sense parties to the Connecticut suit, the trial was had under the influence of mistake, surprise, and accident, and the complainants should be relieved therefrom, and the case be decided on its merits.

Mr. Charles E. Perkins and *Mr. Alvan P. Hyde* for appellees.

Mr. Justice Matthews delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

Opinion of the Court.

The first inquiry upon this appeal manifestly is, as to the effect to be given in this suit to the decree of the Superior Court of Connecticut; for, if as set up and claimed by the appellees, it is an estoppel by record, the matter of the bill is *res judicata*, and we cannot open it.

And in considering the grounds on which it is sought to repel the bar of this decree, we must disregard at once all that do not attack the jurisdiction of the court over the cause or the parties. It cannot be assailed collaterally for mere error. It follows, therefore, that we cannot notice the allegation that appellants were minor defendants, for whom a general guardian only, and not a guardian *ad litem*, appeared to defend; for the infants, having been properly served, were before the court, and are bound by its action, even if erroneous; the failure to appoint a guardian *ad litem*, at most, is error merely, and does not defeat the jurisdiction.

What was the proper method of proceeding against defendants, whether by general guardian or guardian *ad litem*, is a question local to the law of the jurisdiction, and, in the proceeding under review, was passed on by the State court. It found in the decree that "the said minors were duly represented by their guardians," and that finding cannot be questioned collaterally, as it is not a question of jurisdiction. *Coit* v. *Haven*, 30 Conn. 190; *Christmas* v. *Russell*, 5 Wall. 290; *Thompson* v. *Whitman*, 18 Wall. 457.

It seems to be in accordance with the general practice in Connecticut for a general guardian to be made a party and to defend for his ward, and that, in such cases, the appointment and appearance of a guardian *ad litem* are not necessary. Reeves' Domestic Relations, 267; 1 Swift's System, 217; 1 Swift's Digest, 61; *Wilford* v. *Grant*, Kirby, 114.

We dismiss, also, without further remark, those grounds of objection which seem to proceed upon some supposed breach of duty or trust on the part of the executors and general guardian in not making proper defence. The bill does not charge any such breach of trust, or seek relief on that ground; and any suggestions of that character cannot affect the integrity and effect of the decree of the Superior Court.

Opinion of the Court.

The objection that no question could be passed upon in that case affecting the rights of the complainants to the interest claimed by them in the residuary stock, because the time for the actual enjoyment of the legacy was postponed by the will until the youngest attained the age of majority, is equally untenable and has not been insisted upon. The interest was vested, and the question of distribution in right, if not in possession, was before the court.

This leaves, as the single ground on which the estoppel is opposed, that the executors, who by the will were trustees of the 500 shares bequeathed to the complainants, were not parties to the cause, nor before the court in their capacity as trustees, but only as executors; that, consequently, the title and estate held by them as trustees were not represented by any one competent to do so, and that, consequently, the decree, not binding the legal title of the trust estate, cannot operate upon the beneficial interest of the *cestuis que trust.*

This argument proceeds upon the assumption that, by the terms of the will, the natural persons who were appointed as executors of the will were also, but with a distinct title, made trustees for the appellant of the legacies given for their benefit; that there was vested in these trustees a separate and independent legal title and estate in the subject of the legacies, as much so as if they had been different natural persons; that that title and estate could not be affected by any judicial proceedings to which they were not parties as such trustees; and that the beneficial interest of the appellants is equally protected, as it was for that very purpose that the legal estate was vested in others as their trustees; and that consequently the decree set up as an estoppel is not an adjudication between the same parties as are now before the court in the present suit.

The language of the original bequest of the five hundred shares of stock is: "I also give and bequeath to my executors and their successors in said office," . . . "in trust for the issue of said James B. Colt, lawfully begotten, the profits and dividends thereof to be applied to the education of his said issue, so far as the same may be necessary for that purpose, until the youngest surviving of said issue shall have

reached the age of twenty-one years, when said stock and all accumulations thereof, if any, shall go to said issue, in equal proportions, as an absolute estate." And the codicil, which revokes that bequest, gives the same property "to the other children of my said brother," . . . "to have and to hold to said other children of the said Christopher in equal proportions. This last bequest is in trust for said children, and the property hereby bequeathed is to be held by my said executors for said children in the same manner and subject to the same limitations as are provided in said original will in the bequest to the children of the said James B. Colt," &c.

We have no difficulty, notwithstanding the language of this bequest, giving the property, in the first instance, directly to the children, in holding, that it creates a trust for their benefit; but we have as little in holding, both as to it and the original bequest which it displaced, that the trust constituted was vested in the executors, in their official capacity as such, so that in case one or all of them had at any time ceased to be executors, he or they would, at the same time, have ceased to be trustees; and that in case a vacancy in the office of either of the executors had occurred and been filled, as provided in the will, by the appointment of a successor by the remaining executors, the trust would have devolved upon the new executors, *virtute officii*, so that the executors for the time being would always be the trustees, and so that whatever in their official capacity, as executors, they did in respect to the subject of this legacy, is to be imputed to them also in their character as trustees, and equally affected and bound the trust and its beneficiaries. The five hundred shares came into their hands as executors. It remained there for the general trusts of the administration of the estate until they were fully served. The possession of them, thereafter, the law imputed to them still as executors, but in trust for the special purposes, to which by the will they were appropriated. There was no change of possession; there was no change of the legal title; there was but a succession of uses, according to the terms of the will. They continued to hold this stock as executors, although in trust, until its actual payment to the legatees.

In the original bequest to the children of Christopher Colt in the will, of annuities for education and support during minority, and one hundred shares of stock payable on arriving at age, there are no words creating a trust; and yet the executors, in the mean time, were bound to them, in respect to these benefits and interests as executors, and yet in trust, quite as much as they were, in respect to the five hundred shares, by the words of that bequest.

As long as personal property is held by executors as part of the estate of the testator, for the payment of debts or legacies, or as a residuum to be distributed, they hold it by virtue of their office and are accountable for it as executors; that liability only ceases when it has been taken out of the estate of the testator and appropriated to and made the property of the *cestui que trust*. *Bond* v. *Graham*, 1 Hare, 482, 484; *Arthur* v. *Hughes*, 4 Beav. 506; *Penney* v. *Watts*, 2 Phillips ch. 149, 153; *Hall* v. *Cushing*, 9 Pick. 395; *Dorr* v. *Wainwright*, 13 Pick. 328; *Towne* v. *Ammidown*, 20 Pick. 535, 540; *Newcomb* v. *Williams* 9 Metc. (Mass.) 525; *Conkey* v. *Dickinson*, 13 Metc. (Mass.) 51; *Prior* v. *Talbot*, 10 Cush. 1; *Miller* v. *Congdon*, 14 Gray, 114; Adams on Equity, 251. "And it may be here observed," says Williams on Executors, 1796, pt. 4, bk. 2, ch. 2, sec. 2, "that when personal property is bequeathed to executors, as trustees, the circumstance of taking probate of the will is, in itself, an acceptance of the particular trusts. Therefore, where the will contains express directions what the executors are to do, an executor, who proves the will, must do all which he is directed to do as executor, and he cannot say, that though executor, he is not clothed with any of those trusts." Lewin on Trusts, 156.

But in whatsoever sense the executors were trustees for the appellants, what was the subject and scope of their trust, and of their duties as trustees? It embraced, it will be said, the 500 shares of stock bequeathed by the codicil. In respect to that their duties were defined. They were to hold it, collect the profits and dividends, and apply them to the education of the children while under age, and divide and pay it to them when they attained their majority. And in any litigation, in-

volving the title or possession of that specific stock, which had been segregated from the body of the estate and appropriated to the uses of the trust, it might well be that the executors, in their distinct capacity as such trustees, were necessary parties, bound to protect the trust estate and property, without whose presence any judicial determination would be nugatory. How far in such a case their presence as parties is formal for the mere purpose of binding the legal title, or how far it is essential so as to impose upon them the active duty of defence, must depend upon the nature and terms of the trust, and the circumstances of particular cases. Mr. Calvert, in his work on Parties, p. 283, says: "The general inference to be derived from those cases, in which strangers file bills adversely to property held in trust, is that the *cestuis que trust* are necessary parties, and ought to have an opportunity of appearing in defence of their rights. Indeed, that it is the main duty of trustees of these cases to take care that all the *cestuis que trust* are before the court; this duty performed, they may abstain from taking part in the argument, and leave the *cestuis que trust* to carry on the contest." *Holland* v. *Baker*, 3 Hare, 73.

But the trust supposed did not extend to whatever else under the will the beneficiaries chose to claim; it certainly did not extend to the residuary stock at that time undistributed. That was still in the hands of the executors, as such; and in respect to it, they were under no duty to the appellants, other than that which they owed to all other legatees claiming an interest in it. They could not with propriety take part with one against another, for of that they were trustees for all who by law were entitled to share in it. The most that could be required of them, would be that, upon every question involved in the distribution, opportunity should be given for each legatee to obtain the judgment of the court upon his claims. It would have been competent and quite proper for the executors, when James B. Colt preferred his claim to share in the residuary stock, to have filed a bill in equity to obtain a construction of the will and the advice of the court. In that, they would have been complainants, as executors. They would have made all other legatees and distributees, or those claiming to be entitled

as such, parties defendant. They could not make themselves defendants as trustees; and they could not file the bill as complainants in a double character and for different purposes, and represent inconsistent interests; although they could, as executors and complainants, set forth whatever case existed, with all its questions and claims, in which they might have inconsistent interests, officially and personally, bringing themselves before the court in every character in which they had an interest to assert or defend, and all others beneficially interested in the subject matter of the controversy. Their duty would have been, in such a case, fully discharged, if, as was done by James B. Colt, in the proceedings in question, the appellants had been summoned with their guardian, and, upon a fair statement of the case, their interests had been placed under the protection of the court, acting according to the forms of equity procedure. Nothing more could be required, as nothing more was needed for effectually securing the substantial justice of a full and fair hearing and determination for each party in his own right.

In the case as it was made they were present as executors of the will, having possession of the undistributed residuum of stock, asking the court for its judgment whether they should hold any part of it, and if any, how much as trustees for the appellants, all parties in interest being before the court and heard, or with the opportunity to be heard; in the case of the appellants, by guardian and counsel. The subject matter of the litigation was not any trust estate in property held by the executors for the appellants. It was the residuary stock, and the respective rights and interests of all the legatees in its distribution. The executors were not trustees for the appellants of their claim to share in this residuum in the sense of being bound to assert it adversely to all others, for whom equally they were trustees of the residuum, although that claim was founded on the interest of the appellants in the 500 shares which the executors did hold for them in trust. The very question was whether they had a corresponding interest in the residuum. If it should be judicially determined that they had, then, too, that interest would be held thereafter by the executors for them in trust as the other shares. But no such

trust could arise until their right was established. And the executors were not bound, as against other legatees, to assume the burden of establishing its existence; much less were they at liberty to assume its existence before it was established. Their duty, both as trustees and executors, was fully performed when they invoked the judgment of the court, in the proceeding as framed, in the presence of all the parties beneficially interested. They were present also as executors, and therefore as trustees, so far as the determination and judgment of the court might render that necessary or important; for if that judgment had sustained the claim of the appellants it would have been a decree that the executors should hold the share of the residuary stock awarded to them in trust for them according to the terms of the will. It was, however, the other way, and declared that as to the matter in dispute the executors were not their trustees. That judgment, pronounced and acted upon, in our opinion, is conclusive as an adjudication in the present litigation, and precludes inquiry into the merits of the original claims and questions which it was intended to adjust and end.

For that reason

The decree of the Circuit Court is affirmed.

MOBILE & MONTGOMERY RAILWAY COMPANY *v.* JUREY & Another.

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

Argued April 15th, 1884.—Decided May 5th, 1884.

Common Carrier—Contract—Court and Jury—Damages—Error—Insurance—Subrogation.

The fact that a railroad company gives a shipper a bill of lading when the goods are delivered does not preclude the shipper, in an action against the company as common carriers, from showing, when such is the fact, that the bill of lading does not express the terms of the transportation contract.

A court instructing a jury as to the construction of a writing offered in evi-

Argument for Plaintiff in Error.

dence as a contract, should take into consideration not only the language of the paper, but the subject matter of the contract and the surrounding circumstances.

When it plainly appears on the face of a record that the judgment below was right, it will not be reversed for a technical error which worked no injury to the plaintiff in error.

An insurer against loss by fire subrogated for the assured by reason of payment of the policy may, in a suit against a common carrier brought in the name of the assured for the value of the goods insured, recover the full amount of the loss or damage, without regard to the amount of the policy. There is nothing in § 2891 Alabama Code in conflict with this general rule.

The measure of damages in an action against a common carrier for loss of goods in transit is their value at the point of destination with legal interest.

When a common exception is taken to a part of a charge involving two propositions, one of which is sound and the other error, the exception is of no avail unless the erroneous part be specially brought to the attention of the court before the jury retires.

The plaintiffs below (defendants in error) shipped cotton over the defendant's railroad, taking a bill of lading which exempted the company from liability from destruction by fire. The cotton was insured for part of its value. It was entirely destroyed in transit. The policy being paid, this action was brought in the name of the shippers on the contract of shipment for the benefit of the insurer, but without averring the policy and its payment. The material facts appear fully in the opinion of the court. The contentions upon them were: 1. That the bill of lading expressed the contract, and could not be varied by parol evidence. 2. That the action being brought in the name of the shippers, without setting forth the policy, a recovery could not be had for the benefit of the insurer. 3. That in any event that recovery would be limited to the amount of the policy. 4. That the recovery in this form of action must be limited to the value of the goods less the amount received from the insurers. 5. There were also questions as to the pleadings and as to the rate of interest, which are stated in the opinion of the court.

Mr. Thomas G. Jones and *Mr. David Clopton* for plaintiff in error, submitted on their brief. To the effect of the bill of lading as a contract they cited: *The Lady Franklin*, 8 Wall.

325; *The Delaware*, 14 Wall. 579. That the common-law liability of a common carrier may be limited by contract: *York Company* v. *Central Railroad*, 3 Wall. 107; *Railroad Company* v. *Androscoggin Mills*, 22 Wall. 594; 2 Waite, Actions & Defences, 39–41. That the shipper is presumed to assent to the terms of a bill of lading: *Belger* v. *Dinsmore*, 51 N. Y. 166; *Kirkland* v. *Dinsmore*, 62 N. Y. 171; *Steers* v. *Liverpool, New York & Philadelphia Steamship Co.*, 57 N. Y. 1; *Grace* v. *Adams*, 100 Mass. 505. To the insufficiency of the declaration under the law and practice in Alabama: *Munter* v. *Rogers*, 50 Ala. 283; *Hill* v. *Nichols*, 50 Ala. 336; *Montgomery & West Point Railroad* v. *Edmunds*, 41 Ala. 667. That the recovery by the insurer must be limited to the amount paid on the policy: *Hale & Long* v. *Railroad Companies*, 13 Wall. 367; *Gails* v. *Hailman*, 11 Penn. St. 515; *Hart* v. *Western Railroad*, 13 Met. (Mass.) 99; *Connecticut Fire Insurance Co.* v. *Erie Railway*, 73 N. Y. 399; *Stodder* v. *Grant*, 28 Ala. 416; *Columbus Insurance Co.* v. *Peoria Bridge Association*, 6 McLean, 70; *Martin* v. *Ellerbe*, 70 Ala. 326; *Blow* v. *Maynard*, 2 Leigh, 29. And that the rate of interest computed in the judgment was excessive: *Boyce* v. *Edwards*, 4 Pet. 111; *Hunt's Executors* v. *Hall*, 37 Ala. 702; *Fanning* v. *Consequa*, 17 Johns. 510.

Mr. H. C. Semple (*Mr. D. S. Troy* and *Mr. H. C. Tompkins* were with him) argued for defendants in error.

Mr. Justice Woods delivered the opinion of the court.

The defendants in error, Jurey and Gillis, brought this action for the use of the Factors' & Traders' Insurance Company against the plaintiff in error, the Mobile & Montgomery Railway Company, to recover $12,000 for the failure of the latter to deliver certain cotton which had been placed in its possession as a common carrier. The complaint, which was drawn according to the form prescribed by the Code of Alabama, was as follows:

"The plaintiffs claim of the defendant the sum of twelve thousand dollars as damages for the failure to deliver certain goods, viz., one hundred and ninety-seven bales of cotton, weighing ninety-six thousand nine hundred and thirty-six

pounds, received by the defendant, as a common carrier, to be delivered to the plaintiffs at New Orleans, La., for a reward, which it failed to do."

The railroad company pleaded the following pleas:

"1. The defendant for answer to the complaint says it is not guilty of the matters alleged therein.

"2. For further answer to the complaint the defendant says that the plaintiffs, the said Jurey and Gillis, were paid the damages for the recovery of which this suit is brought, before the action was commenced."

The plaintiffs demurred to the second plea. The demurrer was sustained. The cause was then tried on an issue joined on the first plea, and resulted in a verdict and judgment for the plaintiffs for $10,344.25. The defendants have by this writ of error brought the judgment under review.

All the evidence in the case is set out in the bill of exceptions taken at the trial. It tended to show the following facts: The cotton mentioned in the complaint was delivered at Montgomery, Alabama, by the defendants in error, Jurey and Gillis, to the plaintiff in error, the railroad company, to be transported to New Orleans, and there delivered to the shippers. The cotton consisted of two hundred and sixty-four bales. The train upon which it was shipped was made up as follows: There were eight or ten box cars next to the engine; behind these were four flats loaded with the cotton, not covered by tarpaulins, and next to them, and last of the train, was a cab car in which the conductor rode; there were two men with buckets of water, besides the conductor and brakemen, to watch the cotton. While running down grade at about twenty miles an hour, and when the engine was not emitting any sparks, the signal to halt was given by the bell, and the cotton was discovered to be on fire. Every effort was made to stop the train as soon as possible, and when this was done, the hands on the train did what they could to save the cotton; but the fire was too hot, and the burning cars and cotton were consumed. The woods through which the train was running when the fire occurred, were on fire, and the woods were frequently burning along the defendant's road at that time of the year.

It further appeared that all the cotton loaded on the platform cars, consisting of one hundred and ninety-seven bales, was consumed, and of course never delivered to Jurey and Gillis.

The contract for the transportation of the cotton was made by Jurey with T. K. Scott, the agent of the railroad company in Montgomery. Jurey testified: "I arranged with Scott to take the two hundred and sixty bales to New Orleans for two dollars per bale. When the cotton was ready for shipment and hauling to the railroad depot, I again visited Mr. Scott, at the company's office in Montgomery, in order to ascertain when my risk ceased and that of the company began, and Scott answered that soon as the cotton was delivered on the railroad platform the cotton would be at the risk of the company." Jurey further stated: "I contracted with the railroad company, through its agent, Mr. Scott, to deliver the cotton in New Orleans for two dollars per bale, with the distinct understanding that it was at the railway company's risk as soon as delivered on its platform at Montgomery. After the cotton had been destroyed by fire I saw the bill of lading for the first time, and noticed that risk by fire was excepted. I immediately went to Mr. Scott and called his attention to it, and that such was not our agreement. The bill of lading was obtained by Mr. C. Hall, the broker in the premises. I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions." He further stated as follows: "We have been paid by the Factors' and Traders' Insurance Company of this city (New Orleans), by reason of its having been covered under our open policy, and this suit is for the use and benefit of that company as subrogee of our rights, because we reinsured the cotton in that company notwithstanding that defendant had guaranteed its delivery."

Scott testified that, while the cotton was being delivered on the railroad platform at Montgomery, and before the signing of the bill of lading, Jurey asked him if the railroad company would be responsible in the event the cotton was burned on the platform or in the cars, and he replied it would be in either event.

Crenshaw Hall testified that he was a cotton broker in

Montgomery, and acted for Jurey in delivering the cotton at the railroad company's depot; that he made no agreement and had no understanding with the railroad company in regard to the rate of freight, but simply sent the cotton to the depot by order of Jurey; Jurey told him that he himself would make the contract with the railroad company, as he thought he could get better rates. When the cotton was all delivered at the depot, witness received a bill of lading therefor. When the bill was delivered to him, Jurey, according to his recollection, was in the country, ten miles from Montgomery, and did not return until news had been received of the burning of the cotton. The bill of lading was signed in the handwriting of M. H. Sayer, a freight clerk at the depot of the railroad company in Montgomery. It was as follows:

"Mobile and Montgomery Railway Company.

"Received from C. Hall two hundred and sixty-four (264) bales cotton —— of which are in bad order, marked as stated below, and consigned to Jurey and Gillis, to be transported and delivered to same, New Orleans, at the rate of ——. And, in consideration of above rate, it is agreed upon and distinctly understood that the shipper releases the Mobile & Montgomery Railway Co. and connections from all liabilities for any loss or damage that may occur from the bursting of ropes and bagging, old damage, wet, or from fire while upon their roads."

Then followed a statement of the number of bales of cotton, and the marks. At the foot of the bill were the words and figures: "Frt. $2.00 bale."

The court, of its own motion, among other instructions, gave the jury the following:

"That the ground taken in argument by counsel for the railroad company was not the law, to wit: If Jurey & Gillis, before the commencement of the suit, had been paid by the Factors' & Traders' Insurance Company, as insurers, paying the loss it had insured against, and if Jurey & Gillis had no interest in the recovery, then the insurance company was the real plaintiff, and the burden of proof was on it to show the jury, by satisfactory

evidence, how much it had so paid; and that if it failed to do so or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered."

The court further charged the jury of its own motion, that if the plaintiffs were entitled to recover, the measure of the damages would be the value of the cotton at New Orleans, where it was to have been delivered, together with interest on said sum so ascertained, at the rate of eight per cent. per annum, from the time when the cotton ought to have been delivered.

The court, at the instance of the plaintiff's counsel, gave the following instruction: "That the paper read in evidence by the defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier."

The defendant asked the court to give the jury the following instructions:

"2. If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' and Traders' Insurance Company, for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment of the insurance money by the insurance company to Jurey & Gillis, the insurance company was subrogated to the rights of Jurey & Gillis, and can maintain a suit in the name of Jurey & Gillis for their use to recover the amount paid by them to Jurey & Gillis; but upon these facts the plaintiffs cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant.

"4. If the jury find from the evidence that Jurey & Gillis were paid by the Factors' and Traders' Insurance Company (for whose use this suit is brought) before this suit was brought, for the damages sustained by Jurey & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action and under the complaint in this case."

The court refused to give either of these instructions.

The first assignment of error argued by the counsel for plaintiffs in error relates to the admission in evidence of the testimony of Jurey and Scott, in respect to the terms of the

contract by which the railroad company undertook to transport the cotton of the defendants in error to New Orleans. The contention is, that the bill of lading was the contract, and being in writing, no parol evidence could be received to vary its stipulations. Before this rule can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract between the parties? No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing, in either case it is equally binding. *American Transportation Company* v. *Moore*, 5 Mich. 368; *Shelton* v. *Merchants' Dispatch Company*, 59 N. Y. 258; *Roberts* v. *Riley*, 15 La. Ann. 103. The defendants in error insisted that the contract between them and the railroad company was by parol, that it was made between Jurey for the defendants in error, and by Scott for the railroad company, and denied that the bill of lading was the contract, and alleged that it had never been delivered to the defendants in error, but only to Hall, who was not authorized to make a contract for them. It is plain, upon this statement of the controversy, that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding as detailed by the witnesses or the bill of lading expressed the agreement of the parties. The evidence that the contract was by parol, and was not the contract expressed in the bill of lading, came from Jurey, one of the defendants in error, and from Scott, the agent of the plaintiff in error, between whom it was made, and was not contradicted. The contention that this evidence should have been excluded, is certainly not based on any solid ground. There is nothing in this assignment of error for which the judgment should be reversed.

The next contention of the plaintiffs in error is that the court erred in instructing the jury "that the paper read in evidence by the defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier." It is insisted that the purport of the charge is that, independent and irrespective of the parol evidence and upon its face, the

contract contains no restriction. But such is evidently not the meaning of the instruction, because the words of the bill of lading clearly import an exception to the liability of a common carrier. What the court must have meant was that, in view of the circumstances under which the bill of lading was executed, as detailed by the uncontradicted evidence of the witnesses, taken in connection with the fact that the rate of freight which is stated to be the consideration for the exception, is left blank in the body of the bill of lading, it was not the intention of the parties to the contract that the railroad company should be exempted from any of the liabilities of a common carrier. The court was called upon to construe a paper writing. It must be conceded that the writing was open to construction. It was the right and duty of the court, in order to decide upon its meaning, to look not only to the language employed, but to the subject matter and surrounding circumstances. *Barreda* v. *Silsbee*, 21 How. 146, 161; *Nash* v. *Towne*, 5 Wall. 689; *Canal Company* v. *Hill*, 15 Wall. 94. When, therefore, the court was required to state authoritatively to the jury the meaning of the bill of lading, it cannot be presumed that it shut its eyes to the strong light thrown on it by the facts attending its execution, or that its instruction is to be interpreted as applying only to the words of the contract. It must be presumed that the court used all proper means to ascertain the true meaning of the bill of lading, and we think its interpretation, in view of all the circumstances of the case, was the right one.

The next ground upon which the plaintiffs in error ask a reversal of the judgment is the refusal of the court to give the charges numbered 2 and 4 as requested by the plaintiff in error. The argument in support of this assignment is as follows: Section 2891 of the Code of Alabama provides: "In all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party in the record." In no part of the body of the complaint is there any averment showing in what way and by what means the Factors' and Traders' Insurance Company acquired an interest in this suit or a right to bring

this action in the name of the owners of the cotton for their use, or that they have any interest in the suit, and as the evidence shows that the Factors' and Traders' Insurance Company acquired their right to bring a suit against a carrier by having paid their insurance liability to Jurey and Gillis, which was a secondary liability, the carrier being primarily liable, the form of complaint adopted in this case was not sufficient; that the complaint should state with certainty the facts showing the right of the insurance company to bring the action and the amount of the recovery to which they are entitled. The ground of their contention is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to prove what sum was so paid.

This is an attempt to reverse the judgment of the Circuit Court on a question of pleading. The record in the case, in our opinion, shows that the plaintiff in error made a contract for the transportation of the cotton of the plaintiffs, with no exception of the carriers' common-law liability; that it did not deliver the cotton, for the value of which this suit was brought; that the cotton was destroyed while in possession of the plaintiff in error, and was a total loss; and that the loss has been paid to the defendants in error by the insurance company. Under these circumstances, as it plainly appears on the face of the record that the judgment of the Circuit Court was right, it would not be reversed for an error which could not possibly have worked any injury to the plaintiff in error. *Brobst* v. *Brock*, 10 Wall. 519; *Decatur Bank* v. *St. Louis Bank*, 21 Wall. 294.

But we are of opinion that the ground upon which this assignment of error is based is not tenable, which is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to show how much it paid. Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the

carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned.

The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value. *Mason* v. *Sainsbury*, 3 Doug. 61; *Yates* v. *Whyte*, 4 Bing. New Cas. 272; *Clark* v. *Hundred of Blything*, 2 Bar. & Cress. 254; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385; *Atlantic Ins. Co.* v. *Storrow*, 5 Paige, 285.

This rule is so strictly applied, that when two ships, belonging to the same owner, came into collision with each other, and one of them sank and became a total loss, it was held that the insurers of the lost ship did not, upon their payment of a total loss, become entitled to make any claim for the loss against the insured as the owner of the ship in fault in the collision, for their right existed only through the owner of the ship insured, and not independently of him, and as he could not have sued himself, they could have no remedy against him. *Simpson* v. *Thompson*, 3 App. Cases, 279; see also *Globe Ins. Co.* v. *Sherlock*, 25 Ohio St. 50.

In *Gails* v. *Hailman*, 11 Penn. St. 515, it was held that "a shipper who has received from the insurer the part of the loss insured against, may sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid by the insurer in ease of the carrier;" and upon the trial of such a case, the court will restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction.

Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole *spes recuperandi*, and the right to the whole damages, though the

insured vessel was, in fact, worth a larger sum than the valuation named in the policy. *North of England Ins. Association* v. *Armstrong*, L. R. 5 Q. B. 244. See, also, *Clark* v. *Wilson*, 103 Mass. 219, 227.

The authorities above cited which relate to marine policies apply, as well as the other cases cited, to the question in hand, for in *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, it was held that "there is no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land."

We are of opinion, therefore, that the recovery in this case might properly have been, as it was, for the entire loss sustained by the nominal plaintiffs with regard to the amount of insurance paid. The only effect of the provision of section 2891, Code of Alabama, is to make the party for whose use the suit is brought *dominus litis*, and to give it the same rights as if it were the assignee of the cause of action. Its recovery is on the nominal plaintiff's cause of action. But as there is no formal assignment, and the suit is in the name of the nominal plaintiff, the party beneficially interested is only bound to establish the cause of action, without proof of his equitable right to the recovery.

It follows from these views that the complaint was sufficient for the case as presented by the evidence, and that the evidence tended to sustain the case stated in the complaint.

The next ground for reversal argued by the plaintiff in error is, that the Circuit Court erred in sustaining the demurrer to the second plea. Is has already been stated that, under the Code of Alabama, where a suit is brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party to the record. In view of this provision of the statute, in a suit brought by one person for the use of another, a plea of payment, which does not allege a payment to the beneficial plaintiff or a payment to the person holding the legal title, before the person holding the beneficial interest acquired his right, is clearly bad. The plea which was adjudged insufficient makes neither of these

averments, and was therefore bad. The object of the plea seems to have been to raise the question whether the payment by the insurer to the insured, for property lost while in the possession of a common carrier, discharged the liability of the common carrier. If the plea was based on any such theory, the views we have expressed show that it did not present a bar to the present action.

The last assignment of error which we shall notice, is based on the charge of the court, to the effect, that "the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at eight per cent. per annum from the time when the cotton ought to have been delivered." The error alleged is, that the rate of interest should have been placed at five per cent., which is the legal rate in Louisiana, where the contract was to be performed, and not at eight per cent., which was the legal rate in Alabama, where the contract was made.

Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions, first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. "The rule is, that the matter of exception shall be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error if there be any in his instructions to them." *Jacobson* v. *The State*, 55 Ala. 151.

"When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection." *South & North Alabama Railroad Company* v. *Jones*, 56 Ala. 507.

So in *Lincoln* v. *Claflin*, 7 Wall. 132, this court said: "It is

possible the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. . . . But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. . . . It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct." On these authorities we are of opinion that the ground of error under consideration was not well saved by the bill of exceptions.

Many other grounds of error have been assigned though not argued by counsel for the plaintiff in error. But what we have said covers most of them. The others are not well taken. We find no error in the record.

The judgment of the Circuit Court is affirmed.

GIBBS & STERRETT MANUFACTURING COMPANY v. BRUCKER.

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

Submitted April 25th, 1884.—Decided May 5th, 1884.

Contract—Lord's Day.

An agreement signed by the maker on Sunday, but not delivered to the other party on that day of the week, is no violation of a statute making it a penal offence to do business on the first day of the week.

A contract made on Sunday with an agent of the other party without his knowledge, the agent having no authority to bind his principal, and ratified by the principal on another day of the week and then exchanged, is not void as a violation of a statute making it penal to do business on Sunday.

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

Mr. William P. Lynde for plaintiff in error.

Mr. Edward S. Bragg for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

This was an action at law brought by the Gibbs & Sterrett Manufacturing Company, the plaintiff in error, against Peter Brucker, the defendant in error, and Pirmin Kœpfer, upon a cause of action which was stated in the complaint substantially as follows: On January 23d, 1878, the plaintiff, as party of the first part, made an agreement in writing with James Gibson, John Wirtz, and Peter Fox, as parties of the second part, by which the latter were appointed agents for the former to sell, within certain designated territory, during the season of 1877, the reapers and mowers manufactured by the plaintiff. In consideration of such appointment, the parties of the second part agreed to sell the reapers and mowers within the designated territory and to account for the proceeds of the sales to the plaintiff. The contract bore date January 11th, 1878. After the signatures of Gibson, Wirtz, and Fox, the following contract of guaranty was appended:

"For value received we hereby guarantee the fulfilment of the contract on the part of James Gibson, John Wirtz, and Peter Fox, and hereby join them in each and every obligation therein contained."

This guaranty also bore date January 11th, 1878, and was signed by Pirmin Kœpfer, Jacob Steffes and Peter Brucker. The contract and guaranty were negotiated by one Matteson, a special agent of the plaintiff for that purpose, but who had no power to close or conclude the same. After the execution and delivery of the contract and guaranty, and between that time and September 1st, 1878, the plaintiff delivered to Gibson, Wirtz, and Fox, reapers, mowers, &c., of the value of $7,379.10, and of that sum they failed to account for or pay over to the plaintiff $4,664.49, although demanded of them by the plaintiff, and on September 15th, 1878, the plaintiff gave notice thereof to Kœpfer and Brucker, Steffes having previously died, and demanded payment from them of the sum so due the plain-

tiff, which they refused to pay. The demand of the complaint was for judgment against Kœpfer and Brucker for $4,664.49, with interest from December 4th, 1879.

Kœpfer made no defence. Brucker filed an answer, in which he alleged, by way of defence, that he signed the guaranty, and, so far as he was connected therewith, delivered the same upon the day of the week commonly called Sunday. Upon the issue raised on this answer, the case was tried by the court, which made special findings of fact substantially as follows:

The plaintiff was a manufacturing corporation of the State of Pennsylvania, with its home office in that State, and having a branch or general agency in the city of Chicago, in the State of Illinois. During and after the month of January, 1878, Messrs. Hoag & Conklin, of Waterloo, in the State of Wisconsin, were the agents of the plaintiff for that State for the purpose of making sales of the manufactures of the plaintiff therein through sub-agents, to be appointed in the following manner: Hoag & Conklin were to canvass the State of Wisconsin for the purpose of selecting good and responsible men to become agents, and were to fill out in duplicate the plaintiff's printed form of contract, and cause the same to be signed by the agents selected, and by their sureties, and immediately thereafter to forward such duplicates to the plaintiff at its western branch, at Chicago, for its approval and signature. Hoag & Conklin had no power or authority to sign or close any such contract on behalf of the plaintiff.

From January 10th until January 25th, 1878, and thereafter, one M. V. Matteson was an employé and agent of Hoag & Conklin, for the purpose of carrying out the said contract on their part, and had and exercised no other or greater or different powers in that regard than Hoag & Conklin.

Hoag & Conklin were to be paid by the plaintiff, by certain commissions upon the amount of machinery sold, and Matteson was to be paid by Hoag & Conklin, by commissions upon the amount of machinery sold through agencies established by him.

On January 11th, 1878, which was Friday, the agency con-

tract referred to in the complaint was, at the instance of Matteson, signed by Gibson, Wirtz and Fox, and the guaranty contract on which the suit was brought was on the same day signed by Kœpfer. On Sunday, January 13th, the guaranty contract was signed by Steffes and Brucker, and on the same day delivered to Matteson.

At this time Wirtz, Gibson and Fox knew, but Brucker did not, that Matteson had no authority to sign or close the contract on behalf of the plaintiff, but that it must be sent to the plaintiff at Chicago to be accepted and signed by it. Brucker had no knowledge of the powers of Matteson, and made no inquiry concerning them.

On Monday, January 14th, Matteson sent duplicates of the contract and guaranty so signed by mail to the plaintiff at Chicago for acceptance and signature, and the same were accepted and signed by the plaintiff on Wednesday, January 23d, and on the same day one of the duplicates was returned by mail to Gibson, Wirtz and Fox, but no communication took place between the plaintiff and Brucker in reference thereto.

During the spring and summer of 1878, the plaintiff delivered to Wirtz, Gibson, and Fox, upon the contract, reapers and mowers, on which there remained due to plaintiff the sum of $3,336.25, with interest thereon from March 14th, 1881, for which defendant Brucker was liable, provided the guaranty contract was valid as against him.

Neither the plaintiff, nor any officer or agent thereof, excepting Matteson, ever had notice or knowledge, until after the signing of contracts in Chicago, and until after the delivery of all of the reapers and mowers to Gibson, Wirtz, and Fox, that the instrument of guaranty was signed and delivered by defendant Brucker on Sunday.

Upon these facts the judges of the court were divided in opinion upon the question whether the contract of guaranty and suretyship, upon which this suit was brought, was void and invalid under the statutes of Wisconsin, because the same was so signed and delivered by the defendant Brucker upon Sunday; and the presiding judge being of opinion that the contract was invalid, for the reason stated, judgment in favor of the defend-

ant was rendered in accordance with his opinion, and thereupon the plaintiff sued out this writ of error.

The law of Wisconsin referred to in the certificate of division of opinion is as follows:

"Any person who shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except only works of necessity and charity, or be present at any dancing or public diversion, show or entertainment, or take part in any sport, game or play, on the first day of the week, shall be punished by fine, not exceeding ten dollars; and such day shall be understood to include the time between the midnight preceding and the midnight following the said day, and no civil process shall be served or executed on said day." Revised Statutes of Wisconsin of 1878, section 4595.

The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. *Cranson* v. *Goss*, 107 Mass. 439; *Holman* v. *Johnson*, Cowp. 341.

If, therefore, the evidence shows a good cause of action without any participation of the plaintiff in an illegal transaction, he may recover, the law simply refusing its aid to either party in giving effect to an illegal transaction in which he has taken part. *Tuckerman* v. *Hinckley*, 9 Allen, 452; *Stackpole* v. *Symonds*, 3 Foster (23 N. H.) 229; *Bloxsome* v. *Williams*, 3 B. & C. 232; *Roys* v. *Johnson*, 7 Gray, 162.

Applying these principles, it is clear there was no obstacle to a recovery by the plaintiff in this case. The plaintiff itself took no part in any violation of the law of Wisconsin forbidding the doing of labor, business, or work on Sunday, unless it was bound by the acts and knowledge of Matteson in regard to the signing of the contract by Brucker, the defendant. But it was not so bound.

The complaint alleged that Matteson was the special agent of the plaintiff to negotiate the agreement set out therein, but

that he had no power to close or conclude the same. This averment is fully sustained by the findings, by which it appears that neither Hoag & Conklin nor Matteson had power to sign, accept, or close any such contract on behalf of the plaintiff. The knowledge, therefore, of Matteson, that the defendant Brucker signed the contract on Sunday, and his acceptance of the manual delivery of the contract on the same day, was not within his agency, and was not the act of, and was not binding on, the plaintiff. So far, therefore, as there was any violation of the law of Wisconsin forbidding the transaction of business on Sunday, it was the act of Brucker alone, in which the plaintiff took no part and of which it had no knowledge. The fact, therefore, that the contract was signed by the defendant and handed to Matteson on Sunday is, upon the authorities cited, no obstacle to a recovery.

There is another ground on which the case of the plaintiff may be placed.

In order to make good the defence set up in the answer, it is necessary to prove not only that the defendant signed his name to the contract on Sunday, but that he delivered it on Sunday. The mere signing of a contract on Sunday, which is not delivered on that day, does not avoid the contract. *Adams* v. *Gay*, 19 Vt. 358; *Goss* v. *Whitney*, 24 Vt. 187; *Saltmarsh* v. *Tuthill*, 13 Ala. 390, 406; *Flanagan* v. *Meyer*, 41 Ala. 132; *Commonwealth* v. *Kendig*, 2 Penn. St. 448; *Hill* v. *Dunham*, 7 Gray, 543; *Hall* v. *Tucker*, 37 Mich. 590; *Hilton* v. *Houghton*, 35 Me. 143.

The question, therefore, arises, was the contract which was signed by Brucker on Sunday delivered by him on Sunday? The delivery on Sunday relied on by defendant to avoid the contract, was the alleged delivery to Matteson. But we have seen that, according to the findings of the Circuit Court, Matteson was not the agent of the plaintiff for that purpose, and could not accept a delivery of the contract so as to bind the parties. In other words, the handing to him by the defendant of the contract was not a delivery in the legal sense, and was no more effectual to bind the plaintiff or the defendant than if the contract had been handed to an indifferent third person.

The fact was that the delivery to Matteson was virtually the delivery to a messenger to transmit the contract to the other party for its approval or disapproval. Until the contract was approved and executed by the plaintiff, the defendant had his *locus penitentiæ*, and could have withdrawn his assent to the contract. In a word, there was no contract until the agreement had been assented to by both parties, and this, according to the findings, was on Wednesday, January 23, when the contract was approved and signed by the plaintiff.

The fact that the defendant did not know, when he handed the contract to Matteson, what the powers of Matteson were, or that the contract would have to be sent to the plaintiff for its acceptance and signature, can have no influence on the result. Even if it was the purpose of the defendant to bind himself by a delivery of the contract to Matteson, such delivery, being to an unauthorized person, would not bind the plaintiff, and if the plaintiff was not bound neither was the defendant.

The defence, therefore, resolves itself into this, that the defendant, without the concurrence or knowledge of the plaintiff, signed on Sunday a paper writing, which bore date of a week day, and which, to become a contract between the parties, required the assent and signature of the plaintiff, which was given on a week day. This, according to the authorities, does not avoid the contract.

We have examined all the cases decided by the Supreme Court of Wisconsin which have been cited by counsel, and find nothing in them contrary to the views we have expressed. *Moore* v. *Kendall*, 2 Pin. 99; *Hill* v. *Sherwood*, 3 Wis. 343; *Melchoir* v. *McCarty*, 31 Wis. 252; *Knox* v. *Clifford*, 38 Wis. 651; *Troewert* v. *Decker*, 51 Wis. 46; *De Forthe* v. *The Wisconsin & Minnesota Railroad Company*, 52 Wis. 320. The case of *Knox* v. *Clifford*, *ubi supra*, sustains the conclusion we have reached, though on a different ground. In that case it was held that he who makes and puts in circulation a promissory note bearing date on a week day, is estopped as against an innocent holder from showing that it was executed on Sunday.

We base our decision, however, on the grounds we have indicated, first, because it does not appear that the plaintiff had any part in executing the contract in violation of the law of Wisconsin forbidding the transaction of business on Sunday; and, second, because the contract, though signed by the defendant on Sunday, was not delivered by him, and did not take effect on that day.

We are of opinion that the Circuit Court erred in rendering judgment for the defendant upon the findings of fact.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

PHILLIPS and Others *v.* DETROIT.

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

Argued April 22d, 1884.—Decided May 5th, 1884.

Patent.

The construction of the pavement described in the letters patent for "a new and useful improvement in street and other highway pavements" granted to Robert C. Phillips, December 5th, 1871, demanded only ordinary mechanical skill and judgment, and but a small degree of either, and required no invention.

The facts which make the case are stated in the opinion of the court.

Mr. George H. Lothrop, for appellants.

Mr. D. C. Holbrook, for appellee.

Mr. Justice Woods delivered the opinion of the court.

This was a suit in equity brought by Robert C. Phillips, Eugene Robinson, and Jesse H. Farwell, who were the exclusive licensees of Phillips for the State of Michigan, to restrain the defendant, the city of Detroit, from infringing letters patent granted to Phillips, December 5, 1871, for "a new and

useful improvement in street and other highway pavements." The specification and claim of the patent were as follows:

"My improvement consists mainly in the use of wood of any suitable kind in its natural or undress state; that is, in the form of round blocks or sections of small trees or the branches of trees from which the bark has been removed, cut as nearly at right angles to their length as may be, generally in lengths of about six inches, their diameters varying from three to twelve inches. These are placed upon end upon a bed or foundation composed of a stratum or layer of broken stone about eight inches deep, upon which a course of coarse sand or gravel of, say, six inches in depth is spread, the whole properly rolled or rammed so as to be solid and presenting an even or uniform surface for the blocks to rest upon. Upon this surface the blocks are placed upon end, as nearly together as may be, in such manner as to form an even or uniform surface. They are then rolled or rammed heavily so as to force them well down upon the bed. The spaces or openings between the blocks are then filled with good, hard, coarse gravel and sand and again rolled or rammed, after which the whole is covered with gravel or sand to a depth of about one inch, when the travel may be turned on. As stated above, these blocks may be composed of any suitable wood, but locust is preferred. White oak, white cedar (arbor vitæ), chestnut, yellow pine, and others afford good material. . . . I thus produce a pavement which can be laid as easily and with less expense than cobble-stone pavement, and which has been found in practice to be more durable than the most approved wooden pavement hitherto in use. I do not claim broadly the use of wooden blocks in the state in which they are cut from the tree or branches; nor yet do I claim the foundation of stone or gravel and the filling of the spaces between the blocks with sand or gravel separately considered; but what I do claim as my invention and desire to secure by letters patent is a wooden pavement composed of blocks of any desired wood, cut from the trunks or branches of trees or saplings of any desired length in their natural form, the bark only being removed, placed with their fibres vertical upon a bed of broken stone and gravel or sand, or either of them, the spaces between the blocks being filled with gravel or sand, the whole made compact by ramming, rolling, or other proper methods, as herein shown and described."

The answer of the defendant admitted that it had caused to be laid a pavement, such as is described in the patent of the complainants, and by way of defence alleged want of novelty in the improvement covered by the patent.

Upon final hearing the Circuit Court dismissed the bill on the ground that, in view of the state of the art, the patent did not describe any patentable invention. From this decree the complainants appealed.

We think the decree of the Circuit Court was right. The patent purports to be for a combination. The alleged combination consists in a pavement formed by blocks of wood, cut from the trunks or branches of trees, set with their fibres vertical upon a bed of broken stone, sand or gravel, the spaces between the blocks being filled with sand or gravel. The kind of wood of which the blocks are composed and their length and diameter, are immaterial. The placing of the blocks with their fibres vertical is shown to be an old method long antedating the patent, and is so obviously the only practicable mode of placing them that its suggestion in the patent cannot be called invention. The specification expressly disclaims, as a part of the patent, the use of wooden blocks in the state in which they are cut from the tree or its branches, the foundation of stone or gravel, and the filling of the spaces between the blocks with sand or gravel, separately considered. The only thing, therefore, left for the patent to cover is the bringing together of these three old and well known elements in the construction of a pavement—namely, the wooden blocks, the foundation, and the filling.

In passing upon the novelty of the alleged improvement covered by this patent, we are permitted to consider matters of common knowledge or things in common use. *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v. *Phillips*, 99 U. S. 592; *King* v. *Gallun*, 109 U. S. 99; *Ah Kow* v. *Nunan*, 5 Saw. 552. We therefore take into consideration the fact that the common and well known method of constructing pavements in use long before the date of the Phillips patent, was to prepare a foundation or bed of gravel or sand, place the blocks, boulders or bricks of which the pavement was to be made upon this bed, and fill the spaces

between them with sand or gravel, or both mixed. Familiar instances of pavements thus made are the cobble-stone pavements usually laid in streets, and the brick pavements usually laid upon sidewalks. This is the method pointed out in the specification of the Phillips patent. It is conceded in the disclaimer embodied in the specification that the use of wooden blocks like those described in the specification is not new, and the evidence shows that such blocks, set vertically, had long been employed in the construction of pavements. The improvement described in the appellant's patent consists, therefore, in simply taking a material well known and long used in the making of pavements, to wit, wooden blocks set vertically, and with them constructing a pavement in a method well known and long used. It is plain, therefore, that the improvement described in the patent was within the mental reach of any one skilled in the art to which the patent relates, and did not require invention to devise it, but only the use of ordinary judgment and mechanical skill. It involves merely the skill of the workman and not the genius of the inventor. The following cases illustrate the subject.

In *Hotchkiss* v. *Greenwood*, 11 How. 248, the substitution of a well known porcelain door-knob for a clay knob, in combination with a particular shank, was held to be no invention. So, where the patentee had taken a fire-pot from one stove, a flue from another, and a coal reservoir from the third, and had put them into a new stove, where each fulfilled the office it had fulfilled in its old situation and nothing more, the patent was held void for want of invention. *Hailes* v. *Van Wormer*, 20 Wall. 353.

In *Smith* v. *Nichols*, 21 Wall. 112, it was held that "a mere carrying forward a new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent."

The case of *Reckendorfer* v. *Faber*, 92 U. S. 347, is much in point. The patent was for an improvement which was described in the specification as follows: "I make a lead pencil

in the usual manner, reserving about one-fourth the length, in which I make a groove of suitable size, A, and insert in this groove a piece of prepared India rubber, secured to said pencil by being glued at one edge. The pencil is then finished in the usual manner, so that on cutting one end thereof you have the lead B, and on cutting the other end you expose a small piece of India rubber C ready for use." This device was held not to be patentable, and it was declared that "the law requires more than a change of form or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used to give patentability."

In *Atlantic Works* v. *Brady*, 107 U. S. 192, is found one of the most recent and emphatic declarations of this court upon the subject. It was there said, that the design of the patent laws was to reward those who make some substantial discovery or invention which adds to our knowledge or makes a step in advance in the useful arts, and that it was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. In *Howe* v. *Abbott*, 2 Story, 190, it was held that the application of a process to palm leaf to curl it for mattresses, the same process having been used to curl hair for mattresses, was not patentable. In the case of *Kay* v. *Marshall*, 8 Clark & Fin. 245, it was said to be no invention to use for spinning flax, which had been so macerated that its fibres were shortened, an arrangement of rollers borrowed from cotton spinning machinery. See also *Stimpson* v. *Woodman*, 10 Wall. 117; *Rubber Tip Pencil Company* v. *Howard*, 20 Wall. 498; *Slawson* v. *Grand Street Railroad Company*, 107 U. S. 649; *King* v. *Gallun*, 109 U. S. 99.

The cases cited are conclusive of this. We are of opinion that, taking into consideration the state of the art, no invention was required for the construction of the pavement described in the patent, and that it demanded only ordinary mechanical skill and judgment and but a small degree of either.

The decree of the Circuit Court is affirmed.

CARVER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued April 18th, 1884.—Decided May 5th, 1884.

Claims against the United States.

If a treasury agent for the collection of cotton, who was convicted by a military commission of defrauding the United States, and was sentenced to pay a fine, and paid the fine and was then released, consents after his release that the money may pass into the treasury, he cannot maintain an action in the Court of Claims to recover it back on an implied contract to refund it, either on the ground that the fine was illegally imposed, or that it was paid under duress.

The facts making the case fully appear in the opinion of the court. The case below is reported 16 C. Cls. 361.

Mr. S. S. Henkle for appellant.

Mr. Solicitor-General for appellee.

Mr. Justice Harlan delivered the opinion of the court.

The case made by the finding of facts in the court below is, substantially, as will be now stated.

On the 14th day of August, 1865, the President of the United States instructed Major-General Thomas, commanding the military division embracing the State of Alabama, to examine whether frauds were not being practised by treasury agents in the collection of cotton, and to cause those ascertained to be guilty, whether connected with the Treasury Department or with the military forces, to be dealt with in the most summary manner.

Previous to that time, about July 1st, 1865, the claimant Carver was a sub-agent for the collection of cotton in behalf of the government, and, with another, was so engaged in Choctaw County, in that State. His authority as such agent terminated August 5th, 1865. But, under certain regulations, then recently adopted, he became a bonded special agent of the Treasury Department, for the collection of cotton in the same county, and, in that capacity, entered upon his duties on

the 29th day of August, 1865. He was superseded on the 16th of September thereafter, but, while in office, he collected and appropriated, in connection with others, about 600 bales of cotton, none of which was ever turned over to, or received by, the United States.

On October 4th, 1865, the claimant having been previously arrested, a military commission, under an order of the general commanding the department of Alabama, was convened for his trial, and he was tried and found guilty of numerous frauds practised by him while holding and exercising the office of bonded special agent of the Treasury Department. The sentence imposed upon him was a fine of $90,000, "to be paid into the Treasury of the United States, and that he be confined at hard labor in such penitentiary as the commanding general may direct for the term of one year and until such fine of ninety thousand dollars ($90,000) shall be paid." The finding and sentence were approved by the department commander, and the provost-marshal-general was required to see that the sentence was carried into effect.

On November 7th, 1865, the claimant paid the fine, and so much of the sentence as imposed imprisonment was remitted by the department commander. Carver was, thereupon, released from arrest. Out of the amount recovered from the claimant, the government paid one-fourth to W. M. Moulton, as compensation for his giving information of the alleged frauds and preparing the case for trial. The balance was covered into the treasury.

After Carver's trial and conviction, and after the payment of the fine imposed upon him, he endeavored to make amends for the frauds of which he was found guilty. He proposed to the department commander to make a full statement of cotton transactions in that county, in which the government was concerned, and of which he had any knowledge or information, provided the $90,000 collected from him was allowed as a credit on his accounts; also to guarantee the further recovery of from $10,000 to $15,000, he receiving a fair interest, say one-fourth, for such recovery, which was to be had without suit or expense to the government. The Secretary of the

Treasury, in a communication to the department commander, signified his willingness "to consider the $90,000 collected from Carver in the form of a fine as a credit for that amount on any account the government may have against him growing out of his connection with cotton in Choctaw County, and to allow him for his services, expenses, &c., in the premises, 33⅓ per cent. of any further sums he may recover and pay over for the benefit of the national treasury on said account."

Subsequently, on May 17th, 1866, Carver submitted to the Secretary of the Treasury a communication, signed by himself, showing that the amount really due the government on cotton collected was $94,243.35, instead of $90,000, and asked the decision of that officer "whether said balance of $4,243.35 shall be collected, or whether, under all the circumstances, said balance shall be relinquished." On June 14th, 1866, Carver paid said balance of $4,243.35 to the provost marshal of Alabama, who, by order of the Secretary of the Treasury, paid to him the sum of $1,414.45.

The present action was commenced by Carver on December 15th, 1871. It proceeds upon these grounds: That the charges against him before the military commission were false and feigned; that the military commission by which he was tried was without jurisdiction in the premises, since he, not being in the military service, nor a contractor for military arms or supplies, was not subject to trial otherwise than in the civil courts; also, that its proceedings were wholly unauthorized, illegal, and void. For these reasons, he claimed that an action as upon implied promises and contracts had accrued to him against the United States for money had and received to his use and benefit; and for said sum of $90,000 he prayed judgment. His petition was dismissed.

The claim of appellant is entirely without merit. Under the findings of fact, which this court must accept as true, it is unnecessary to consider any question involving the authority and jurisdiction of the military commission before which the claimant was arraigned, and by means of which the government compelled him to pay into its treasury the sum of $90,000; for, if it were conceded that Carver was not subject to be

tried in that mode, and that the entire proceedings against him were illegal and void, it yet appears, that, after his release, he voluntarily conceded that there was justly due from him to the government a larger sum than he had paid; and, upon the basis of that concession, he secured a credit upon his accounts for the amount he had so paid, receiving, out of the balance, admitted to be due from and chargeable to him, the sum of $1,414.45. We can imagine no reason why it was not competent for him, without reference to the legality of the proceedings before the military commission, to come to an understanding with the authorized officers of the government, substantially upon the basis suggested by him and acceded to by them. Even if the original payment to the government was under duress, he had the right, subsequently, to agree, as he did, that what the government coerced him to pay was, in fact, fairly due upon a proper settlement of his accounts. And when, by way of supplement to, and in execution of, that agreement, he accepted, as compensation for his services, or as a gratuity, a portion of the balance justly due from him, he is estopped to raise any question as to the legality of the methods employed to collect from him what should have been paid without compelling the government to expend, for its collection, the large sum that was allowed Moulton for his services.

The judgment is affirmed.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* LATHROP, Administrator.

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

Argued April 3d, 1884.—Decided May 5th, 1884.

Court and Jury Trial—Evidence.

The rule reaffirmed, that a case should not be withdrawn from the jury unless the testimony be of such a conclusive character as to compel the court in the

Statement of Facts.

exercise of a sound legal discretion, to set aside a verdict in opposition to it.

Upon an issue, in a suit upon a life policy, as to the insanity of the insured at the time he took his own life, the opinion of a non-professional witness as to his mental condition, in connection with a statement of the facts and circumstances, within his personal knowledge, upon which that opinion is based, is competent evidence.

This was a writ of error from a judgment in favor of Helen Pitkin, the beneficiary in two policies issued by the Connecticut Mutual Life Insurance Company upon the life of her husband —one, on the 10th day of August, 1866, for the sum of $5,000; and the other, on the 24th day of September, 1873, for the sum of $423. The insured, George E. Pitkin, died on the 29th day of September, 1878. After the case came to this court the beneficiary in the policies died, and there was a revivor against her personal representative.

The defence was the same as to each policy. Briefly stated, it was this: That the policy expressly provides that in case the insured shall, after its execution, become so far intemperate as to impair his health, or induce delirium tremens, or should die by his own hand, it shall be void and of no effect; that, after its execution and delivery, he did become so far intemperate as to impair his health, and induce delirium tremens; also, that he died by his own hand, because with premeditation and deliberation, he shot himself through the head with a bullet discharged by himself from a pistol, by reason whereof he died. Further, that the affirmative answer by plaintiff, in her application for insurance, to the question, whether the insured was then and had always been of temperate habits, being false and untrue, the contract was annulled; because, by its terms, the policy was to become void if the statements and representations in the application—constituting the basis of the contract between the parties—were not in all respects true and correct.

The plaintiff, in her reply, put in issue all the material allegations of the answer, except that alleging the self-destruction of her husband; as to which she averred that, "at the time he committed said act of self-destruction, and with reference thereto," he "was not in possession of his mental faculties, and was not responsible for said act."

Opinion of the Court.

On the trial the plaintiff offered in evidence the opinions of non-professional witnesses who were not experts as to the condition of Pitkin's mind at the time when he killed himself, whether he was sane or insane. This evidence was admitted and excepted to. At the close of the plaintiff's evidence the defendant's counsel moved to instruct the jury to return a verdict for the defendant. This was refused and the refusal excepted to. A verdict was returned for plaintiff. The defendant sued out this writ of error.

Mr. Jeff Chandler, for plaintiff in error, cited to the point that the opinions of non-professional persons as to Pitkin's sanity were inadmissible, *Harrison* v. *Rowan*, 3 Wash. C. C. 580; *Commonwealth* v. *Wilson*, 1 Gray, 339; *Pool* v. *Richardson*, 3 Mass. 337; *Commonwealth* v. *Fairbanks*, 2 Allen, 511; *McCurry* v. *Hooper*, 12 Ala. 823; *Wyman* v. *Gould*, 47 Maine, 159; *O'Brien* v. *Bache*, 36 N. Y. 276, 282.

Mr. J. Brumbach (*Mr. Wallace Pratt* and *Mr. Gardiner Lathrop* were with him) for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

At the close of the evidence introduced for the plaintiff, the defendant, by counsel, moved the court to instruct the jury that upon the pleadings and evidence the plaintiff could not recover. That motion was denied, and the action of the court —to which the defendant at the time excepted—is assigned for error. This instruction, it is claimed, should have been given upon the ground that the evidence disclosed no symptom whatever of insanity upon the part of the insured. But that position cannot be sustained upon any proper view of the testimony. There certainly was evidence tending to show a material, if not radical, change for the worse in the mental condition of the insured immediately preceding his death. In the judgment of several who knew him intimately and had personal knowledge of such change, he was not himself at the time of the act of self-destruction. Whether his strange demeanor immediately before his death was the result of a deliberate, conscious pur-

pose to feign insanity, so as thereby the more readily to defraud the company, was a matter peculiarly within the province of the jury to determine. If the refusal of the court to sustain the motion would have been error, had there been an entire absence of proof to sustain the plaintiff's suit, it is sufficient to say that there was evidence of a substantial character tending to show that the insured was insane when he took his life. In *Insurance Company* v. *Rodel*, 95 U. S. 232, 238, where the question was made as to the duty of the court, on a motion by the defendant for a peremptory instruction based wholly on plaintiff's evidence, it was said, that "if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and, indeed, could not properly, take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon." The case clearly comes within the rule announced in *Phœnix Insurance Company* v. *Doster*, 106 U. S. 30, 32, that "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it."

When the evidence was concluded on both sides, the defendant submitted requests for instructions. Some of them were given and some refused, but it does not appear from the record which were given and which refused. As the exception which was taken related to the refused instructions, and since it does not appear which of them belonged to that class, none of the series asked by defendant can be noticed. We may, however, remark that the charge of the court, to which no exception was taken, embodied all of defendant's instructions that were applicable to the case and which could properly have been given.

This brings us to the consideration of the substantial questions presented by the assignments of error. They relate to

the admission, against the objections of the defendant, of certain evidence touching the condition of the mind of the insured at or about the time he destroyed his life.

Before the introduction of the particular testimony to which the objections related, there was, as we have already said, proof tending to show that Pitkin was not entirely sound in mind. Witnesses well acquainted with him remarked the unusually excited, wild expression of his face. A domestic in his family testified that "he looked very wild and frightened out of his eyes; he looked like some one that was crazy." Within a few hours before death he bade one witness, whose store he visited, good-bye, saying that he was "going to a country where there is no return." To another witness, on the same occasion, he appeared to be "out of his head; kind of mad, insane." At this stage of the case, one Strein was introduced as a witness for plaintiff. Pitkin was in his saloon about 11 o'clock of the day on which he took his life, and a few hours only before his death. So much of his examination (omitting the questions) as is necessary to a proper understanding of the objections made by plaintiff in error is here given:

"A. He asked for a glass of wine, and I gave it to him. He said he hadn't had a drink yet that day, or since the one he had last night from me—that was a glass of wine. He said, 'I may look queer this morning or drunk to other people, but I aint drunk.' He said, 'Some people may think me drunk, but I am not; I am not drunk in my body but I am in my mind.' He looked unusual to me. He had on his old clothes and his neck-tie was out of shape, his face was red, and his eyes staring at me, which made me think he was quite out of his usual way. His appearance and the look was quite different from his usual appearance prior to that time. He looked in his face quite red, and his eyes had quite another expression. He had them open wide, with a look that was wild, and he looked around the room awhile and walked up and down and seemed very restless. He would not stand at one place like he usually did, but walked up and down. I spoke a few words after that, but I did not notice him very much, for I was very busy."

The witness being asked to state the impression made upon

him by what he saw of Pitkin's condition, the defendant objected to the question as incompetent. But the objection was overruled, and an exception was taken. The witness answered:

"My impression was that he seemed to be quite out of his head that morning. I could not say the reason. I didn't know then anything about his disappointment; I found that out afterward."

Another witness, Mr. Ferry, an attorney-at-law, was introduced by the plaintiff. He saw Pitkin the morning of the day he killed himself. What occurred was thus stated by him:

"I came down Broadway, walking, and Mr. Pratt came down from his residence on Washington street, in a street car, and got out on the corner of 6th and Broadway, and we went there in front of the office. Mr. Pitkin was standing very near the door, and as we passed up the stairway going to our office we both said, 'Good morning' to him, and Mr. Pratt says, 'Pit., why ain't you at church?' Mr. Pitkin said, 'I am not going to church, I am going to hell;' and we immediately passed on up stairs and into the doorway, but as we started up stairs Pitkin stuck his head into the door and says, 'Do you want to send any word to him?' Mr. Pratt says, 'To whom?' 'To the devil; I am going to hell,' and he turned immediately and went out of the door."

Being asked how Pitkin looked during that conversation, he said that "he seemed very much agitated and nervous; his face was flushed; the pupil of his eye dilated and bright, and there was no expression in it." Against the objections of defendant he was permitted to testify that the impression left on his mind, from the conduct, actions, manner, expressions, and conversation of Pitkin, was that "he was crazy, and didn't know what he was doing."

Exception was also taken to the action of the court in permitting the witness Aldrich to answer a certain question. He saw the deceased a few moments before his death, and observed that "he looked strange," had "a very peculiar look," one that he had never seen before. It was "a wild look." Being asked what impression Pitkin made upon him by his manner and

conduct at the time, he answered—the defendant's objection to the evidence being overruled—"I thought he was out of his head."

It is contended, in behalf of plaintiff in error, that the impressions and opinions of these non-professional witnesses as to the mental condition of the insured, although accompanied by a statement of the grounds upon which they rested, were incompetent as evidence of the fact of insanity. This question was substantially presented in *Insurance Company* v. *Rodel*, *ubi supra*, which was an action upon a life policy containing a clause of forfeiture in case the insured died by his own hand. The issue was as to his sanity at the time of the act of self-destruction. Witnesses acquainted with him described his conduct and appearance at or about, and shortly before, his death. They testified as to how he looked and acted. One said that he "looked like he was insane;" another, that his impression was that the insured "was not in his right mind." In that case the court said, that "although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony, and expressed in an inartificial way the impressions which are usually made by insane persons upon people of ordinary understanding."

The general rule undoubtedly is, that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well-established exception in the case of witnesses having special knowledge or skill in the business, art, or science, the principles of which are involved in the issue to be tried. Thus, the opinions of medical men are admissible in evidence as to the sanity or insanity of a person at a particular time, because they are supposed to have become, by study and experience, familiar with the symptoms of mental disease, and, therefore qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon facts within their personal knowledge, as upon a hypothetical case disclosed by the testimony of

others. But are there no other exceptions to the general rule to which we have referred?

Counsel for the plaintiff in error contends that witnesses, who are not experts in medical science, may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every, case, civil and criminal, which involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common-sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation—matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. While the *mere* opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because, the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached. It will also depend, in part, upon the degree of the mental unsoundness of the person whose condition is the subject of inquiry; for, his derangement may be so total and palpable that but slight observation is necessary to enable persons of

ordinary understanding to form a reasonably accurate judgment as to his sanity or insanity; in other cases, the symptoms may be of such an occult character as to require the closest scrutiny and the highest skill to detect the existence of insanity.

The truth is, the statement of a non-professional witness as to the sanity or insanity, at a particular time, of an individual, whose appearance, manner, habits, and conduct came under his personal observation, is not the expression of mere opinion. In form, it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner, and motions of another person, of which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. But, in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact; not, indeed, a fact established by direct and positive proof, because in most, if not all cases, it is impossible to determine, with absolute certainty, the precise mental condition of another; yet, being founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge, upon such subjects. Insanity "is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character." It is, as has been well said, "a condition, which impresses itself as an aggregate on the observer," and the opinion of one, personally cognizant of the minute circumstances making up that aggregate, and which are detailed in connection with such opinion, is, in its essence, only fact "at short-hand." 1 *Wharton & Stillé's Med. Juris.*, § 257. This species of evidence should be admitted, not only because of its intrinsic value, when the result of observation by persons of intelligence, but from necessity. We say from necessity, because a jury or court, having had no opportunity for personal observation, would otherwise be deprived of the

knowledge which others possess; but, also, because, if the witness may be permitted to state—as, undoubtedly, he would be, where his opportunities of observation have been adequate—"that he has known the individual for many years; has repeatedly conversed with him and heard others converse with him; that the witness had noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that, in his conduct he was wild, irrational, extravagant, and crazy,—what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not so testify, but must give the supposed silly and incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and thus, without the least intimation of any opinion which he has formed of their character, where are such witnesses to be found? Can it be supposed, that those, not having a special interest in the subject, shall have so charged their memories with these matters, as distinct independent facts, as to be able to present them in their entirety and simplicity to the jury? Or, if such a witness be found, can he conceal from the jury the *impression* which has been made upon his mind; and when this is collected, can it be doubted, but that his judgment has been influenced by many, very many, circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware?" *Clary* v. *Clary*, 2 *Iredell's Law*, 78, 83. The jury, being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice.

These views are sustained by a very large number of adjudications in the courts of this country, some of which are cited

in the margin.* In several of those cited the whole subject was very fully considered in all its aspects. While the cases are, to some extent, in conflict, we are satisfied that the rule most consistent with sound reason, and sustained by authority, is that indicated in this opinion.

Counsel for the plaintiff in error calls our attention to the case of *Wright* v. *Tatham*, 5 Clark & Fin. 670, as an authority for the broad proposition that non-professional witnesses cannot give their opinions and impressions concerning the state of a person's mind, even in connection with the facts within their personal knowledge, upon which such opinion is based. On a question of the competency of a party to make a will, certain letters, written to that party by third persons, who had died before they were offered as evidence, and which letters were found many years after their date among the testator's papers, were held, in that case, not to be admissible without proof that he acted on them. Whether the opinions of non-experts, in connection with a statement, under oath, of the facts, are admissible upon an in-

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* *Clary* v. *Clary*, 2 Iredell's Law, 83; Dunham's Appeal, 27 Conn. 192; *Grant* v. *Thompson*, 4 Ib. 203; *Hardy* v. *Merrill*, 56 N. H. 227, substantially overruling *Boardman* v. *Woodman*, 47 N. H. 120; *State* v. *Pike*, 49 Id. 399, and *State* v. *Archer*, 54 N. H. 465; *Hathaway's Adm'r* v. *National Life Ins. Co.*, 48 Vt. 335; *Morse* v. *Crawford*, 17 Ib. 499; *Clark* v. *State*, 12 Ohio, 483; *Gibson* v. *Gibson*, 9 Yerg. 329; *Potts* v. *House*, 6 Geo. 324; Vanauken's Case, 2 Stock. Chy. 186; *Brooke* v. *Townsend*, 7 Gill, 10; *DeWitt* v. *Barly*, 17 N. Y. 340, explaining decision in same case in 5 Selden, 371; *Hewlett* v. *Wood*, 55 Id. 634; *Clapp* v. *Fullerton*, 34 Id. 190; *Rutherford* v. *Morris*, 77 Ill. 397; *Duffield* v. *Morris*, 2 Harrington, 375, 384; *Wilkinson* v. *Pearson*, 23 Penn. St. 117; *Pidcock* v. *Potter*, 68 Id. 342; *Doe* v. *Reagan*, 5 Blackf. 217; *Dove* v. *State*, 3 Heisk. 348; *Butler* v. St. Louis Life Ins. Co. 45 Iowa, 93; *People* v. *Sanford*, 43 Cal. 29; *State* v. *Klinger*, 46 Mo. 224; *Holcombe* v. *State*, 41 *Tex.* 125; *McClackey* v. *State*, 5 App. (Tex.) 320; *Norton* v. *Moore*, 3 Head. 480; *Powell* v. *State*, 25 Ala. 26, 28; 1 Bishop's Crim. Pro. § 536–40; 1 Wharton & Stillé's Med. Juris., § 257; Wharton's Law of Evidence, § 510 *et seq.*; 1 Redfield on Wills, Ch. 4, Part 2, in a recent edition of which (p. 145, n. 24), it is said, touching the decision in *Hardy* v. *Merrill*, *ubi supra*: "There will now remain scarcely any dissentients among the elder States; and those of recent origin, whose decisions have been based upon the authority of the earlier decisions of some of the older States, which have since abandoned the ground, may also be expected to change." See also *May* v. *Bradlee*, 127 Mass. 414; *Com.* v. *Sturtevant*, 117 Id. 122.

quiry as to the insanity of an individual, was not involved or determined in that case. On the contrary, the observations made by some of the judges, in illustration of their opinions upon the precise point in judgment, would indicate a concurrence in the general views we have expressed. After stating that the letters were offered as evidence of the opinions of the writers, Baron Alderson said: "The objection to their admissibility is that this opinion is not upon oath, nor is it possible for the opposite party to test by cross-examination the foundation on which it rests. The object of laying such testimony before the jury is to place the whole life and conduct of the testator, if possible, before them, so that they may judge of his capacity; for this purpose you call persons who have known him for years, who have seen him frequently, who have conversed with him or corresponded with him. After having thus ascertained their means of knowledge, the question is put generally as to their opinion of his capacity. I conceive this question really means to involve an inquiry as to the effect of all the acts which the witnesses have seen the testator do for a long series of years, and the manner in which he was, during that period, treated by those with whom he was living in familiar intercourse. This is not properly opinion, like that of experts; but rather a compendious mode of putting one instead of a multitude of questions to the witness under examination, as to the acts and conduct of the testator." 5 *Clark & Fin.* 720. And Baron Parke: "These letters are sufficiently proved to have been written and sent to the house of the deceased by persons now dead, and they indicate the opinion of the writers that the alleged testator was a rational person, and capable of doing acts of ordinary business. But it is perfectly clear that, in this case, an opinion not given upon oath in a judicial inquiry between parties is no evidence; for the question is, not what the capacity of the testator was reputed to be, but what it really was in point of fact; and, though the opinion of a witness upon oath as to that fact might be asked, it would be only a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanor of the deceased." *Ibid*, 735.

One other assignment of error remains to be considered. It relates to the admissions of the statements made by two witnesses of what passed between each other on the occasion of their seeing and conversing with the deceased, within an hour or two before he shot himself. They detailed what passed between them and the deceased, describing the latter's appearance and condition as indicating, in their judgment, that he was not in his right mind. As he left the presence of these witnesses, one of them remarked to the other that "Pitkin is not himself; George looks kind of crazy." The other, in response, expressed substantially, though in different language, his concurrence in that opinion. To the admission of this brief conversation between the witnesses on the occasion referred to, the defendant objected, but the objection was overruled, and an exception taken. We do not think there was in this any error to the prejudice of the substantial rights of the company. The witnesses when under oath expressed the same opinion as to the condition of the deceased. What passed between them at the time to which their testimony referred was a part of what occurred on the occasion when they saw the deceased, and may well have been repeated to the jury, as showing that their opinion as to the mental condition of the deceased was not then presently formed, but was one formed at the very moment they saw him, within a very few hours before his death.

Upon the whole case we perceive no error in the proceedings of which plaintiff in error may complain, and the judgment is

Affirmed.

ROBB *v.* CONNOLLY.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Submitted April 7th, 1884.—Decided May 5th, 1884.

Constitutional Law—Fugitives from Justice—Conflict of Law.

An agent, appointed by the State in which a fugitive from justice stands charged with crime, to receive such fugitive from the State by which he is surrendered, is not an officer of the United States within the meaning of former adjudications of this court.

Statement of Facts.

Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of *habeas corpus* in proceedings for the arrests of fugitives from justice, and their delivery to the authorities of the State in which they stand charged with crime.

Subject to the exclusive and paramount authority of the national government by its own judicial tribunals to determine whether persons held in custody by authority of the courts of the United States, or by commissioners of such courts, or by officers of the general government acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal, and this notwithstanding such illegality may arise from a violation of the Constitution and laws of the United States.

On the 20th day of November, 1883, one C. H. Bayley was arrested in the city of San Francisco, California, and delivered to W. L. Robb, who had been empowered by the Governor of the State of Oregon to take and receive him from the proper authorities of the State of California, and convey him to the former State, to be there dealt with according to law.

The arrest and delivery were in pursuance of the warrant of the Governor of California, as follows:

"STATE OF CALIFORNIA, *Executive Department.*

"The people of the State of California to any sheriff, constable, marshal, or policeman of this State, greeting:

"Whereas it has been represented to me by the Governor of the State of Oregon that C. H. Bayley stands charged with the crime of embezzlement, committed in the county of Clatsop, in said State, and that he has fled from the justice of that State, and has taken refuge in the State of California; and the said Governor of the State of Oregon having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said C. H. Bayley to be arrested and delivered to W. L. Robb, who is authorized to receive him into his custody and convey him back to said State of Oregon;

"And whereas the said representation and demand is accompanied by a certified copy of the information filed in the office of the justice of the peace of the precinct of Astoria, Clatsop county, State of Oregon, whereby the said C. H. Bayley stands charged with said crime, and with having fled from said State and taken

refuge in the State of California, which is certified by the Governor of the State of Oregon to be authentic :

"You are, therefore, required to arrest and secure the said C. H. Bayley, wherever he may be found within this State, and to deliver him into the custody of the said W. L. Robb, to be taken back to the State from which he fled, pursuant to the said requisition, he, the said W. L. Robb, defraying all costs and expenses incurred in the arrest and securing of said fugitive. You will make return to this department of the manner in which this warrant has been executed.

"In witness whereof I have hereunto set my hand and caused the great seal of the State to be affixed, this, the twentieth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"[SEAL.] "GEORE STONEMAN,

"*Governor of the State of California,*

"By A. E. SHATTUCK, *Deputy.*

"By the Governor :

"THOS. L. THOMPSON, *Secretary of State.*"

Bayley sued out a writ of *habeas corpus* from the judge of the Superior Court for the City and County of San Francisco, directed to Robb, and commanding him to have the body of the petitioner before said judge, together with the time and cause of his detention, &c. His application for the writ proceeded upon the ground that the imprisonment and detention were illegal, in that "no copy of an indictment found or affidavit made, before a magistrate, charging petitioner with any crime, was produced to the Governor of California," and consequently, that the warrant of arrest was issued without compliance with the act of Congress.

Robb made return that he held Bayley "under the authority of the United States," as evidence whereof he produced a copy of the warrant of the Governor of California, with his commission from the Governor of Oregon, authorizing him to take and receive the prisoner as a fugitive from justice. He refused "to produce said C. H. Bayley, on the ground that, under the laws of the United States, he ought not to produce said prisoner, because the honorable Superior Court has no

power or authority to proceed in the premises." For this refusal—the court finding that the body of the petitioner could be produced—Robb was adjudged guilty of contempt of court, and by order of the judge he was arrested by the sheriff and committed to jail until he "obeys said writ and produces the body of the said C. H. Bayley," or "until he be otherwise legally discharged." He thereupon sued out a writ of *habeas corpus* from the Supreme Court of California. His application proceeded on the ground that Bayley was in his custody "under and by virtue of the authority of the United States, and that said Superior Court had no jurisdiction to proceed in the premises," and "his [Robb's] imprisonment is contrary to the laws of the United States and in excess of the jurisdiction of said court." Upon hearing, the writ was dismissed, and Robb remanded to the custody of the sheriff.

"It is no part of our duty," said the Supreme Court of California, "to decide whether the authority under which Robb holds the prisoner Bayley is sufficient or not. Neither is it incumbent on us to decide whether Bayley is held under the authority of the United States, and if so, how far it is competent for the court below to inquire into the legality of the proceedings under which he is held. Whether an affidavit or indictment must accompany the requisition or not; whether the recitals in the governor's warrant of arrest are conclusive or simply *prima facie* evidence of the facts they recite, all these are matters for the consideration of the court issuing the writ and before whom the prisoner is to be brought. The only inquiry in this case relates to the power of the court below to compel *the production of the body* of the prisoner before it, so that the cause of his imprisonment and detention can be inquired into, and on this point we have no doubt. It was not the duty of the court issuing the writ, nor was it obliged to accept as true, the return of the party. It was within the jurisdiction of the court, at least, to inquire into the facts of the case and the alleged cause of detention, and to this end it was proper that the prisoner should be brought into the presence of the court, in obedience to the command of the writ, whereupon the prisoner would have had a right to

traverse the return. *People* v. *Donohue*, 84 N. Y. 438; *People* v. *Brady*, 56 Id. 182; *Norris* v. *Newton*, 5 McLean, 92; *State* v. *Schlemn*, 4 Harr. (Del.) 577. This the petitioner refused to do, and by such refusal was guilty of a contempt of court."

From the judgment dismissing the writ and remanding Robb to the custody of the sheriff, he prosecuted this writ of error.

Mr. H. G. Sieberst and *Mr. Alfred Clarke*, for plaintiff in error.

Mr. A. C. Searle and *Mr. E. C. Marshal*, Attorney-General of California, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

For the purpose of giving effect to the second section of article four of the Constitution of the United States, declaring that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on the demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime," Congress passed the act of February 12th, 1793, in relation to fugitives from justice. 1 Stat. 302. The provisions of its first and second sections have been re-enacted in sections 5278 and 5279 of the Revised Statutes, which are as follows:

"Sec. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugi-

tive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appear, within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

"SEC. 5279. Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year."

The penal code of California, in conformity with the constitution of that State, provides, in reference to the Superior Court of the City and County of San Francisco, that "said court and their judges, or any of them, shall have power to issue writs of *mandamus*, *certiorari*, *prohibition*, *quo warranto*, and *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties."

The authority and duty of the judge of that court to issue a writ of *habeas corpus* upon Bayley's application is not disputed in argument. But the contention of the plaintiff in error is, that in receiving and holding Bayley for the purpose of transporting him to Oregon he was, and is, acting under the authority and executing the power of the United States; and, therefore, that neither the Superior Court of San Francisco, nor one of its judges, could legally compel him to produce the prisoner, or commit him, as for contempt, for refusing to do so. If that court was without jurisdiction, by reason of the paramount authority of the Constitution and laws of the United States, to compel the plaintiff in error, in response to the writ of *habeas corpus*, to produce the prisoner, then his committal for contempt was the denial of a right, privilege, and immunity secured by the supreme law of the land. The claim by the plaintiff in error that there was such a denial constitutes the foundation of our jurisdiction.

It is contended that the principles announced in *Ableman* v. *Booth*, and *United States* v. *Booth*, 21 How. 506, and in *Tarble's*

Case, 13 Wall., 397, sustain the refusal of the plaintiff in error to produce the prisoner. The soundness of this position will be the subject of our first inquiry.

In *Ableman* v. *Booth*, the general question was as to the authority of a justice of the Supreme Court of Wisconsin, upon a writ of *habeas corpus*, to compel the marshal of the United States to produce the body of one, committed to his custody by an order of a commissioner of a circuit court of the United States, for failing to give bail for his appearance in the district court of the United States for that State, to answer a charge of having violated the provisions of the fugitive slave act of September 18th, 1850. In other words, a judge of the supreme court of the State claimed and exercised the right to supervise and annul the proceedings of that commissioner, and to discharge a prisoner committed by him for an offence against the laws of the general government. In *United States* v. *Booth*, the question was as to the authority of a justice of the supreme court of the same State, upon a writ of *habeas corpus*, to discharge one in custody, under a judgment of the district court of the United States, in which he had been indicted for an offence against the laws of the United States, and by which he had been sentenced to be imprisoned for one month, to pay a fine of $1,000 and costs of prosecution, and to remain in custody until the sentence was complied with. The authority claimed by the justice who issued the writ and discharged the prisoner was affirmed by the supreme court of the State, and hence, as was said, the State court claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and, upon a summary and collateral proceeding, by *habeas corpus*, set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the district court. 21 How. 513, 514.

It was held that no such paramount power existed in any State, or her tribunals, since its existence was inconsistent with the supremacy of the general government, as defined and limited by the Constitution of the United States and the laws made in pursuance thereof, and could not be recognized with-

out bringing within the control of the States the entire criminal code of the United States, including all offences, from the highest to the lowest, involving imprisonment as a part of the punishment inflicted. While the sovereignty of the State within its territorial limits to a certain extent was conceded, that sovereignty, the court adjudged, was so limited and restricted by the supreme law of the land, that the sphere of action appropriated to the United States was as entirely beyond the reach of the judicial process issued by a State judge or a State court, as the proceedings in one of the States were beyond the reach of the process of the judicial tribunals of another State.

"We do not question," said this court, "the authority of a State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclu-

sive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." 21 How., 523.

Before considering the scope and effect of that decision, it is proper to examine *Tarble's case*, 13 Wall. 397, which is, also, relied on to support the proposition that the judge of the State court was without jurisdiction to compel the plaintiff in error to produce the body of the alleged fugitive from justice. In that case the question was whether a judicial officer of a State, or a commissioner of a State court, had jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of soldiers in the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment had not been made in conformity with law. "It is evident,"

said the court, "if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial and conviction, for offences against the laws of the United States." 13 *Wall.*, 402. The grounds of the decision in *Ableman* v. *Booth* and *United States* v. *Booth* were fully examined, and the conclusion reached is indicated in the following extract from the opinion: "State judges and State courts, authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear, upon his application, that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the person, to give, by a proper return, information in this respect." *Ib.*, 409. Alluding to the fact that the language used in *Ableman* v. *Booth* and *United States* v. *Booth* had been construed by some as applying only to cases where a person is held in custody under the undisputed lawful authority of the United States, as distinguished from his imprisonment under mere claim and color of such authority, the court rejected any such limitation upon the

decisions in those cases, and said: "All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts and officers alone, to grant him release." *Ib.*, 411. It was adjudged that the State court commissioner was without jurisdiction to issue the writ for the discharge of the prisoner in that case, because it appeared, upon the application presented for the writ, that "the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government; and the same information was imparted to the commissioner by the return of the officer."

From this review of former decisions, it is clear that the question now presented has never been determined by this court. In *Ableman* v. *Booth*, the prisoner, as we have seen, was held in custody by an officer of the United States, under a warrant of commitment from a commissioner of a Circuit Court of the United States, for an offence against the laws of the general government. In *United States* v. *Booth*, he was in custody in pursuance of a judgment of a court of the United States founded upon an indictment, charging him with an offence against the laws of the United States. In *Tarble's case*, the person whose discharge was sought was held as an enlisted soldier of the army, by an officer of that army acting directly under the Constitution and laws of the United States.

No such questions are here presented, unless it be, as claimed, that the plaintiff in error is, within the principles of former adjudications, an officer of the United States, wielding the authority and executing the power of the nation. We are all of opinion that he was not such an officer, but was and is simply an agent of the State of Oregon, invested with authority

to receive, in her behalf, an alleged fugitive from the justice of that State. By the very terms of the statute under which the executive authority of Oregon demanded the arrest and surrender of the fugitive, he is described as the "agent of such authority." It is true that the executive authority of the State in which the fugitive has taken refuge, is under a duty imposed by the Constitution and laws of the United States, to cause his surrender upon proper demand by the executive authority of the State from which he has fled. It is equally true that the authority of the agent of the demanding State to bring the fugitive within its territorial limits, is expressly conferred by the statutes of the United States, and, therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States, within the meaning of former decisions. He is not appointed by the United States, and owes no duty to the national government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the State in which the fugitive stands charged with crime. He is, in every substantial sense, her agent, as well in receiving custody of the fugitive, as in transporting him to the State under whose commission he is acting. What he does, in execution of that authority, is to the end that the violation of the laws of his State may be punished. The fugitive is arrested and transported for an offence against her laws, not for an offence against the United States. The essential difference, therefore, between the cases heretofore determined and the present one is, that in the former, the judicial authorities of the State claimed and exercised the right, upon *habeas corpus*, to release persons held in custody in pursuance of the judgment of a court of the United States, or by order of a Circuit Court commissioner, or by officers of the United States in execution of their laws; while, in the present case, the person who sued out the writ was in custody of an agent of another State, charged with an offence against her laws.

Underlying the entire argument in behalf of the plaintiff in error is the idea that the judicial tribunals of the States are ex-

cluded altogether from the consideration and determination of questions involving an authority, or a right, privilege, or immunity, derived from the Constitution and laws of the United States. But this view is not sustained by the statutes defining and regulating the jurisdiction of the courts of the United States. In establishing those courts, Congress has taken care not to exclude the jurisdiction of the State courts from every case to which by the Constitution, the judicial power of the United States extends. In the Judiciary Act of 1789 it is declared that the Circuit Courts of the United States shall have original cognizance, "concurrent with the courts of the several States," of all suits of a civil nature, at common law or in equity, involving a certain amount, in which the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. By section 711 of the Revised Statutes of the United States, as amended by the act of February 18th, 1875, jurisdiction, exclusive of the courts of the several States, is vested in the courts of the United States of all crimes and offences cognizable under the authority of the United States; of all suits for penalties and forfeitures incurred under their laws; of all civil causes of admiralty and maritime jurisdiction; of seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all cases arising under the patent-right or copyright laws of the United States; of all matters and proceedings in bankruptcy; and of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizen of other States, or aliens; the jurisdiction of the States remaining unaffected in all other cases to which the judicial power of the United States may be extended. And by the act of March 3d, 1875, the original jurisdiction of the Circuit Courts of the United States is enlarged so as to embrace all suits of a civil nature, at common law or equity, involving a certain amount, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a contro-

versy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects. But it is expressly declared that in such cases their jurisdiction is "concurrent with the courts of the several States"—the jurisdiction of the latter courts being, of course, subject to the right to remove the suit into the proper court of the United States, at the time and in the mode prescribed, and to the appellate power of this court, as established and regulated by the Constitution and laws of the United States. So, that a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the Constitution or laws of the United States, or involving rights dependent upon such Constitution or laws. Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.

The recognition, therefore, of the authority of a State court, or of one of its judges, upon writ of *habeas corpus*, to pass upon the legality of the imprisonment, within the territory of that State, of a person held in custody—otherwise than under the judgment or orders of the judicial tribunals of the United States, or by the order of a commissioner of a Circuit Court, or by officers of the United States acting under their laws—

cannot be denied merely because the proceedings involve the determination of rights, privileges, or immunities derived from the nation, or require a construction of the Constitution and laws of the United States. Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of *habeas corpus* in proceedings for the arrest of fugitives from justice and their delivery to the authorities of the State in which they stand charged with crime. When a demand has been made, in accordance with the Constitution of the United States, by the State from which the fugitive has fled, upon the executive authority of the State in which he is found, that instrument, indeed, makes it the duty of the latter to cause his arrest and surrender to the executive authority of the demanding State, or to the agent of such authority. But if it should appear, upon the face of the warrant issued for the arrest of the fugitive, that such demand was not accompanied or supported by a copy, certified to be authentic, of any indictment found against the accused, or of any affidavit made before a magistrate of the demanding State, charging the commission by him of some crime in the latter State, could it be claimed that the arrest of the fugitive would be in pursuance of the acts of Congress, or that the agent of the demanding State had authority from the United States to receive and hold him to be transported to that State?

This question could not be answered in the affirmative, except upon the supposition, not to be indulged, that, so far as the Constitution and the legislation of Congress are concerned, the transporting of a person beyond the limits of the State in which he resides, or happens to be, to another State, depends entirely upon the arbitrary will of the executive authorities of the State demanding and of the State surrendering him. Whether the warrant of arrest, issued by the Governor of California for the arrest of Bayley, appeared, upon its face, to be authorized and required by the act of Congress; that is, whether, upon its face, a case was made behind which the State courts or officers could not go, consistently with the Constitution and laws of the United States, are questions upon which it is unnecessary to express an opinion. What we decide—and

the present case requires nothing more—is, that, so far as the Constitution and laws of the United States are concerned, it is competent for the courts of the State of California, or for any of her judges — having power, under her laws, to issue writs of *habeas corpus*, to determine, upon writ of *habeas corpus*, whether the warrant of arrest and the delivery of the fugitive to the agent of the State of Oregon, were in conformity with the statutes of the United States; if so, to remand him to the custody of the agent of Oregon. And, since the alleged fugitive was not, at the time the writ in question issued, in the custody of the United States, by any of their tribunals or officers, the court or judge issuing it did not violate any right, privilege, or immunity secured by the Constitution and laws of the United States in requiring the production of the body of the fugitive upon the hearing of the return to the writ, to the end that he might be discharged if, upon hearing, it was adjudged that his detention was unauthorized by the act of Congress providing for the arrest and surrender of fugitives from justice, or by the laws of the State in which he was found. The writ was without value or effect unless the body of the accused was produced. Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the general government, acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States.

It is proper to say, that we have not overlooked the recent elaborate opinion of the learned judge of the Circuit Court of the United States for the District of California in *In Re Robb*, 19 *Fed. Rep.*, 26. But we have not been able to reach the conclusion announced by him.

Syllabus.

For the reasons we have stated, and without considering other questions discussed by counsel, the judgment of the Supreme Court of California must be

Affirmed.

JOHNSON, Dative Testamentary Executor *v.* WATERS, Administrator.

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

Argued October 16th, 17th, 1883.—Decided May 5th, 1884.

Donation (inter vivos), (mortis causâ)—Equity—Jurisdiction—Parties—Pleading—Prescription.

In Louisiana a donation to take effect at the death of the donor, so far as it is gratuitous, is a donation *mortis causâ*, which can be made only by will and testament, or by an instrument clothed with the forms required for validity as such, and clearly showing by its provisions that it is a disposition by will.

In Louisiana a donation of land *inter vivos*, reserving the use to the donor until his death, is void if made without consideration :—if made with a partial consideration, the value of the object given exceeding by one-half or more that of the charges or services—*quære* whether the gift will not be of a mixed nature, one part sale and valid, and one part donation and invalid.

A Circuit Court of the United States has jurisdiction in equity of proceedings under a bill filed by a creditor of the estate of a deceased person to set aside for fraud a sale of the real estate of the deceased which was made and confirmed by order of a State court having competent jurisdiction, when the inquiry is not into irregularities of proceeding in the other court, but into actual fraud in obtaining the judgment or decree of sale and confirmation.

A creditor of the estate of a deceased person may maintain an independent suit in Equity to set aside for fraud a sale of real estate of the deceased made under order of Court, though a party to the proceedings, if he was no party to the fraud, and was ignorant of it until after confirmation or homologation of the sale, and no question about it was before the court which confirmed the sale and passed upon the executor's accounts.

In Louisiana the acknowledgment of a succession debt by an executor or administrator, and the ranking of it by the judge in the manner provided by the Code of Practice, suspend the prescription.

A complaint which sets forth as cause of action a subject which is prescribed, without setting forth the matter which takes it out of the prescription, may be amended so as to set that matter forth, if the answer admits its truth.

Opinion of the Court.

A defective description of the representative capacity of a defendant in the subpœna which summons him in is cured if he is properly described in the bill, and if he appears, even by the defective title, and answers generally without objection.

In a creditor's bill, brought on behalf of the plaintiff and such other creditors as may become parties, it is error in granting relief to confine it to the creditor complaining. The usual and correct practice is, by means of a reference to a master, to give to all valid creditors an opportunity to come in and have the benefit of the decree.

On the facts in this case the sale of the testator's real estate made by order of a Parish court in Louisiana, and confirmed by that court, is void for fraud as against *bonâ fide* creditors.

The facts are stated in the opinion of the court.

Mr. John A. Campbell for appellants.

Mr. Henry B. Kelly and *Mr. Julius Aroni* (*Mr. Henry L. Lazarus* and *Mr. John G. Simrall* were with them) for appellee.

Mr. Justice Bradley delivered the opinion of the court.

This suit was commenced by a creditor's bill filed by William Gay, a citizen of Kentucky, on behalf of himself and all other creditors of Oliver J. Morgan, late of Louisiana, deceased, against Oliver T. Morgan, his testamentary executor, John A. Buckner, Ferdinand M. Goodrich, Edward Sparrow, and J. West Montgomery, citizens of Louisiana.

The bill alleges that Oliver J. Morgan, at the time of his decease (which occurred in October, 1860), was indebted to the complainant and to divers other persons; that he owed the complainant $33,250, for which he had given him three drafts or bills of exchange; one for $13,000, dated January 7th, 1860, payable twelve months after date; one for $10,250, dated February 2d, 1860, payable 13th January, 1861; and one for $10,000, dated February 10th, 1860, payable 25th January, 1861; all of which were unpaid at maturity, and were duly protested; and that on the 23d day of December, 1870, the complainant obtained judgment in the Circuit Court of the United States for the District of Louisiana against the succession of the deceased, for the amount of the drafts and interest thereon, which judgment it is alleged has never been paid.

Opinion of the Court.

The main object of the bill is to set aside as fraudulent and void certain sales of the testator's lands made by the testamentary executor in January, 1869, to the defendants, Buckner, Montgomery and Goodrich, and to have the said lands resold in due course of administration for the purpose of paying the debts of the complainant and the other creditors, and for an account of assets and debts, an injunction and a receiver.

It is alleged in the bill, amongst other things, that, at the time of his decease, Oliver J. Morgan was the owner of a large estate, valued at nearly a million of dollars, consisting mostly of lands, abundantly sufficient, if honestly applied, to pay all his debts; but the bill charges, in substance, that the defendants have fraudulently combined to defeat the claims of the creditors by procuring the sale which is sought to be set aside. It is stated that this sale was made under an order of the Probate Court of the Parish of Carroll (where the lands are situated) on application of Buckner, as guardian of his daughter, and of the executor; the petition being signed by the other defendants as attorneys, and untruly representing that the lands were unproductive, and that it was necessary to sell them all to pay the debts of the estate. It is further stated that a simultaneous order was made, on the application of Oliver T. Morgan as executor of the will of Julia Morgan (adverse to and irreconcilable with his duties and trust as executor of Oliver J. Morgan), for the sale of three-fourths of the same lands as belonging to the estate of Julia Morgan; and that the sale was made under both orders. It is also stated that, before the sale, the confederates procured a false and fraudulent appraisement of the lands to be made at $2.75 per acre, reducing the whole value thereof to $43,205.25, instead of $947,153.80, at which they had been correctly appraised in the inventory. It is further stated that, at the sale, Buckner became the purchaser of 9,171 acres of the lands at $3 per acre; Montgomery, of 5,040 acres, and Goodrich, of 1,500 acres, at the same price; and it is charged that this price was grossly inadequate, and that the sale was a sham sale, intended as a means of securing the lands to the benefit of the family, and of cheating and de-

frauding the creditors. Various allegations are contained in the bill tending to establish the charge of fraud.

The defendants filed separate answers, denying generally the charges of fraud, and setting up various matters in explanation of the sale complained of, and in opposition to the equity of the bill.

They concurred in admitting the plaintiff's demand, and the recovery by him of a judgment thereon in the Circuit Court of the United States; but say that the judgment was allowed to be taken by an arrangement between the attorneys of plaintiff and defendant that the plaintiff, Gay, should acquiesce in the provision made for the creditors at the sale complained of, which provision was the purchase at said sale, by the defendant Montgomery, of 5,040 acres of land for the common benefit of the creditors; in making which arrangement, they allege that E. D. Farrar acted as attorney for Gay, and Edward Sparrow for the estate.

They also admitted the various appraisements made in 1860 and 1868; but deny that the latter was a false appraisement, or that it was procured by fraud; and referred to various circumstances in explanation of the great depreciation of the land at the latter period, such as the depressed and unsettled state of the country, the uncertainty of labor, and the high rate of taxation.

All the answers rely upon the regularity and validity of the mortuary proceedings in which the sale was made; and for the purpose of showing that as much was done for the creditors as could fairly have been demanded, they place great stress upon the alleged fact that three-fourths of all the lands sold belonged to the succession of Julia Morgan, the deceased daughter of Oliver J. Morgan, and wife of Oliver T. Morgan, and not to the succession of Oliver J. Morgan; and also upon another alleged fact, that John A. Buckner, as tutor of his daughter, had a mortgage lien, or privilege, on the whole property for more than $100,000, which (as they contended) was more than the whole property could possibly have produced at the time of the sale.

If these statements were true, they would go far to remove

the imputation of fraud in the proceedings complained of; for there would have been no motive for fraud if the just rights of the heirs precluded the possibility of a surplus for the general creditors. The matter will be better understood, however, by a short history of Oliver J. Morgan's estate.

His wife, Narcissa Deeson, had died in 1844, leaving two children by him, namely, Julia and Ann. Julia married, first, one Keene, by whom she had several children; and, secondly, Oliver T. Morgan (a nephew of Oliver J.), by whom she had a daughter. Ann married a Mr. Kellam, by whom she had a son, Oliver H. Kellam; and the latter had a son, Oliver H. (whom, for convenience, we will call Oliver H. Kellam, Junior), and died leaving a widow, Melinda M., and his infant son, Oliver H., Jr. Thus Oliver H. Kellam, Jr., became sole heir of his grandmother, Ann, and was himself represented by his mother, Melinda, as his natural tutrix. Melinda afterward married John A. Buckner, and by him had a daughter.

Oliver J. Morgan (sometimes called General Morgan), had a large landed estate, situated on the Mississippi River, in Carroll Parish, La., consisting of five plantations contiguous to each other, Albion and Wilton in the centre, Melbourne to the southeast, down the river, and Westland and Morgana to the west and northwest, amounting altogether to over 15,000 acres of land, much of it rich cotton land. He also had a large number of slaves, and considerable movable estate. The greater part of this property was community property; but some of it had been acquired after the wife's death. Only one-half of the community property belonged to Oliver J. Morgan; the other half belonging to his two daughters as heirs of their mother. Ann having died, her share was inherited by her grandson, Oliver H. Kellam, Jr.

In 1857 Oliver J. Morgan filed a petition in the District Court of Carroll Parish for a partition of the estate. An inventory was taken, answers were filed by Julia Morgan (who was then living), and by Melinda M. Kellam, as tutrix of her minor son, and evidence was taken as to the amount of improvements. The slaves were inventoried at $125,715.60, and were divided between the parties. The lands were inventoried, but the

appraisers reported that they could not be conveniently divided, and recommended that they should be sold. An order of sale was accordingly made, and the sale took place January 18th, 1858, and Oliver J. Morgan himself purchased all the lands for $362,201.80. The value of his improvements was appraised at $92,219, leaving a balance of $269,982.80, the one-half of which, $134,991.40, belonged to the heirs. One-half of this sum, or $67,495.70, was due to Julia Morgan, and the other half to the minor, Oliver H. Kellam, Jr. Although the sale was for cash, no money was paid. Julia Morgan and her husband, Oliver T. Morgan, executed a request that the money coming to her should be left in her father's hands; and Mrs. Kellam acquiesced in the same course with regard to the share of her infant son. Thus Oliver J. Morgan became absolute owner of the whole landed property, but was indebted to his daughter, Julia, and to his great-grandson, Oliver H. Kellam, Jr., each in the sum of $67,495.70. A certificate of the sale, signed by the sheriff and O. J. Morgan, was filed in the court, as part of the proceedings in the cause, stating the fact that the money was not paid, but remained in O. T. Morgan's hands.

By virtue of this sale a vendor's privilege arose in favor of the heirs; but it is declared by the Civil Code of Louisiana, art. 3238, that "the vendor of an immovable or slave only preserves his privilege on the object when he has caused to be duly recorded at the office for recording mortgages his act of sale." It appears from the recorder's certificate that this was never done in this case.

As Oliver J. Morgan had but one descendant by his daughter Ann, and several by his daughter Julia, he desired, as far as possible, to equalize their ultimate portions in the succession of his estate; but having two heirs, his daughter Julia and great-grandson Oliver H. Kellam, Jr., he had the power of disposing of only one-half of his estate, and the two heirs would be forced heirs for one-fourth each. (Civil Code, art. 1480.) He determined, therefore, that his great-grandson, Oliver H. Kellam, Jr., should have only the one-fourth which the law secured to him as forced heir, and that his daughter Julia should have the other three-fourths of his estate. To

insure this object, on the 9th of March, 1858, he executed an act of sale and donation to his daughter Julia, in which it was stated that for the purpose of paying her the sum of $67,495.70 which he owed her, and to give her three-fourths of his landed estate and to Oliver H. Kellam one-fourth, according to the estimates put upon the portions conveyed to each, he gave to her, by way of donation, certain described lands, composing the Wilton and Albion plantations, 3,047.86 acres, estimated at $50 per acre; and the Morgana and Westland plantations, estimated at from $45 to $10 per acre; the whole amounting to 11,477.79 acres, estimated at $304,254.22; and leaving the Melbourne plantation for his great-grandson, though there is no evidence that it was ever conveyed to him. The act of donation to Julia reserved the donor's usufruct for life, and declared that he was to retain possession of the property, with the revenues arising therefrom, till his death. And it was further declared that the act of donation, as [well as] delivery under it, was to take place and effect on the day of the donor's death. This act was signed by Oliver J. Morgan, Julia Morgan, and Julia's husband, Oliver T. Morgan, and was duly recorded in the recorder's office.

Such a donation, namely, to take effect at the death of the donor—so far at least as it is gratuitous—is a donation *mortis causa*. Article 1455 of the Civil Code of Louisiana defines a donation *mortis causa* to be an act to take effect when the donor shall no longer exist. And article 1563 declares that "no disposition *mortis causa* shall be made otherwise than by will and testament. All other form is abrogated." It is added that the name is of no importance, "provided that the act be clothed with the forms required for the validity of a testament, and the clauses it contains, or the manner in which it is made clearly establish that it is a disposition by will."

The donation in question had not the form of a will, and was never treated or proved as such; and by the last will of Oliver J. Morgan, executed but a few months before his death, he revoked all former wills made by him.

If the document in question could be regarded as a donation *inter vivos*, it would still be void for another reason. By it the

donor reserves the usufruct of the land to himself, during his life; but by article 1520 of the Civil Code, treating of donations *inter vivos*, it is declared that "the donor may dispose for the advantage of another of the enjoyment or usufruct of the immovable given, but cannot reserve it for himself." It has been decided by the Supreme Court of Louisiana, in a number of cases, that a donation of land or of a slave, reserving the use to the donor for life, is void. *Lagrange* v. *Barré et al.*, 11 Robinson, 302; *Dawson* v. *Holbert*, 4 La. Ann. 36; *Haggerty* v. *Corri*, 5 Ann. 433; *Davis* v. *Carroll*, 11 Ann. 705; *Carmouche* v. *Carmouche*, 12 Ann. 721.

It may be urged that there was a consideration for the act, and that this prevented it from being void. But that consideration, as shown by the account contained in the act itself, was only $67,495.70 due to Julia (which the act was to satisfy), and $9,530.72 to be paid by her to Oliver H. Kellam; amounting in all to $77,026.42; whilst (by the same account) the value of the land conveyed by the act was $304,254.22. So that the consideration, or charge, in pecuniary estimation, was only one-fourth of the value of the whole property conveyed.

The exact account of the value of the lands, and of the rights of the heirs in reference thereto, as made up by Gen. Morgan himself, and embodied in the act of sale and donation to Julia, is as follows:

"Whole amount of community lands	$362,201 80
"Lands acquired since the dissolution of the community	75,760 00
"Whole amount of land	$437,961 80
"Deduct amount due to heirs arising from sale of community lands on the 18th of January, '58, to each $67,495.70	134,991 40
"Balance divided by four	$302,970 40
"Portion coming to Oliver H. Kellam	$75,742 60
"Amount due him as above	67,495 60
"Entire interest of Oliver H. Kellam, in estimated value of lands	$143,238 20

"Three-fourths interest for Julia Morgan	$227,227 80
"Amount due as above	67,495 70
"Entire interest of Julia Morgan	$294,723 50
"Value of land conveyed in this deed to Julia Morgan	$304,254 22
"Deduct entire interest	294,723 50
"Excess to be accounted as before stipulated	$9,530 72."

This account, better than anything else, explains to the eye the motives and intent of Oliver J. Morgan in executing the act of sale and donation under consideration.

Now, the Civil Code, article 1510, divides donations *inter vivos* into three kinds—the purely gratuitous; the onerous, which is burthened with charges; and the remunerative, of which the object is to recompense services rendered. By article 1513 it is declared that "the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges, or of the services."

In the present case the value of the object given exceeded, not merely by one-half, but by nearly three times that of the charge or consideration. The act is subject, therefore, to the incidents and conditions of a donation, and it is void by the express letter of the code, unless it can be sustained in part by virtue of its being a sale in part and a donation for the residue.

Pothier, writing under the old law, says that where the charges of an onerous donation are of less value than the thing given, for example, 2,000 livres, when the thing given has the value of 3,000 livres, the act will be of a mixed nature, a sale for two-thirds and a donation for one-third. Contrat de Vente, No. 613, 614. Zachariae, professing to give the modern French law under the code, states it substantially as the former law is stated by Pothier, and this would probably be the construction of the Civil Code of Louisiana. By this rule, the act in question would have been a sale for one-quarter of the land contained in it, and a donation for three-quarters; or, to speak with accuracy, the proportion would be as $77,026.42

to $227,227.80, the whole amount conveyed by the act being $304,254.22. If the old rule applies under the specific provisions of the code, the act was a good conveyance for the above proportion, and void as to the residue. As this matter (of validity in part) was not discussed before us it may come up for consideration by the Circuit Court, if called upon to instruct the master as to the ulterior disposition of the proceeds of any sales that may be made of the lands in controversy. As the representatives of Julia Morgan allowed the lands to be sold in 1869, they cannot claim any portion of them now specifically as lands; but they may be entitled in equity to such proportion of the proceeds, as the act of sale and donation was a sale and not a donation. The whole value of the lands was shown by the account to be $437,961.80. Of this amount the sum of $77,026.42, the only real consideration of the act, is about $17\frac{6}{10}$ per cent. Should all the lands be sold, the heirs of Julia Morgan may be entitled to this proportion of the proceeds free and clear of all debts. We do not now decide this question. For the present purpose, it is enough to say that it is very clear that the act of donation did not convey to Julia Morgan three-fourths of the land as claimed, and did not, in fact, convey to her even one-fifth of the land, if it conveyed any portion thereof.

But prior to these transactions, and probably not long after his wife's death, Oliver J. Morgan had placed his daughter Julia on the Westland, and (perhaps) on the Morgana plantation, and his grandson Oliver H. Kellam on Melbourne; the latter being succeeded by his widow, Melinda M. Kellam, and her minor son. The two families continued to occupy these portions of the property, respectively, until the sale made in 1869, and Julia Morgan and her representatives also succeeded to the possession of Wilton and Albion plantations after her father's death.

Whether Oliver J. Morgan had doubts of the validity of the donation made to his daughter, or not, he subsequently made a will by which he substantially confirmed to her the benefit which he intended by it. This will is dated May 1st, 1860, and the testator, after directing the payment of

all his debts and giving certain legacies, gave and directed as follows:

"Fourth. I give and bequeath unto my beloved daughter, Julia Morgan, one-half of all the residue of my estate, it being my intention thereby to give to her all that portion of my estate that I have a right to dispose of over and above the portions going to my forced heirs; and in the event of my said daughter Julia dying before I do, then it is my will and I do hereby bequeath unto her children, Narcissa Keene, Alexander C. Keene, William B. Keene, Morgan Keene, and Julia H. Morgan, or such of them as may be living at my death, the said one-half of my entire estate as above, it being my will that my said daughter shall have, inclusive of her forced heirship, three-fourths of my entire estate; but in the event that should she die before I do, then it is my will and the express intention of this testament that those of her children who may be living at my death shall have the said three-fourths of my estate.

"Fifth. I do hereby appoint and ordain Oliver T. Morgan, my nephew and son-in-law, executor of this my last will and testament, without requiring him to give security as such."

Oliver J. Morgan died October 4th, 1860, and his will was proved in the same month, and an inventory of his estate was made November 7th, in which his lands were appraised at $947,153.80, his slaves at $196,961, and his movable property at $38,200: total, $1,182,314.80.

Julia Morgan died prior to 1868, leaving a will of which her husband, Oliver T. Morgan, was executor. Melinda M. Kellam married John A. Buckner, by whom she had a daughter, Mollie Buckner. Oliver H. Kellam, Jr., died without issue, leaving his mother as his sole heir; and she soon after died, leaving her infant child, Mollie Buckner, her sole heir, who thus came to be the sole heir and representative of Ann Kellam.

Notwithstanding the large estate left by Oliver J. Morgan, he died considerably in debt, and owed, amongst others, to William Gay, the complainant, the amount before stated. The

coming on of the Civil War produced a great change in the value of the property; the slaves were a total loss, and, no doubt, much other property was injured or destroyed; but through the management of agents, and in other ways, considerable income was derived from the lands prior to the sale which took place in 1869. The crop of 1860 was over 2,500 bales of cotton, which must have produced at least $90,000 soon after Gen. Morgan's death. The sum of $21,870.68 was recovered from the government for cotton collected under the superintendence of army officers in 1862. The defendant Buckner, being examined as a witness, states that "Montague had charge of and cultivated Melbourne and Wilton in the year 1863, and H. B. Tebbetts had charge of some of the places during the years 1864 and 1865. In 1866 H. B. Tebbetts rented Wilton and Melbourne. Don't think he took Albion. He was to pay ten dollars per acre rent for all the land that he cultivated. Tebbetts promised Matt. F. Johnson and witness to pay ten dollars per acre for such land as he should cultivate on Melbourne and Wilton in 1866. The most of the land was overflowed on Melbourne in 1866, and witness don't know how much land was cultivated. Wilton was not overflowed in 1866, to his knowledge. Witness states that Tebbetts paid him $3,000 for the rent of Melbourne in 1866. Don't know how much he paid Matt. F. Johnson for Wilton, but that the rent was coming to Matt. F. Johnson from Tebbetts, according to the contract. Matt. F. Johnson and Samuel L. Clambliss cultivated Wilton in 1867 together; that is to say, a portion of the place. Charles Atkins cultivated a small portion of Melbourne in 1868, as witness' agent and manager. Very little was made on the place in 1868. Witness don't remember who cultivated Wilton and Albion in 1868."

Henry Goodrich, a planter, nephew of Oliver J. Morgan, states that he had charge of Wilton and Albion in behalf of the heirs from December, 1868, till April, 1873, and that in 1869 these plantations produced 800 or 900 bales of cotton; and about 700 bales in each of the years 1870, 1871, and 1872; and that during these four years the price of cotton averaged

about $60 per bale net. Dr. Devine, another witness, states that he, with two others, hired about 100 acres of Wilton in 1869, and they received about 30 bales apiece, or nearly a bale to the acre, and sold it for 27 to 30 cents per pound, or about $120 per bale. So that the annual product of Wilton and Albion alone in these years was not less than from $40,000 to $50,000, and that of Melbourne, half that amount; and whilst the result in the previous years, from the close of the war to the beginning of 1869 was undoubtedly less, it must have amounted to a considerable sum. Adding together the amount of the movable estate, the proceeds of the crop of 1860, the sum received from government, and the income realized from the landed estate down to 1869, the aggregate was probably not less than $200,000; all of which was first applicable to the payment of the debts due from the estate. But as the outside debts were not paid, the heirs or executors must have received it. The executor's final account is in evidence, and does not show that this money ever came into his hands; and the proof is very strong that he allowed the heirs to appropriate it. The amount which they thus appropriated, as well as the rental value of the plantations occupied by them before General Morgan's death, was properly chargeable against any claims that they had against the estate. How much they did receive nowhere appears. No credit is given therefor.

As to Julia Morgan's interest, it is not claimed that the estate was in debt to her; but it is claimed, and was claimed at the time of the sale in 1869, that her succession was entitled to three-fourths of the property by virtue of the act of donation made to her in 1858, and that this portion of the property was not subject to the debts of General Morgan, except the debt due to Buckner as tutor of his minor child. It was conceded to be subject to this debt, perhaps for the purpose of giving greater force to the sale, as there was evidently an understanding between the parties, as we shall hereafter see. But we think we have conclusively shown that the entire interest of Julia Morgan in the property of her father was subject, at his death, to all his debts, inasmuch as it was derived to her partly by last will, and partly as forced heir. If any portion of her

interest was not thus subject, it could only have been a small fraction at most—less than one-fifth of the whole property.

As to the Kellam interest, John A. Buckner, as tutor of his infant daughter (who represented Oliver H. Kellam, Jr., through the mother of both), claimed the entire sum of $67,495.50 and interest thereon from 1858, amounting at the time of the sale (January, 1869) to more than $100,000. At 5 per cent. interest it amounted to $104,618.33.

As to this claim, it may be remarked that as Oliver J. Morgan intended to pay to his daughter Julia what was due to her from her mother's estate by giving to her the lands which she succeeded to and received, so he evidently intended to pay to his great-grandson, Oliver H. Kellam, what was due to him on the same account, although, so far as the record discloses, he executed no act of donation for that purpose. But the careful statement in the act of donation to Julia, of the account between Oliver J. Morgan and the two heirs of his wife, in relation to the landed estate shows that the lands conveyed to Julia exceeded by $9,530.72 the three-fourths intended for her, including the $67,495.70 due to her from her mother's estate; and the donor directed that she should pay this sum of $9,530.72 to Oliver H. Kellam. This payment, according to the account, together with the remaining lands not given to Julia, but appropriated to Kellam, completely paid and satisfied the debt of $67,495.72 due to him, and the one-fourth to which he was entitled as forced heir. So that it is quite clear that Oliver J. Morgan regarded the debt as paid, with the exception of the small sum of $9,530.72 to be paid by Julia Morgan.

In other words, by means of the sale of the lands in the partition suit, and the subsequent distribution of his estate, Oliver J. Morgan intended that his great-grandson should receive just what, if no sale had been made, the law would have given him, and no more; and that Julia Morgan should receive the remainder; so that in reality, and in equity, there was no such thing as a debt due from him to his great-grandson, any more than to his daughter Julia. Whatever debt there might have been was paid by the property which he

received—except the said sum of $9,530.72, which was made a charge upon Julia's share.

This, as it seems to us, was clearly the intention and understanding of Oliver J. Morgan. Why should he have been indebted to his heirs for the land or any part of it, when they received every foot of it at his death, and had enjoyed a great deal of it in his life-time; he being entitled by law to the use of it during his life? The idea of an existing debt seems to have been an after-thought.

This supposed debt was claimed and represented to be a mortgage on the estate, and as having priority over all other debts. But we have seen that this claim was untenable, since Article 3238 of the Civil Code declares that the vendor of an immovable or slave only preserves his privilege on the object, by recording the act of sale at the office for recording mortgages, which was never done in this case. John A. Buckner, in his petition for the sale of the property, in December, 1868, makes the following allegation on the subject, namely: "That your petitioner, Buckner, tutor, is creditor by judgment of the district court in said parish [Carroll], as appears by reference in the suit in said court styled ——— v. ———, No. ——, on the docket as ———." The only judgment to which reference could have been made (so far as appears in the record) was the judgment in the partition suit instituted by Oliver J. Morgan in 1857. The judgment for partition was made November 7th, 1857, and the judgment for selling the lands was made December 2d, 1857. The certificate of sale, showing the amount bid for the lands, and the sums due to the heirs of Narcissa Deeson, was filed in the court on the 19th day of January, 1858. If this certificate of sale could have been called a judgment, it might have been a judicial mortgage; but it would have had no effect as such until recorded in the office of mortgages for the parish. Civil Code, Articles 3290, 3297, 3314, 3318. The only exception to this rule is made in favor of the legal mortgages of minors and interdicted and absent persons, on the property of their tutors, curators, &c., and of the wife on the property of her husband for her dotal rights. Civil Code, Arts. 3298, 3333. In the present case, neither the judgment in the parti-

tion suit, nor the certificate of sale, was ever recorded in the mortgage office; and Oliver J. Morgan was not the tutor or curator of Oliver H. Kellam, Jr., who was under the tutorship of his mother, Melinda M. Kellam. The claim, therefore, that the debt due from Oliver J. Morgan and his succession, to Oliver H. Kellam, Jr. (if any such debt existed), was a first lien upon the lands of the succession, secured by mortgage, and entitled to be first paid, was entirely unfounded. Yet this pretended debt, and its pretended priority over all other claims against the estate, and the mortgage by which it was declared to be secured, were used throughout the whole of the proceedings instituted in 1868 for the sale of the land, as potent factors in getting up the idea and impression that it was useless for any other creditors to interfere or make opposition, inasmuch as this privileged debt was sufficient to absorb the entire property, and that if anything at all should be conceded to the general creditors, it would be a mere matter of grace and generosity on the part of Mr. Buckner.

We next come to the proceedings for selling the property, commenced in December, 1868, and consummated in March, 1869.

First comes the petition, and as it is important, we state it in full. It was presented to the parish judge December 9th, 1868, and is as follows:

"To the Honorable the Judge of the Parish Court in and for the Parish of Carroll, State of Louisiana.

"The petition of John A. Buckner, who applies as natural tutor of his minor child, Mollie Buckner, issue of his marriage with Matilda M. Mason, widow of Oliver H. Kellam, and of Washington Jackson, and Dudley and Nelson and Ann B. Wilkins, all of which petitioners appear as creditors of the succession of Oliver J. Morgan, deceased, represent:

"That your petitioners are creditors of said estate; that your petitioner Buckner, tutor, is creditor by judgment of the district court in said parish, as appears by reference in the suit in said court styled v. , No. , on the docket as ; that your petitioners Washington Jackson

and Ann B. Wilkins have claims which have been acknowledged and ranked according to law.

"Petitioners show that said estate of O. J. Morgan is under administration in the hands of Oliver T. Morgan, executor; that said estate is possessed of landed property situated in this parish, but which is not yielding any revenues, and that the only means for paying the debts of said estate is by a sale of the property thereof. Wherefore petitioners pray that said O. T. Morgan, executor, may be ordered to sell the property of said estate for the purpose of paying the debts thereof; that an order may be granted for the sale of the property of said succession, as mentioned in the inventory, and for general relief, &c.

"And the said Oliver T. Morgan, executor of the last will and testament of Oliver J. Morgan, dec'd, appears and intervenes in this proceeding and shows to your honorable court that said succession is indebted to the creditors aforesaid and various other creditors, and that as said estate is without any means or funds on hand in order to pay said debts, a sale of said property is necessary.

"Wherefore, petitioners and intervenor pray that an order may be granted for the sale of the lands of said estate according to law, and that inventory and appraisement of said lands may be made; that a commission may issue for that purpose to the recorder of the parish, and that a writ of sale may issue to said executor, authorizing him to make said sale, and for general relief in the premises.

"Sparrow & Montgomery,
"*Att'ys for Creditors.*
"Ferd. M. Goodrich,
"*Att'y for Executor.*"

The following order was thereupon made by the judge:

"The foregoing petition being considered, it is ordered, adjudged, and decreed that the prayer of the petition may be granted; that a commission to take an inventory be directed to the recorder of the parish; that the lands of said estate be sold in subdivisions in such manner as the said executor may direct, and in other respects according to law; and that such subdivisions be sold in block, and after making such sale the said execu-

tor shall file a tableaux of distribution, and that a commission issue to said executor, O. T. Morgan, to make such sale.

"Done and signed in chambers this the 9th day of December, A.D. 1868.

"C. A. De France, *Parish Judge.*"

Thereupon a commission was issued to the recorder of the parish, who appointed Michael Gingery and W. D. Davis appraisers, and the appraisers made an inventory as follows:

1. Certain specified lots, comprising the Melbourne plantation, 2,171 acres, at $2.75	$5,970 20
2. Certain lots, composing the Wilson and Albion plantations, 7,000 acres, at $2.75	19,250 00
3. Certain lots, composing Westland plantation, 5,040 acres, at $2.75	13,860 00
4. Certain lots, composing the Morgana plantation, 1,500 acres, at $2.75	4,125 00
Total, 15,711 acres, at $2.75	$43,205 25

This inventory was dated December, 1868.

Then followed a writ of sale, directed to the executor, Oliver T. Morgan, and dated December 18th, 1868, directing him to sell the said lots; terms, cash on the spot.

On the same day (Dec. 18th) the executor, according to his return, advertised the sale for the 19th of January, 1869; but before the day of sale arrived, the idea occurred to the parties, that Julia Morgan owned three-fourths of the property; and hence, on the 13th day of January, 1869, Oliver T. Morgan, as executor of the estate of Mrs. Julia Morgan, presented to the judge another petition, stating the fact of having presented the previous petition, and of the order of sale and advertisement, and then adding as follows:

"Your petitioner shows that said Julia Morgan claimed to be owner of three-fourths undivided interest in said land, although they are claimed in toto by the estate of said Oliver J. Morgan, and are offered for sale in order to pay his debts; that the debts due by him to the heirs of Oliver H. Kellam, who are also heirs of Mrs. Narcissa Morgan, deceased, late wife of said Oliver J.

Morgan, amounts to $137,000.00, being for one-fourth of the interest of said Mrs. Narcissa in the community existing between her and her said husband, which devolved to said heirs, and which community had been adjudicated to said Oliver J. Morgan at said sum; that said sum of money, so due by said Oliver J. Morgan, is secured by legal mortgage on all of said land; that in order that said property may be sold to the benefit of said estate, it is necessary that the interest of said Mrs. Julia Morgan may be sold; that her said interest is under the incumbrance of said mortgage, existing against said Oliver J. Morgan, for the amount so due to the heirs of Oliver H. Kellam; that for the purpose of paying the said sum the said heirs of Kellam, the interest of said Julia Morgan, deceased, should also be sold.

"Wherefore petitioners pray that an order for the sale of the interest of said Julia Morgan, deceased, in said land, may be made for the purpose of paying said debt, and that the proceeds of such sale may be paid by preference to the settlement thereof.

"That for this purpose, a writ of sale may issue to your petitioner, in his capacity of executor, to make such sale; that such sale take place on the premises, at Wilton plantation, in block, and for general relief, &c.

"FERD. M. GOODRICH,
"*Att'y for Executor.*"

And upon this petition the following order was granted:

"The foregoing petition being considered, it is ordered that the prayer of the petition be granted; that the undivided interest of said Mrs. Julia Morgan, deceased, in said land, be sold at public sale, in order to pay said debt; that said sale be made at the 'Wilton plantation' for cash, in block, and that for this purpose a writ do issue to said executor, and that he be authorized to make said sale.

"Carroll Parish, La., January 13th, 1869.

"C. A. DE FRANCE, *Parish Judge.*"

On the same day a writ of sale was issued in pursuance of this order.

The sale took place (as advertised) on the 19th day of January, 1869, and the lands were bid off as follows: The Melbourne plantation (2,171 acres), and the Wilton and Albion

plantations (7,000 acres), to John A. Buckner, for $3 per acre; The Westland plantation (5,040 acres), to J. W. Montgomery, for $3 per acre; and the Morgana plantation (1,500 acres), to Ferdinand M. Goodrich, for $3 per acre; total, $47,133. Deeds were given to the purchasers on the 23d of January, 1869. On the 26th separate petitions were filed by Buckner and Goodrich for monitions to be published and the sales to them homologated. Publication was accordingly made, and decrees of homologation were entered on the 2d of March, 1869.

This is an outline of what took place in the formal proceedings, and of what appears on paper. Several things outside and behind the mere forms are to be noticed, all tending to corroborate the conclusion, that this sale was projected and carried out, not for the purpose of paying the debts due to the creditors of the estate, but for the purpose of defeating their payment, and of preserving the estate for the benefit of the heirs.

The general scheme seems to have been, first, to circulate and give currency to the fact that a large indebtedness of the succession existed in favor of one of the heirs, sufficient in amount to absorb the entire estate, and secured by a mortgage giving it priority over all other claims; secondly, to depreciate the value of the property so that this supposed indebtedness would cover it all; thirdly, to put forward the claim of Julia Morgan to three-fourths of the property which, even, if not sustained, would show a complication of the title that would affect the salable value of the land; and fourthly, to procure a judicial sale by which the title might be cleared of all incumbrances, and the land might be distributed to the heirs according to their prior interests therein, free from all liability to the debts of the estate. If this scheme was not distinctly formed in the minds of the parties, it seems nevertheless to have been substantially carried into effect, with the added circumstance of providing a liberal compensation to the attorneys and counsel by whose aid it was accomplished.

The following is the account given by J. W. Montgomery of the manner in which the proceedings were initiated and carried out:

Opinion of the Court.

"He thinks it was in the fall of 1867 John A. Buckner called on him in the town of St. Joseph, where he (witness) was attending court, with a request that he should take charge of the collection of a claim against the estate of Oliver J. Morgan, which, with interest, amounted to about $100,000, and which he was attempting to collect as a representative of one of the minor heirs of the estate of Mrs. Oliver J. Morgan, and which claim he represented to be, and which witness knew to be, in judgment against Oliver J. Morgan during his lifetime, and secured by mortgage on all of his property and was really the only mortgage on it.

"When witness returned home he mentioned the proposition of Buckner to his law partner, General Edward Sparrow, who refused to go into it unless some arrangement was made by which something could be secured to some other creditors whom they represented. Witness himself was willing to take charge of Buckner's claim and give up the others, because the heirs whom Buckner represented had always been their client, and had a preferred claim by which witness thought he, the heir, could sweep the whole property; but General Sparrow adhered to the proposition that something must be done for the other ordinary creditors whom their firm represented, and insisted on a compromise by which something should be secured to them. Afterwards it was agreed between counsel, Sparrow & Montgomery and Buckner, that the creditors should be protected to a certain extent. In the meantime F. M. Goodrich, attorney-at-law, representing certain creditors, also insisted that his clients should participate in such an arrangement. Subsequently Oliver T. Morgan, the executor of Oliver J. Morgan, insisted that there should be no preference among the ordinary creditors. If one was to come in, all were to come in; that if Buckner was willing to make a concession in favor of the creditors represented by Sparrow & Montgomery, he did not see any reason why all the other creditors should not come in too. It was therefore agreed that other creditors, whom their law firm did not represent, should participate in any compromise which might be made in that respect. It was then agreed between Sparrow & Montgomery and Buckner that all the creditors of Judge Morgan might be permitted to bid upon the 5,040 acres before mentioned, without interference from his mortgage claim; that he would not press his mortgage claim against the land that they should bid on, and that they might

bid on it free from interference on his part, though there was no contract or understanding that the creditors should absolutely buy it, but only had a right to bid on it so far as their attorneys might deem it to their interest.

"Witness had no further authority than this for buying in for the creditors. In the exercise of a fair discretion, witness thought he was doing the best for those which he represented, knowing that Buckner's claim was sufficient to sweep the whole property, and that whatever he might get for his clients under such an arrangement was just so much clear gain, and so F. M. Goodrich, attorney for other creditors, and Oliver T. Morgan, executor, thought. Accordingly, after Buckner had made his concession in this form, recognizing their right to bid on some of the property without interference from him or the claim he represented, they then, as his attorneys, and as attorneys for some of the other creditors whom they represented, presented a petition to the court asking for a sale of the property to pay debts against the estate of Oliver J. Morgan."

The witness added that, at the sale, by request of some of the representatives of the creditors, and by understanding between himself and his law partner, he, Montgomery, bid upon the 5,040 acres [Westland] for the creditors; and Buckner permitted him to buy in said property free from interference by his preferred claim, which "was the result of a pressure brought to bear upon Buckner;" and he holds said 5,040 acres for the benefit of such creditors as choose to come into the arrangement.

This statement is certainly a very remarkable one in view of all the facts of the case as they have been demonstrated by the evidence. The gravity with which the "compromise" was made between Buckner and the other creditors, after "the pressure brought to bear upon Buckner," is certainly interesting, when we recollect, what was clearly proved in the cause, that the Westland plantation, consisting of 5,040 acres, which was thus allowed to be bid off for the benefit of the other creditors, was, at the time, overflowed with water, and was estimated by several credible witnesses as worth not over a dollar and a quarter per acre, whilst the Wilton and Albion

plantations bought in by Buckner were worth probably $25 per acre, as will be shown more fully hereafter.

The first thing that was done after the presentation of the petition for a sale, was to appoint appraisers and have the property appraised; since no bid could be accepted which did not equal the appraised value of the property. Of course it was essential to the accomplishment of the supposed object of the parties that this appraised value should be as small as possible. It certainly was small enough—two dollars seventy-five cents per acre for each of the five plantations. They were all razeed down to one uniform value per acre, when the proof is overwhelming that they were very unequal in value. But the appraisement was a mere sham. The appraisers knew nothing about the plantations; they never saw them. They seem to have been picked up in the street and made their appraisement at guess, if not at the dictation of some of the parties interested. Their names were Davis and Gingery.

Ingram, one of the witnesses, who had been Gen. Morgan's overseer for several years, and now a planter himself, says he was well acquainted with Davis, who lived in West Carroll [the Morgan estate being in East Carroll]. He had the reputation of being somewhat of an idiot. His mental weakness was notorious in the country, and he was usually known by the name of "fool Davis." He also knew Michael Gingery. He resided in the western part of the parish, and was a man of very poor judgment—a carpenter. Witness would not feel safe in buying or selling by their judgment. He said further, that he would not think it a fair appraisement to appraise lands like Wilton, Albion, and Melbourne at five dollars per acre; that such lands were worth from eight to ten dollars per acre rent ever since the war. That before the war they could have been sold for $70 or $80 per acre; and that they were worth half as much since the war.

Davis himself, when examined as a witness, admits that he had no knowledge of the Morgan property except a general knowledge he had of all the swamp lands of Carroll Parish; that he had no knowledge of the condition of the Morgan property in 1869, except what he heard from others. He ad-

mits that he got his ideas of the value of property in the parish from the prices at which property was sold at succession and other public sales about the court-house.

A number of witnesses were examined as to the real value of the property; but, perhaps, none more competent than Mr. Henry Goodrich, a nephew of Gen. Morgan, and manager of his plantations from 1838 to 1843; and again manager for Matthew F. Johnson from 1868 to 1873. He thought the appraisement of the land in 1860 was rather high, and that about $500,000 would have been a fair valuation. He said that $3 dollars per acre, the price bid at the sale in January, 1869, was a low valuation; thought that the open lands in 1869 were worth $75 per acre, and the wood lands worth $15. He spoke particularly of the Wilton, Albion, Morgana, and Melbourne plantations—not of the Westland.

Mr. Le May, who had been a planter most of his life, testified that he had known the Morgan property since the year 1858, and in 1862 he managed the Westland plantation for the succession. He added:

"Westland plantation and the adjacent lands are subject to overflow and have been overflowed every year since the war. Said Westland plantation and adjacent lands are of little value, and witness says he could not estimate them to be worth more than one dollar and twenty-five cents per acre at present and ever since the war. He means to say that Westland plantation and adjacent lands belonging to the succession of Oliver J. Morgan he could not estimate higher than one dollar and twenty-five cents per acre.

"Wilton, Albion, Melbourne, and Morgana plantations are not included in this estimate. Westland plantation is established on the lands of the succession of Oliver J. Morgan furthest back from the Mississippi River, and the adjacent lands referred to are wild lands belonging to said succession. Says that Wilton, Albion, and Melbourne plantations have always been regarded as first-class plantations in the Parish of Carroll. Regards the lands embraced in said plantations as worth about seventy-five dollars per acre before the war, and twenty-five dollars now and since the

war, cash valuation. Such lands have been renting for from eight to ten dollars per acre since the war. . . .

"Witness having heard read to him the deposition of witness N. D. Ingram, corroborates in the main his testimony in regard to the location and description of the property, but does not appraise the lands since the war quite as high. Witness does not think that the appraisement of said Wilton, Albion, and Melbourne plantations at three (3) dollars per acre in 1868 was a fair valuation of said property. Witness considers that the same were worth in cash at that time twenty-five (25) dollars per acre.

"Witness was acquainted with Michael Gingery and W. D. Davis, who were the appraisers of said property. Gingery was a carpenter by trade, and resided in the western portion of the parish of Carroll, now West Carroll. . . . Witness considered Mr. Gingery to be an illiterate man, and not competent to fix a value on said property. Witness says he has known W. D. Davis as a citizen of the western portion of the Parish of Carroll, now West Carroll, for several years. Witness says he does not know of two more incompetent persons than Gingery and Davis to appraise property. Thinks that more incompetent persons could not have been found to make said appraisement in 1868."

Testimony of a different character was adduced, it is true, but in our judgment the result of the evidence is, that the appraisement, as we said before, was a mere sham. We have little doubt that the property of the estate which, in the aggregate, was bid off by Buckner, Goodrich, and Montgomery for $47,133, was worth at least five times that amount.

But there is no wonder that the property sold at a mere nominal price; there was no competition. The facts which were circulated, that Buckner had a preferred claim for over $100,000, and that three-fourths of the property belonged to Mrs. Julia Morgan or her heirs, were sufficient to drive away all bidders; and, as if this were not sufficient, one person at least, who had intended to bid on the property, was actually deterred from attending the sale by being told that it was to be a sale for the benefit of the heirs, or a family affair. Rhodes, one of the witnesses, says:

"That on the morning of the sale of the succession property of Oliver J. Morgan, in January, 1869, he and John Lynch went to the Wilton plantation, where the sale was to occur, expecting to attend the sale, and Lynch was calculating upon buying some of the property. When they reached Wilton they found no person present authorized to make the sale. Passed above said plantation and met Judge J. W. Montgomery and Ferdinand M. Goodrich, attorneys, going down to the sale. Major Lynch spoke of going back to attend the sale and questioned them as to the terms of the same. Mr. F. M. Goodrich replied to him that it was to be a sale for the benefit of the heirs, or a family affair. Lynch was informed that if he went back and purchased at the sale, he would get a long litigation on his hands, and they induced him not to attend the sale. . . . Witness is satisfied that if John Lynch had been let alone by Mr. Goodrich he would have attended the sale and would have bid something like the value of the property, and it would not have been sacrificed for the nominal price of three dollars per acre. Lynch, Ruggles & Co. paid about forty dollars per acre for the Illanara plantation, situated about four miles below Wilton, and it is far inferior to Wilton and Melbourne plantations in value per acre. Witness is satisfied that Lynch would have given more than twenty-five dollars per acre for Wilton, Albion, and Melbourne plantations had he attended the sale, and believed he could have obtained a valid title."

J. W. Montgomery was examined on the subject of the conversation between Lynch and Goodrich, to contradict Rhodes, and he says, "that F. M. Goodrich stated to Major Lynch . . . that the property was being sold to pay in part a large claim against it held by the family. This is what I remember of Goodrich's statements."

We do not see that the contradiction materially affects the result of the evidence.

Besides, the actual events which ensued, the proceedings at the sale itself, and what took place after the sale, go to prove most conclusively that it was intended as a mere family arrangement for securing the property, against the demands of the creditors, in the hands of the two branches of the family precisely as they had always held it,—except that for the sake

of appearances, the Westland plantation of 5,040 acres, then overflowed, and not worth more than a dollar and a quarter an acre, was bid off by Montgomery for the creditors;—and Morgana, consisting of 1,500 acres, was given to Montgomery and Goodrich for their services, and was afterward sold by the latter for about $10,000. The Wilton and Albion plantations, although bid off by Buckner, never changed hands, but continued to remain, and still remain in the possession of Julia Morgan's heirs, whilst Buckner himself kept Melbourne and occupied it as before. This is conceded by all the parties, Buckner and Montgomery being fully examined on the subject and admitting the fact. The pretence that the sale was made to satisfy Buckner's claim of over $100,000 was nothing but a pretence; when pressed on the subject, he admitted that, although the aggregate amount of his bids on the three plantations sold to him (which was $27,513) was legally a credit on the amount of the debt, yet that he did not claim the plantations held by the representatives of Julia Morgan, namely, Wilton and Albion. He was examined as a witness in 1878, nine years after the sale, and testified, amongst other things, as follows:

"The heirs of Julia Morgan have held possession of the land they had before the war; and witness has held possession of the land he had before the war. Witness does not hold the property in common; there is only a temporary division.

"Witness has held possession of Melbourne ever since the war, and the heirs of Julia Morgan have held possession of Wilton and Albion, except that the heirs recognized Oliver T. Morgan as executor, but he did not require of them any account of the rents and revenues.

"Witness says that his understanding was, at the time of the sale, in January, 1869, when he bought in the property for the heirs, that they were to receive their proportion of the land purchased in witness' name, and he was to retain his proportion.

"They were (the heirs of Julia Morgan) to take three-fourths of the land and witness one-fourth, and this understanding was had as to the exact amount in the division after the sale. There

was no conversation or agreement with the heirs, or any other parties, as to how the division should be made."

It is unnecessary to pursue the subject further in relation to the question of fraud. We are entirely satisfied that the sale was a sheer fraud as against the general creditors of the estate.

The next question is, whether the complainant is in a situation to contest the validity of the sale by the present suit. It is contended that he is concluded by the proceedings in the Probate Court of Carroll Parish, which is alleged to have had exclusive jurisdiction of the subject matter, and its decision is alleged to be conclusive against all the world, but especially against the complainant, who was a party to the proceedings.

The administration of General Morgan's succession undoubtedly properly belonged to the Probate Court of the Parish of Carroll, and, in a general sense, it is true that the decisions of that court in the matter of the succession are conclusive and binding, especially upon those who were parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The Court of Chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it. Story's Eq. Jur. §§ 1570–1573; Kerr on Fraud and Mistake, 352–353. This subject was discussed in *Gaines* v. *Fuentes*, 92 U. S. 10, and *Barrow* v. *Hunton*, 99 U. S. 80. In the latter case, speaking of the proceeding in the Louisiana practice to procure nullity of a judgment, we said: "If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for

irregularity, or to a writ of error, or to a bill of review on appeal, it would belong to the latter category" [that is a supplementary proceeding, connected with the original suit], "and the United States Court could not properly entertain jurisdiction of the case. . . . On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; . . . a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, &c."

These considerations apply with full force to the argument based on the monition proceedings which were resorted to after the sale for the purpose of procuring a homologation thereof as against all the world. The monition, as issued by and published under the direction of the Probate Court, called upon "all persons who could set up any right to the property, in consequence of any informalities in the orders and decrees under which the sale was made, or any irregularity or illegality in the appraisement or advertisement, or time and manner of sale, or of any other defect whatsoever, to show cause within thirty days why the sale should not be homologated and confirmed."

In the case of *Jackson* v. *Ludeling*, 21 Wall. 616, we held that the judgment of confirmation, or homologation, on such a monition, has relation only to mistakes and omissions of the officers of the law, and not to the question whether the purchasers obtained their title by fraud or were trustees *mala fide* for others; and that such a judgment is conclusive of nothing but that there have been no fatal irregularities of form. The concluding remarks of the opinion in that case have a strong bearing upon the present. It is there said: "A sale may have been conducted legally in all its process and forms, and yet the purchaser may have been guilty of fraud, or may hold the property as a trustee. In this case the complainants rely upon no irregularity of proceeding, upon no absence of form. The forms of law were scrupulously observed. But they rely upon faithlessness to trusts and common obligations, upon combinations against the policy of the law and fraudulent, and upon confederate and successful efforts to deprive them wrongfully

of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence. Homologation is no obstacle to such a claim." In our judgment it is equally no obstacle to the claim of the complainant in the case before us. The same observation may be made with regard to the proceedings had in reference to the executor's final account and discharge.

Had the question of fraud been before the Probate Court in any of these proceedings, and had the complainant been apprised of them, the case might have been different. This court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had an opportunity to litigate in the probate proceedings. But one of the grounds of complaint made by the bill is, that the very attorneys whom he had employed to secure his claim acted as attorney for the succession and heirs, and conducted the proceedings for the sale, and participated as active parties therein, without giving him any notice of what was being done. These allegations were substantially proven. It was shown that Gay, the complainant, resided in Louisville, Kentucky; that early in 1866 he sent his documents (the three bills of exchange described in his original bill), to Gen. Sparrow, of the firm of Sparrow & Montgomery (lawyers), in Louisiana, to secure his claim against Oliver J. Morgan's succession. The bills were presented by the attorney to the executor, Oliver T. Morgan, in April, 1866, and he endorsed and signed on each an acknowledgment that it was a just claim against the succession, to be paid in due course of administration; and thereupon they were submitted to the probate judge, who endorsed on each bill an order that it be ranked as a just claim, to be paid in due course of administration according to law. The bills remained in the hands of Sparrow & Montgomery until the commencemement of the proceedings for sale (or about that time). Buckner having applied to them to conduct these proceedings, the farce (for it seems to us nothing but a farce) of making a compromise with the creditors took place in Sparrow & Montgomery's office, and the claims which they held against the estate were handed over to other attorneys.

Montgomery, when examined as a witness, admitted that the bills of exchange belonging to Gay were handed over to Farrar, and did not pretend that Gay was ever consulted on the subject. When pressed for an answer on this point, he admitted that his partner, Gen. Sparrow, "did voluntarily and of his own accord put the claim in Farrar's hands." He further stated that this was only six or eight weeks before the day of sale, and that Farrar had the bills on the day of the adjudication, that is, the day of sale; and there is not the slightest proof to show that Gay had any notice of any of the proceedings. After having put himself, in his bill, upon want of notice, and after this evidence on the subject, drawn from one of the defendants, it was incumbent on the defendants to have shown, if they could, that he had notice.

It is alleged, however, that since the commencement of this suit, the judgment obtained by the complainant on the bills of exchange has been reversed by this court on writ of error, and that the claim on the original securities is prescribed.

It is true that the judgment was reversed in March, 1874; and that the complainant, by leave of the court below, filed an amended bill setting forth the acknowledgment and recognition of the original bills of exchange, and relying on these evidences of his debt, thus sanctioned, instead of the judgment. This raises a question of law, whether a debt thus presented to and acknowledged by the executor, and ranked by the judge of probate, is subject to prescription like ordinary demands.

By the Code of Practice of Louisiana it is declared:

"Art. 984. No bearer of a claim of money against a succession administered by a curator appointed by a judge or by a testamentary executor shall commence an action against such succession before presenting his claim to the curator or executor.

"Art. 985. If such claim be liquidated and be acknowledged by the curator or testamentary executor or administrator, he shall write on the evidence of the claim, or on a paper which he shall annex to it, a declaration signed by him, and stating that he has no objection to the payment of the claim, after which the bearer of such claim shall submit it to the judge, that it may be ranked among the acknowledged debts of the succession."

Article 986 provides that if the claim is not liquidated, or is objected to by the curator, &c., the bearer may bring his action in the ordinary manner.

These articles show very conclusively that when a claim has been duly acknowledged by the executor, and ranked by the judge (as this was), no judgment on it is necessary. And such is the doctrine of the Supreme Court of Louisiana. In a late case, *Renshaw* v. *Stafford*, Executor, 30 La. Ann. 853, the subject was very fully discussed, and it was held that the acknowledgment of a succession debt suspends the prescription of it as long as the property of the succession remains in the hands of the executor under administration. The court say: "We think it manifest that the law never contemplated that a creditor whose debt has been formally acknowledged should bring a suit to establish his claim. The policy of the law discourages such proceeding; would punish it by inflicting the costs thereof on the creditor. True the law gives him, after a reasonable time, . . . a right to compel the administrator to account."

After referring to previous decisions, the court concludes as follows: "We therefore conclude that after a creditor of an estate has had his claim duly acknowledged by the administrator, the law does not contemplate any further proceeding on his part to establish it as against the estate. That, in principle, the administrator is his trustee, and holds in possession for his benefit the property of the estate which is the common pledge of the creditors."

From this authoritative exposition of the law of Louisiana, we think it clear that the plea of prescription cannot avail the defendants in this case. The bill was filed in January, 1872, just three years after the sale complained of, and within six years after the bills of exchange were acknowledged and ranked among the just debts of the succession. The bills could not have been prescribed before acknowledgment, because they came to maturity in January, 1861, and the Civil War interrupted prescription as against the complainant (a citizen of Kentucky), from April 27th, 1861, to April 2d, 1866. The acknowledgment and recognition in April, 1866, had the effect

to place the claim on the tableau of succession, and obviated the necessity of any other legal demand. Although this was sufficient to preserve the status of the debt free from prescription, yet there was another interruption by the legal demand made by the action which was brought in 1870, and which was in the course of prosecution until the reversal of the judgment by this court in 1874, if not longer. Such a legal demand interrupts prescription "whether the suit has been brought before a court of competent jurisdiction or not." Civil Code, Art. 3518 (3484). It is clear, therefore, that the debt was not prescribed when this suit was brought.

The defendants, however, place some reliance on the fact that the bill was not amended until March 28th, 1879, then first stating the fact that the claim was presented to the executor, and acknowledged and recognized, a period of more than five years after the reversal of the judgment. We do not regard this as material. The making of the bills of exchange was fully stated and set forth, and the bills described, in the original bill of complaint, and it was admitted and stated in the answer of the defendant, that the said claim of the complainant was duly acknowledged by the executor as a just claim against the estate. With such a statement in their own pleading they could hardly be heard to aver that the claim was prescribed. Besides, it is difficult to see how it could possibly be prescribed, any way, during the pendency of this suit, brought for the purpose of securing its payment.

It is not insisted, as it could not be, that the fraudulent sale is prescribed.

We are clearly of opinion that the complainant is not precluded from obtaining relief in the present suit.

Some technical points have been made in the case which we have examined and think untenable. One is that after the decease of Oliver T. Morgan, Matthew F. Johnson was substituted in his place in the suit as dative executor of the said Oliver T. Morgan, and not as dative executor of Oliver J. Morgan. He was in fact both, and the bill of revivor, as amended, distinctly states that subsequent to the filing of his plea, answer and demurrer, by Oliver T. Morgan, testamentary

executor of Oliver J. Morgan, in the year 1873, the said Oliver T. Morgan died; and that subsequent to his death, Matthew F. Johnson had been appointed dative testamentary executor of the last will of said Oliver J. Morgan; and that assets of said Oliver J. Morgan had come into said Johnson's hands in that capacity, and prays that he may answer and set forth whether any and what assets of said estate of Oliver J. Morgan had come into his hands, and for an account, &c. Upon this bill a subpœna was issued commanding the marshal to summon Matthew F. Johnson, dative testamentary executor of Oliver T. Morgan, to appear and answer the bill of revivor. Matthew F. Johnson did appear, entering his appearance as "dative testamentary executor of Oliver T. Morgan" to the bill of revivor, and to the amendments thereof, "wherein Stephen Waters, adminstrator of the succession of Wm. Gay, deceased, is complainant, and said Matthew F. Johnson and others are defendants." This appearance was entitled in the cause by its true title and number. The subpœna was mere process to bring the defendant into court. When he came into court and read the bill of revivor, he was informed that he was called upon to answer as dative executor of Oliver J. Morgan. This was sufficient. From that day until the cause came here on appeal, he defended the cause as representative of the estate of Oliver J. Morgan, and made no objection to the technical defect in the subpœna. The defect was cured when he entered his appearance without raising the objection, and it is certainly too late to raise it now.

There is nothing else in the case, except the form of the decree, to which we deem it necessary to give our attention.

The decree made by the Circuit Court in the first place affirmed the debt due to the complainant, and, secondly, declared the sales made on the 19th of January, 1869, null and void as against the estate of William Gay, complainant, and directed that the lands be seized and sold by the marshal to satisfy the debt due to the estate of Gay, with interest and costs. We think that the latter part of the decree ought to be modified. The bill was filed by William Gay "in behalf

of himself and of all others, creditors of Oliver J. Morgan, . . . who shall come in and seek relief by and contribute to the expense of this suit." In other words, it is a creditor's bill filed on behalf of the complainant and of all other creditors that choose to come in and share the expenses, for the purpose of securing the due administration and application of a trust fund, namely, the estate belonging to the succession of Oliver J. Morgan, deceased. On such a bill it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree. In our judgment, therefore, the decree should be modified so as to declare and direct as follows, that is to say:

I. That the estate of said Oliver J. Morgan, deceased, herein represented by Matthew F. Johnson, dative executor of the last will of said Oliver J. Morgan, is indebted to the estate of said William Gay, deceased, herein represented by Stephenson Waters, administrator, in the sum of $33,250, with interest at five per cent. per annum until final payment on $13,000 from the 10th of January, 1861; on $10,250 from the 16th of January, 1861, and on $10,000 from the 28th of January, 1861, and for all costs of this suit.

II. That the sales of the lands of said estate of Oliver J. Morgan, adjudicated in parcels and subdivisions on the 19th of January, 1869, to John A. Buckner, J. West Montgomery, agent, and Ferdinand M. Goodrich, respectively, and conveyed to them respectively by Oliver T. Morgan, executor, by notarial acts passed before D. C. Jenkins, notary public, on the 23d of January, 1869, and recorded in the office of the parish recorder of the parish of Carroll, in notarial book N, at folios 212, 213, and 214, be declared null and void as against the estate of the said William Gay, complainant herein, and against the other creditors of said estate of Oliver J. Morgan, deceased; and that it be referred to , one of the masters of the court, to take and state an account of the assets belonging to said estate in the hands of said dative testamentary executor, Matthew F. Johnson; and that the said master be authorized to summon said Johnson to appear before him and

render account of said assets; and that said master give three months' public notice by advertisement in a newspaper published in the Parish of Carroll, and in a newspaper published in New Orleans, to all creditors of the said estate of Oliver J. Morgan, deceased, to appear before him, the said master, and establish their several debts.

III. If other sufficient available assets of said estate to pay the said debt be not found in the hands of said Johnson, dative executor as aforesaid, the said master is authorized and required to sell so much of said lands in proper parcels as may be necessary to pay and satisfy said debts; and the lands so sold shall be free and discharged of any lien, claim, or title arising from, or by reason of said sales so made on the 19th day of January, 1869. If the available assets and the proceeds of said lands should not be sufficient to pay all the debts of said estate established before said master, including the debt due to the complainant, there shall be a *pro rata* distribution thereof after the payment of all costs and expenses of the complainant, and of said reference and sale. The sale shall be advertised and proceeded in according to the laws of Louisiana in reference to succession sales.

IV. The said master may apply to the court from time to time for further directions, which are hereby reserved, especially as to the question whether the succession of Julia Morgan, deceased, is entitled to any portion, and what portion, of the proceeds arising from the sale of said lands by virtue of the act of sale and donation made to her by Oliver J. Morgan in 1858, so far as said act was a sale and not a donation.

It is further our opinion, and

We order and adjudge that each party pay his and their own costs on this appeal, except the cost of printing the record, which shall be equally divided between the appellants and appellees.

Statement of Facts.

HENNEQUIN & Another *v.* CLEWS & Another.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

Argued March 13th, 1884.—Decided May 5th, 1884.

Bankruptcy.

One hypothecating, to secure a debt due from himself, securities which had been pledged to him to secure the obligation of another, and failing to return them when such obligation is discharged, does not thereby create a debt by fraud, or in a fiduciary capacity, which is exempted by § 5117 Rev. Stat. from the operation of a discharge in bankruptcy.

In October, 1871, Henry Clews & Co. opened a line of credit on their London house of Clews, Habicht & Co., for £6,000 in favor of Hennequin & Co., a firm doing business in New York and Paris, authorizing the latter to draw from time to time bills of exchange on the London house at ninety days from date, with the privilege of renewal, it being agreed that Hennequin & Co. should remit to Clews, Habicht & Co., a few days before the maturity of each bill, the necessary funds to meet and pay the same, so that Clews, Habicht & Co. should not have to advance any money to pay it. In consideration of such accommodation acceptances, Hennequin & Co. deposited with Clews & Co. certain collateral securities, for the purpose of securing them, in case Hennequin & Co. failed to remit the requisite funds to pay the said bills of exchange, amongst which collaterals were twenty-nine Toledo railroad mortgage bonds, for $1,000 each. Clews & Co. used the said bonds by depositing them with third parties as collateral security to raise money for their own purposes, although not called upon to make any advances to pay the bills of Hennequin & Co., all of which were protected and paid according to agreement. After the bills were all retired, Hennequin & Co. demanded a return of the collaterals; but Clews & Co. having failed in business, did not return them. Thereupon, to recover the bonds, or their value, and damages, this suit was brought in the Superior Court of New York City by Hennequin & Co. against Clews & Co. and the parties with whom they had deposited the bonds. The suit was dismissed as to the latter

parties, and Clews & Co., amongst other things, pleaded that on the 18th of November, 1874, they were adjudged bankrupts under the laws of the United States, and that a trustee was appointed, who succeeded to all their interest in said securities; and by a supplemental answer, filed afterward, they pleaded their discharge in bankruptcy. The following is a copy of the substantial part of this answer, namely:

"The supplemental answer as amended of the defendants Henry Clews and Theodore S. Fowler to the complaint in this action, served by leave of the court first had and obtained, shows to the court that subsequent to the service of the original answer herein, in pursuance of the bankruptcy proceedings mentioned in said answer and the order of the court of bankruptcy, the District Court of the United States for the Southern District of New York, sitting as a court of bankruptcy, did make an order and grant to said defendants certificates of discharge under seal of said court on the 24th day of December, 1875, discharging the above-named defendants and each of them from all debts and claims which by the Revised Statutes, title Bankruptcy, are made provable against the estate of said defendants which existed on the 18th day of November, 1874, excepting such debts, if any, as are by said law excepted from the operation of a discharge in bankruptcy. . . . And the defendants further allege that the claim and indebtedness set forth in the plaintiffs' complaint herein, is one that was discharged by the operation of said bankruptcy discharge, and was provable in said bankruptcy proceedings, and was not one which was exempt from the operation of the bankruptcy statutes."

Copies of the certificates of discharge were annexed to the answer.

The parties thereupon went to trial, and the facts disclosed by the evidence were substantially in accordance with the above statement. The certificates of discharge of the defendants were given in evidence under objections; and the plaintiff asked to go to the jury on the question, as to whether the debt was created by fraud, and also on the question whether it was a debt created by the defendants while acting in a fiduciary

character; both of which requests were refused, and the court directed the jury to render a verdict for the defendants; to all which rulings and directions plaintiffs duly excepted. Judgment being entered for the defendant, the plaintiffs appealed to the Court of Appeals of New York, which affirmed the judgment, and remitted the record to the Superior Court. The plaintiffs sued out this writ of error.

Mr. C. Bainbridge Smith for plaintiff in error.

Mr. William A. Abbott for defendant in error.

Mr. Justice Bradley delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

We have to decide the question, whether a discharge in bankruptcy under the act of 1867 operates to discharge the bankrupt from a debt or obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed? or, whether a debt or obligation thus incurred is within the meaning of the 33d section of said act § 5117 Rev. Stat., which declares that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act?" The New York courts decided that the effect of the discharge in bankruptcy was to discharge the debt, holding that the debt was not created by fraud, nor by embezzlement, nor whilst the bankrupt was acting in a fiduciary character.

The question first came up for discussion in the case upon an order for arresting the defendants, on a charge that the debt was fraudulently contracted. After obtaining their discharge in bankruptcy, the defendants moved to vacate the order of arrest, which motion the Superior Court denied; but the Court of Appeals reversed this judgment, and granted the motion. The opinion of the court on this occasion is reported in 77 N. Y. 427, and was referred to as the ground of judgment when the case finally came up on its merits.

Opinion of the Court.

The question, so far as relates to the principle involved, is not a new one. It came up for consideration under the bankrupt act of 1841, which withheld the benefits of the act from all debts "created by the bankrupt in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity;" 5 Stat. 441, § 1; and which further declared (amongst other things) that no person should be entitled to a discharge who should "apply trust funds to his own use." Ib. § 4. In the case of *Chapman* v. *Forsyth*, 2 How. 202, these clauses were brought before this court for examination. The case was an action of assumpsit for the proceeds of 150 bales of cotton shipped to and sold by the defendants as brokers or factors of the plaintiff. One of the defendants pleaded a discharge in bankruptcy, and the judges of the Circuit Court were divided in opinion on the question whether a commission merchant or factor, who sells for others, is indebted in a fiduciary capacity within the act, if he withholds the money received for property sold by him, and if the property is sold, and the money received on the owner's account. The opinion of this court was delivered by Mr. Justice McLean, and the above question was answered in the following terms: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act. This view is strengthened, and, indeed, made conclusive by the pro-

vision of the fourth section, which declares that no 'merchant, banker, factor, broker, underwriter, or marine insurer,' shall be entitled to a discharge, 'who has not kept proper books of accounts.' In answer to the second question, then, we say, that a factor, who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of the act."

This decision was, of course, authoritative; it was not only followed, but approved by the highest courts of several of the States. In *Hayman* v. *Pond*, 7 Metc. (Mass.) 328, the Supreme Court of Massachusetts, speaking through Chief Justice Shaw, after referring to the decision in *Chapman* v. *Forsyth*, said: "We have no doubt that this is the true construction of the law." In *Austill* v. *Crawford*, 7 Ala. 335, and in *Commercial Bank* v. *Buckner*, 2 La. Ann. 1023, the same views were expressed, though the contrary was held in *Matteson* v. *Kellogg*, 15 Ill. 547, and in *Flagg* v. *Ely*, 1 Edmonds, N. Y. Select Ca. 206.

Under the act of 1867 a series of diverse rulings by different courts arose on the subject; one class treating agents, factors, commission merchants, &c., as acting in a fiduciary character under the act, on the view that the act was conceived in broader and more general terms than the act of 1841; the other class taking the view that the act of 1867 used the phrase, "acting in any fiduciary character," in the sense which it had received by construction in the act of 1841. The cases on both sides of the question are collected in Bump's Law of Bankruptcy, under sec. 33 of the original Bankrupt Act of 1867, section 5117 of the Revised Statutes, pp. 742–745, 10th edition. Those taking the first view are *In re Seymour*, 1 Benedict, 348; *In re Kimball*, 2 Benedict, 554; S. C., 6 Blatch. 292; *Whitaker* v. *Chapman*, 3 Lansing, 155; *Lemcke* v. *Booth*, 47 Missouri, 385; *Gray* v. *Farran*, 2 Cincin. Sup. Ct. 426; *Treadwell* v. *Holloway*, 12 Bank. Reg. 61; *Meader* v. *Sharp*, 54 Geo. 125; S. C., 14 Bank. Reg. 492; *Benning* v. *Bleakley*, 27 La. Ann. 257. Those taking the other view are *Woolsey* v. *Cade*, 15 Bank. Reg. 238; *Owsley* v. *Cobin*, do. 489; *Cronan* v. *Cotting*, 104 Mass. 245. We have examined these cases, and others bearing on the subject, but do

not deem it necessary to refer to them more particularly, inasmuch as the question has recently been fully considered by this court, and the decision in *Chapman* v. *Forsyth* has been followed.

We refer to the case of *Neal* v. *Clark*, 95 U. S. 704, reversing the decision of the Court of Appeals of Virginia in *Jones* v. *Clark*, 25 Gratt. 642. This case involved the meaning and application of the word "fraud," in the clause under consideration,—"no debt created by *fraud* or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged, &c." An executor sold certain bonds which he had received on the sale of the property belonging to the estate, the proceeds of which the will directed him to distribute in a certain way. The sale of the bonds was held by the State court to have been a misappropriation of them, amounting to a *devastavit*, in which Neal, the purchaser, was held to be a participant and liable to account for the value of the bonds purchased; not because he was guilty of any actual fraud, but because, in view of the circumstances attending his purchase, he had committed constructive fraud. Neal had in the meantime obtained his discharge in bankruptcy, which he pleaded in bar to a recovery against him; but the State court held that "fraud," in the 33d section of the bankrupt act (of 1867), included both constructive and actual fraud, and overruled his plea. We reversed the judgment of the State court on this point, and decided that Neal was entitled, under the circumstances of the case, to the benefit of his discharge in bankruptcy. Adopting and applying the reasoning of the court in *Chapman* v. *Forsyth*, we said, "that in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."

The question came before us again in *Wolf* v. *Stix*, 99 U. S. 1, in which a sale of goods to Wolf by an insolvent firm was set aside as fraudulent against creditors, and Wolf and his sureties were then sued on the bond given by him for a return of the goods when attached at the commencement of the proceedings. Wolf having in the meantime become bankrupt, and obtained his discharge, pleaded the same in bar of the action. We held the plea to be a good one to the action on the bond.

The present case is not precisely like either that of *Chapman* v. *Forsyth*, or *Neal* v. *Clark;* but it is very difficult to distinguish it, in principle, from the cases of commission merchants and factors failing to account for the proceeds of property committed to them for sale. There is no more—there is not so much—of the character of trustee, in one who holds collateral securities for a debt, as in one who receives money from the sale of his principal's property—money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral, holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return it when its purpose as security is fulfilled; but if he fails to do so, it is only a breach of contract, and not a breach of trust. A mortgagee in possession is bound by contract, implied if not expressed, to deliver up possession of the mortgaged premises when his debt is satisfied; but he is not regarded as guilty of breach of trust if he neglects or refuses to do so, but only of a breach of contract.

The English authorities are more in accord with the decisions in this country which take a different view from our own on this question. The Debtor's Act of 1869, 32 & 33 Vict., ch. 62, abolished imprisonment for debt, except in the case of statutory penalties, and when arising from the default of a trustee or person acting in a fiduciary capacity, who has been ordered by a court of equity to pay money in his possession or under his control; and except defaults of attorneys and solicitors, and some other special delinquents. The Bankrupt Act of the same date, 32 & 33 Vict., ch. 71, declares that the order of discharge of a bankrupt shall not release him from any debt

or liability incurred or forborne by means of any *fraud or breach of trust.* § 49. Under these statutes, where an agent failed to pay over moneys collected for his principal, Sir George Jessel said, "no doubt this debt was incurred by fraud." *Pashler* v. *Vincent*, 8 Chan., Div. 825. The same doctrine was held in *Marris* v. *Ingram*, 13 Chan. Div., 838, where a son was in the management of his father's farm, and sold part of the stock and received the proceeds. After his father's death, being ordered to pay over the money, and failing to do so, he was held to be a person acting in a fiduciary capacity. In *Middleton* v. *Chichester*, 19 Weekly Reporter, 369, Lord Hatherly said that "the exceptions [in the Debtor's Act] are all referable, not to debts payable *simpliciter*, but to debts contracted in a manner in some degree subject to observation as being worthy of being treated with punishment. . . . In every case we find some shade of misconduct; something of the character of delinquency, though varying in description."

For other English cases arising under the acts referred to, see *Ex parte Wood, re Chapman*, 21 W. R. 71; *Ex parte Hooson, do.* 21 W. R. 152; *S. C.* L. R., 8 Ch. 231; *Cobham* v. *Dalton*, L. R. 10, Ch. 655; *in re Deere, Atty. do.* 658; *Ex parte Halford in re Jacobs*, L. R. 19, Eq. 436; *Phosphate Co.* v. *Hartmount*, 25 W. R. 743; *Earl of Lewes* v. *Barnett*, 6 Ch. Div. 252; *Barrett* v. *Hammond*, 10 Ch. Div. 285; *Ex parte Hemming in re Chatterton*, 13 Ch. Div. 163; Fisher's Dig. Supp. by Chitty, tit. Debtor's Act, Col. 1287.

It is evident that the English courts regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt acts. Perhaps the liberal construction made in favor of the certificate of discharge in this country is due to the peculiar modes and habits of business prevailing amongst our people. It is, no doubt, true, as said in *Chapman* v. *Forsyth*, that a construction of the excepting clauses which would make them include debts arising from agencies and the like, would leave but few debts on which the law could operate. At all events, we think that the previous decisions of this court, and of the State courts in the same direction, accord with the true spirit and meaning of the act of

Congress, and with the necessities of our business conditions and arrangements.

The judgment of the Court of Appeals of the State of New York is

Affirmed.

WILLIAMS & Another *v.* MORGAN & Another, Trustees.

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

Argued October 30th, 31st, 1883.—Decided May 5th, 1884.

Appeal—Jurisdiction—Parties.

A decree in a suit in a circuit court for the foreclosure of a railroad, fixing the compensation to be paid to the trustees under the mortgage from the fund realized from the sale, is a final decree as to that matter, and this court has jurisdiction on appeal.

A holder of railroad bonds secured by a mortgage under foreclosure, has an interest in the amount of the trustee's compensation which entitles him to intervene, and to contest it, and to appeal from an adverse decision.

When purchasers at a sale of a railroad under foreclosure purchase under an agreement, recognized by the court and referred to in the decree, that a new mortgage shall be issued after the sale, a part of which is to be applied to the payment of the foreclosure debt and a part to the payment of expenses, which expenses include the compensation of the trustees under the mortgage foreclosed, the purchasing committee named in that agreement have an interest in fixing that compensation which entitles them to intervene, and to be heard, and to appeal from an adverse decision.

On the facts in this case the allowances made below are held to be excessive.

The facts are stated in the opinion of the court.

Mr. J. Hubley Ashton (*Mr. James Thomson* was with him) for appellants.

Mr. John A. Campbell, Mr. John E. Parsons, and Mr. George De Forest Lord for appellees.

Mr. Justice Bradley delivered the opinion of the court.

Opinion of the Court.

In this case, the only question on the merits relates to the compensation which ought to be allowed to the trustees and receivers of a certain railroad mortgage for their services. A preliminary question, however, is raised, as to the right of the appellants to bring the case here by appeal.

The New Orleans, Mobile, and Chattanooga Railroad Company, on the 1st of January, 1869, executed a first mortgage on its railroad and franchises to secure the payment of four thousand coupon bonds of $1,000 each, with interest at eight per cent. per annum. Oakes Ames and Edwin D. Morgan were the trustees. The former having died, James A. Raynor was appointed in his stead. A second mortgage was given in March, 1869, but was foreclosed in 1870, and the property was bought in for the second mortgage bondholders, who reorganized under the name of the New Orleans, Mobile, and Texas Railroad Company, and gave another mortgage (generally called the second mortgage) to secure $2,000,000, subject to the incumbrance of the first mortgage. Default being made in payment of interest, the trustees, E. D. Morgan and James A. Raynor, in January, 1875, by virtue of a provision in the first mortgage, took possession of the property, but soon found it necessary to secure the sanction and protection of judicial proceedings. On the 12th of March, 1875, they filed a bill for foreclosure and sale of the mortgaged property in the Circuit Court of the United States for the District of Louisiana, and were appointed receivers in addition to their character as trustees. The railroad covered by the mortgage was the road running along the Gulf between Mobile and New Orleans, and was in a dilapidated condition, needing new bridges, new embankments, and extensive repairs as well as rolling stock and machinery. The road and property were managed and taken care of by the trustees and receivers for over five years, during which time Raynor had special charge of the road, superintending and managing everything in that department; whilst Morgan looked after the finances of the concern in New York. They brought the road up to an efficient condition, and made it a desirable property. There is no doubt, from the evidence, that their services were of the greatest value. Raynor gave his

whole time to the road itself and its practical working, superintended the erection of bridges, the raising of the embankment on the marshes, the procurement of depot and ferry accommodations in New Orleans and Mobile, and whatever related to the actual management and superintendence of the road as an important business thoroughfare of travel and transportation. In November, 1875, the trustees applied to the court to allow a fixed compensation to Raynor for the extra service he was performing. In their petition, they say:

"Your petitioners further represent that James A. Raynor has had to perform the duties of general manager of the railroad in place of the officer of the company, and that in the course of the year he has been put to more than the usual labor and care in the management of the administration of the road itself, performing the functions of manager and president, and directors, besides the functions of trustees. Your petitioners respectfully submit an application for a salary or allowance to him during their administration, either by the year or otherwise. No application for trustees, allowances will be made, or is designed herein, but only in respect to the salary of this officer, and for a provision for necessary expenses in order that the disbursements for operating expenses and administration shall all appear."

This application was referred to the master, who reported that, in his opinion, "an allowance of $10,000 per annum, with necessary expenses, not to exceed $2,500 per annum, should be made to Mr. Raynor;" and this report was confirmed by the court subject to any exceptions that might be filed within thirty days. No exceptions were filed, and Raynor received this allowance during the period of his administration, and no question has ever been made of its propriety.

In the latter part of 1879 it was deemed advisable that the trust should be brought to a close and the property sold. About that time negotiations were set on foot for a purchase of the road in the interest of the Louisville and Nashville Railroad Company, which was then extending its business ramifications throughout a large portion of the Southern States. In December, 1879, a large number (more than a majority) of the

first mortgage bondholders executed an agreement by which they appointed George Bliss, L. A. Van Hoffman, and Oliver Ames a committee to negotiate and sell either the bonds or the railroad, and if the latter, to get a decree for foreclosure and sale in the pending proceedings, with power to purchase in the property for the common interest; and they all agreed to deposit their bonds with the Central Trust Company of New York, subject to the disposal of the committee, either for sale or to be used in paying the purchase-money of the road. And the committee was specially authorized, in concert with the trustees and receivers, to make an arrangement with the Louisville and Nashville Railroad Company to transfer the purchase of the road (when made by the committee) to a corporation to be organized in the interest of that company, for its bonds to the amount of $5,000,000, secured by vendor's lien and first mortgage on the railroad purchased; it being, amongst other things, stipulated as follows:

"The trustees and receivers to be protected against all their obligations from management, bonds, contracts complete or incomplete, or otherwise, and all the liabilities of the trustees and receivers, including all the expenses and charges of the foreclosure, reorganization, and everything incident thereto, to be paid in *cash*, to be furnished for the purpose, to the purchasing committee. Four million dollars of such bonds to be disposed of by the purchasing committee in exchanging bond for bond or bonds (and coupons as aforesaid), secured by the said first-mentioned mortgage, the residue of such four millions, and the other one million of such bonds the Louisville and Nashville Railroad Company to have the right to use in providing the cash for the payment hereinbefore mentioned, and in paying the amount necessary to be paid to bondholders, secured by the said first-mentioned mortgage, who shall not become parties to this agreement, the surplus, if any, to belong to the Louisville and Nashville Railroad Company."

On the 10th of February, 1880, another agreement was entered into, called the purchasing agreement, between the bondholders of the first part, the same purchasing committee of the

second part, and David Thomson and William S. Williams, of the third part, by which the authority given to the purchasing committee, by the previous instrument, was confirmed, including that of taking the bonds of the Louisville and Nashville Railroad in exchange for the first mortgage bonds of the N. O., Mobile, and Texas Railroad Company; and Thomson and Williams, proposing to act as purchasers, engaged to obtain from the Louisville Company an agreement to give its coupon bonds for $5,000,000 to carry out the arrangement substantially as indicated in the former agreement. If such an agreement should be obtained, then the railroad, franchises, equipment, and property should be sold under a decree of foreclosure and sale in the pending cause, according to law, and bid in by the committee for the purpose of carrying out the arrangement. It was also agreed that the receivers and trustees should, by the Louisville Company, or in some other satisfactory manner, be protected from all their obligations and liabilities; and it was further agreed, as follows:

"That all liens that may be declared to be superior to the first mortgage bonds, and that the certificates and liabilities and lawful fees, charges, and expenses of the receivers and trustees, and the disbursements of the committee, all to be decreed by the court, unless fixed by agreement, including all the expenses and charges of the foreclosure and of the proceedings to carry out this agreement, less amounts which may be available in the receiver's hands for payment upon such certificates, shall be paid in *cash* at the time to be appointed by the court for taking title under the foreclosure sale, and that all amounts necessary to be paid to bondholders who shall not become parties hereto shall also be paid in cash at the same time, and the purchasers [that is, Thomson and Williams] hereby agree to provide the necessary amounts, and for the purpose they will be entitled to such of the said five million dollars of bonds as shall not be exchanged for bonds deposited as above provided. Said bonds to become their absolute property, charged only with the payments herein last above provided for."

It was further agreed that the purchasing committee, in

making bids, should act under the direction of the purchasers (that is, Thomson and Williams), provided that the price should be sufficient to provide for the payment of all liens prior to the mortgage, and of all charges, expenses, and liabilities; and that they should assign their bid, or take title and convey the same to the purchasers, or make other disposition thereof as requested by the purchasers.

In pursuance of this arrangement, and by consent of Ames and Williams, trustees of the second mortgage, the final decree for foreclosure and sale was made on the 5th day of March, 1880. By the fifth clause of this decree it is declared and decreed that, besides the first mortgage bonds, 4,000 in number, and the coupons for interest thereon, there was due (in the words of the decree), "for replacement and repairs, additions and ameliorations made under the authority of this court, the sum of seven hundred thousand dollars, as shown by certificates, and which sum is a charge and incumbrance upon the said mortgaged property, according to the terms of the securities issued under the order of this court, besides the costs and expenses of the suit and of the management of the property, whereby it appears to the court that a sale of the property should be made, and the motion for the sale is therefore allowed."

By the sixth clause the trustees were directed, under the supervision of the master, to advertise and sell the mortgaged property for cash.

The seventh clause was evidently inserted in view of the preliminary agreements which had been made, and amongst other things decreed as follows:

"Seventh. The court further orders and decrees that it shall be competent for the holders of a majority or greater number of the bonds described in the deed of trust of the plaintiffs to form an agreement appointing a purchasing committee, or, if such an agreement has already been made by a majority of the bondholders, the committee so appointed therein may act, if the agreement empowers. . . . A copy of this agreement shall be deposited with the master, and be open to inspection ten days be-

fore the day of sale. . . . No more money shall be required than shall be sufficient, in the opinion of the master and trustees, to assure the payment of the charges and privileges upon the fund as shown by this decree, and the amount to be ascertained by the master's report before mentioned; and also the charges, including those arising under the orders of the court before mentioned, defined in the first article of the deed of trust, and consisting of expenses of management, conduct of business, repairs, replacement, ameliorations, incidental charges of administration, and for compensation of service, for which there is not adequate provision for payment from the moneys on hand, and these charges the master must ascertain and give notice of at the sale."

By the eighth clause of the decree the master and trustees were directed to report the sale when made, with a draft of the conveyance to be made to the purchaser, or any assignee or substitute for the purchaser; and it was declared competent for the purchasing committee to assign their purchase. By the eleventh clause it was decreed that the trustees and receivers might move for their discharge at the time of the confirmation of the sale, and in the meantime might settle all their accounts in either capacity which had not been adjusted. It was further decreed that any surplus produced by the sale should be paid to the trustees of the second mortgage; and that these trustees should advertise and sell any property covered by the second mortgage which was not covered by the first mortgage.

Under this decree the sale was advertised to take place on the 24th day of April, 1880.

A supplemental decree was made on the 9th of March, 1880, directing the master to proceed between that date and the day of sale to examine the accounts of the trustees, and ascertain what sums were due under the article of the deed of trust referred to in the decree, which provides for the payment of the expenses of management, charges for the custody of the property, compensation for service and allowance to trustees, &c.

The master made a preliminary report on the accounts on the 23d of March, 1880, but not on the subject of allowance to the trustees, or other preferred charges.

On the 27th of March, 1880, the purchasing agreement of February 10th was filed with the master; and the agreement of December 16th, 1879, was also laid before him.

On the 29th of March, the counsel for the trustees and receivers filed with the master a statement of the charges to be paid by the purchasers at the sale to be made on the 24th of April, in substance, as follows:

Certificates issued to raise money for repairs, &c.....	$700,000
To John E. Parsons, for services as counsel.....	15,000
Allowance to E. D. Morgan and Jas. A. Raynor for services and compensation in the management of the railroad and conduct of the business other than the services of management and superintendence of the manager, being the particular services incident to trustees and receivers, annually from the date of entry on the property, $25,000, to be apportioned between them as they shall agree.	
Allowances (to which the plaintiffs assent) to the master of the court.....	5,000
The costs and expenses of the suit in court.	
A charge by the solicitor to be separately preferred.	

On the 2d of April, 1880, William S. Williams and David Thomson filed objections and exceptions to this statement—stating that they did so as parties to the purchasing agreement of February 10th, 1880, and as bondholders; and as grounds of exception, state that there was no proof to sustain the charges, and that they were exorbitant and illegal.

On the 3d of April the counsel for the trustees and receivers moved to overrule the exceptions, as being in favor of no person having any interest.

The master proceeded to take proofs on the subject of the charges, and a great deal of testimony, and documentary evidence were adduced, going to show the great amount of trouble and litigation which the trustees and receivers and their counsel, had to encounter in the five years and more during which they had control of the property. This examination lasted up to the day preceding the sale.

On the 6th of April Williams and Thomson withdrew their opposition to the item of $700,000 for receivers' certificates.

On the 8th of April Foster and Thomson, named in the agreement of February 10th, 1880, as attorneys to represent the purchasers (Thomson and Williams) in settling the form of the decree, and in examining the title, &c., and who were to consult with the counsel for the trustees in carrying out the entire arrangement, filed an objection to the charges and allowances submitted by the trustees, except as to the receivers' certificates; and joined in the objections and exceptions of Williams and Thomson, and asked to be heard.

Thereupon the counsel for the trustees moved to dismiss the exceptions both of Williams and Thomson and Foster and Thomson, on the following grounds:

"Williams and Thomson appear as interposed persons or as brokers of the Louisville & Nashville Railroad Company to accomplish the purchase of the railroad in charge of the plaintiffs or trustees. Their contracts are with a voluntary committee of bondholders who have made a purchasing agreement. They have not purchased the railroad nor purchased the bonds, but have made an agreement with the committee that they should purchase and sell to the railroad on a variety of conditions which may not be fulfilled. Any higher bidder may acquire the railroad. The trustees have reserved right and obligation to purchase the road. Williams and Thomson may not appear and carry out one word of the engagement or comply with the conditions to bind the buyer with the bondholders' committee. They have no right to contest the claims or the accounts of the plaintiffs or those of the attorneys. They must take the property as they find it and the charges on it shall they purchase the property.

"2. The Louisville & Nashville Railroad Company furnish $5,000,000 in bonds to be used for the purchase; a portion is to be used to buy the bonds of the old company; a part to pay preferential charges and claims, and to return the property, amounting to $300,000. These two persons are to have the remnant not consumed by those charges on that fund. So, to make their commissions or brokerage or compensation larger, they come to

contest with trustees, attorneys, and officers of court, who for five years have been at work. The title to do this is insufficient.

"3. Foster and Thomson are attorneys apparently for Williams and Thomson, to examine the title and arrange for the fulfillment of terms, but have no claim that Williams and Thomson have not."

It appears from the master's report, afterward filed, that on the 20th day of April, 1880, the solicitor for the complainants and the committee of bondholders withdrew "the previous claims (submitted March 29th, 1880), for any of the parties under the authority they conferred, all parties preferring to submit their claims anew," &c. The withdrawal was allowed as prayed for; whereupon the said claims were presented anew as follows, viz.:

"Amount of certificates of indebtedness.....	$700,000 00
Do. due to John E. Parsons, professional services.	15,000 00
Do. do. J. A. Campbell, professional services to be settled.....	20,000 00
E. D. Morgan claims for $15,000 annually from date of finding bill to April 1, 1880, for services, trustee and receiver, amounting to.....	75,780 80
J. A. Raynor likewise claims.....	75,780 80
Allowance recommended for master's services.....	5,000 00
Do. do. do for journey to New York under decree, actual expense.....	117 25
Costs of the marshal in the cause.....	
Do do. clerk do	
Attorney's Docket fee.....	20 00"

On the 23d of April, Williams and Thomson and Williams separately, filed applications to the court for leave to be heard before the master and the court in opposition to the claim for charges and allowances; Williams stating that he held first mortgage bonds to the amount of $582,000, and represented others; and that he was a trustee under the second mortgage, and, as such, entitled to any surplus of the proceeds of sale, and interested in resisting and reducing the charges and allowances. Thomson and Williams stated that they had acquired rights under the purchasing agreement and were also first and

second mortgage bondholders, and had an interest as such to oppose the charges.

The court granted both of these applications, and the parties were fully heard before the master on the 23d of April.

The sale took place under the decree on the 24th of April, as advertised, and the property was bid off and adjudicated to the purchasing committee of the bondholders, Bliss, Von Hoffman, and Ames, under the direction of Williams and Thomson, according to the programme of the agreement, and the purchasing committee, at their request, assigned the bid to a new company organized for the purpose, called the New Orleans, Mobile and Texas Railway Company, as reorganized; and to this company the trustees executed a deed accordingly.

On the 3d of May the master made his report on the subject of charges and allowances, stating fully the proceedings before him. Amongst other things he says: "At the final hearing the only question discussed by the parties was as to the amount of the allowances to be made to the complainants for services incident to trustees and receivers; the exceptions to all of the other items of the claim for allowances seem to have been abandoned." And his conclusion is as follows: "That the exceptions of the opponents as to the amounts claimed by Messrs. Morgan & Raynor for their services as trustees and receivers at the rate of $15,000 per annum as being excessive, should be maintained, and that an allowance be made to the said Morgan & Raynor, trustees and receivers, for their services under the deed of trust herein, at the rate of $5,000.00 per annum, from March 12th, 1875, to May 8th, 1880, amounting to $25,677.24 (the said amount to be settled by and between them), as a sufficient compensation for their services. The preferential charges, allowances, and costs to be paid in the cause are as follows:

"Am't for certificates of indebtebtedness.....	$700,000 00
" due to John E. Parsons, counsel.....	15,000 00
" J. A. Campbell do.....	20,000 00
" E. D. Morgan and J. A. Raynor, trustees....	25,677 24
" for publishing notice of sale in New York, New Orleans, and Mobile.....	1,485 70

Am't for marshal of the court.....	$26	00
" clerk " "		
" master's expenses to New York to deposit bonds.....	117	25
" master's fee for services (left to the discretion of the court).....		
" cost of mortgage certificates.....		"

This report was excepted to by the solicitor for the trustees and receivers, and the exceptions being argued, an order was made on the 7th of May 1880, recommiting the report, with instructions to allow Edwin D. Morgan a salary of $10,000 per annum, and James A. Raynor $15,000 per annum; and to the solicitor of the trustees $6,000 per annum; all without reference to other allowances. The remainder of the report was confirmed.

In accordance with these instructions, the master reported on the disputed allowances as follows:

"Am't of allowance to J. A. Raynor, trustee, from date of entry upon the property, Feb'y 1st, 1875, to May 8th, 1880, 5yrs. 3 mos. and 8 days, @ $15,000.00 per annum....	$79,083	28
" allowance to E. D. Morgan, trustee, same time as J. A. Raynor, @ $10,000 per annum..	52,722	15
" allowance to J. A. Campbell, counsel fees, from Feb'y 1st, 1875, to May 8th, 1880, 5 yrs. 3 mos. and 8 days, @ $6,000.00 per annum...	31,633	28"

This report was excepted to on 8th of May by Williams and Thomson, as purchasers named in the contract of February 10th, 1880, and by Wiliams personally, as holder of 582 first mortgage bonds, and as representing others holding similar bonds, and also as trustee under the second mortgage. On the 17th of May the exceptions were dismissed. From this order the present appeal was taken, on the 21st of May, by Williams and Thomson, and by Williams personally, in the characters named above. After the appeal had been taken and allowed, the trustees filed their general accounts, which were duly

reported on and confirmed, including therein the full charges allowed by the master in his last report; and the trustees were discharged from their trust.

It may be remarked at once, that the proceedings in the court below, after the appeal was taken, if it was perfected in time, would not affect it if Williams and Thomson had a right to appeal, and if the order was an appealable one. These conditions existing, that branch of the case was no longer in possession of the court. There is no question that the appeal was perfected in time; the bond was approved and filed on the 31st of May, 1880.

As to the right of Williams and Thomson to appeal, this depends on their right to intervene and contest the allowances to the trustees; or rather on the power of the court to allow them to do so. And we do not well see how this power can be doubted if they had a substantial interest at stake. From the first, they claimed to have such an interest not only as interested under the purchasing agreement (a copy of which they filed with the master), but as bondholders chargeable with the payment of their part of the charges. Though a motion was made to overrule their exceptions, the master declined to pass upon it himself, and the proceedings before him were continued and progressed in (apparently by mutual consent) until the court could hear the motion. This it did on the 23d of April, when Williams separately, and Williams and Thomson jointly, presented (as we have seen) formal applications to be allowed to be heard before the master and the court. Williams claimed the right to be heard on the ground of his being a holder of first mortgage bonds to the amount of $582,000, and of representing others; and on the further ground of being one of the trustees of the second mortgage, entitled to any surplus; and Williams and Thomson claimed the same right, as being interested under the purchasing agreement, and also as being first and second mortgage bondholders. The court very properly, as it seems to us, granted their application. Their status as bondholders and otherwise does not seem to have been denied. As bondholders, and as interested under the second mortgage, if not under the purchasing agreement, we

do not well see how the court, under the circumstances, could have refused their application. The trustees themselves, who were the nominal complainants, were the parties interested to obtain large allowances for themselves, and could not be relied on to have them reduced.

From the time of the sale, on the 24th of April, 1880, if not before, Williams and Thomson became interested in the amount of the charges and allowances that were to be paid out of the extra $1,000,000 of Louisville and Nashville Railroad Company bonds. They were then committed to the carrying out of the purchasing agreement. The bid of the purchasing committee of the bondholders was made on their account and under their direction; it was made for them under the agreement, and they were virtually the purchasers; and from that time, the agreement of February 10th, 1880, governed the proceedings and rights of the parties. The bid was only $4,000,000, and yet the Louisville and Nashville Company issued its $5,000,000 of bonds pursuant to the agreement, $4,000,000 of which were to go to the first mortgage bondholders, and the other $1,000,000 were retained by the purchasers under their agreement to advance sufficient cash to meet the preferred claims. This they did, and all the claims were paid, the present controversy relating to the proper allowances to the trustees and receivers only remaining open. After the sale, it was the purchasers, and not the bondholders, who were interested in those allowances. It was a matter of no moment to the bondholders what allowances were made, for they were to have bond for bond in any event; it was a matter of great moment to the purchasers, for every dollar allowed to the trustees was so much less for them.

This case differs from that of *Swann* v. *Wright's Executors*, 110 U. S. 590, recently decided by this court. In that case Swann had purchased the railroad under a decree which provided that the sale should be subject to the liens already established, or which might be established on references then pending, as prior and superior to the lien of the mortgage; and the claim of Wright was one of this class, having been before the master, on reference, for nearly a year when the decree was made, and warmly contested by the bondholders. The

master did not report on the claim, it is true, until after the sale was made, and the purchaser applied to oppose its confirmation, and was not allowed to do so, and the sale was afterwards confirmed expressly subject to all liens established as specified in the decree of sale. Swann afterwards filed a bill to set aside Wright's claim for fraud in its inception. This bill was dismissed, and the decree of dismissal was affirmed by this court, on the ground that the property was purchased expressly subject to all established claims, or claims that might be established on references then pending, which included Wright's claim as much as if it had been named.

From this recital of the facts in that case it appears that the bondholders were permitted, as Williams and Thomson (also bondholders) were in the present case, to contest the claim sought to be established as prior to the mortgage. The purchaser was not allowed to contest the claim, because he had no right to do so by virtue of any stipulation made either at or before the sale: whereas in the present case, by the preliminary agreement made between the bondholders and the proposed purchasers (and who afterward became such), it was expressly stipulated that the latter were to have all that should be left of the purchasing fund agreed on, after paying $4,000,000 for the bondholders, and all preferred charges and allowances;—a stipulation which made them directly interested in the amount of such charges and allowances, and made them so by the privity of the bondholders themselves. This, as it seems to us, placed the purchasers in the present case in a very different position from that which Swann occupied in the case cited. But, if we are mistaken in this view as regards their position as purchasers, there can be no doubt that as bondholders they had a right under the leave of the court (which was given to them, and which could not have been properly refused) to oppose the charges and allowances in question, and to appeal from the order by which they were allowed.

We think that the position of Williams and Thomson made them *quasi* parties in the case, and brought them within the reason of the former cases decided by this court in which persons incidentally interested in some branch of a cause have

been allowed to intervene for the purpose of protecting their interest, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below. We refer to the cases of *Blossom* v. *Milwaukee Railroad*, 1 Wall. 655, where a purchaser at a foreclosure sale was admitted to appeal; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609, 634, to the same effect; *Hinckley* v. *Gilman, Clinton & Springfield Railroad*, 94 U. S. 467, where a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed receiver; *Sage* v. *Railroad Company*, 96 U. S. 712, where parties interested were allowed to appeal from an order confirming a sale; *Trustees* v. *Greenough*, 105 U. S. 527, where an appeal from an order for allowance of costs and expenses to a complainant sueing on behalf of a trust fund, was sustained; and *Hovey* v. *McDonald*, 109 U. S. 150, where an appeal was allowed to be brought against a receiver from an order made in his favor.

That the order was such as could be appealed from we think is equally apparent. It was final in its nature, and was made in a matter distinct from the general subject of litigation,—a matter by itself, which affected only the parties to the particular controversy, and those whom they represented.

We are then brought to the merits of this controversy. It concerns only the allowances to the trustees; nothing else was insisted on before us. The allowance made by the court below is certainly, to say the least, a liberal one. A great deal of evidence was adduced to show that a vast amount of labor and litigation and operations of perplexity and difficulty were performed by the trustees whilst they were acting as receivers of the court. We are perfectly satisfied that their application for allowance was a very meritorious one. They really lifted the road out of the mire, and renovated it from beginning to end, made important contracts, built expensive bridges, purchased a large amount of iron, and kept the concern on its legs until it could walk alone,—the financiering part not being the least important or difficult. But considering that one of the trustees had a very liberal salary, as manager and superintendent, and

his expenses paid, we think that the allowance made by the Circuit Court was larger than it should have been. It is unnecessary to review the evidence; it is too voluminous. The question is one of fact and estimation, and we will content ourselves by stating the conclusions at which we have arrived.

We are of opinion—

1. That Williams and Thomson had such an interest, and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court.

2. That the said decree was a final decree for the purposes of an appeal.

3. That the allowance to said trustees was greater than, under the circumstances, it should have been. In our opinion the gross sum of $75,000 would have been a just and sufficient allowance to said trustees jointly for their services and compensation as trustees and receivers, exclusive of the salary paid to James A. Raynor as manager and superintendent.

4. That the residue of the order and decree of the Circuit Court should be affirmed, and that each party should pay their own costs on this appeal, except the costs of printing the record, which should be equally divided between the parties.

It is therefore the judgment of this court, and so ordered, that the decree below be reversed as to the allowance made to Edwin D. Morgan and James A. Raynor as trustees and receivers as described in the record, and that the cause be remanded, with instructions to enter a decree allowing the said trustees and receivers jointly for their services and compensation as such trustees and receivers (independently of the salary allowed and paid to the said James A. Raynor, as manager and superintendent), the gross sum of $75,000 *instead of the allowance made by the decree appealed from.*

It is further ordered that the remainder of the said decree be affirmed, and that each party pay their own costs on this appeal, except the cost of printing the record, which is to be equally divided between the parties.

HAGAR *v.* RECLAMATION DISTRICT NO. 108.

SAME *v.* SAME.

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

Argued March 21st, 1884.—Decided May 5th, 1884.

Constitutional Law—Legal Tender—Swamp Lands—Tax.

It is within the discretion of the legislature of California to prescribe a system for reclaiming swamp lands, when essential to the health and prosperity of the community, and to lay the burden of doing it upon the districts and persons benefited.

Lands in California derived by grant from the Mexican government are subject to State legislation respecting swamp and overflowed lands.

The acts of Congress making the notes of the United States a legal tender do not apply to involuntary contributions in the nature of taxes or assessments exacted under State laws, but only to debts in the strict sense of the term; that is, to obligations founded on contracts, express or implied, for the payment of money.

The distinction between a tax which calls for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination before collection, and a tax imposed upon property according to its value to be ascertained by assessors upon evidence, pointed out and commented on. In the former no notice to the owner is required. In the latter the officers in estimating the value act judicially.

A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment to the Constitution, which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined, or in subsequent proceedings for its collection.

It is not competent for the owner of land which is part of a grant to a State under the swamp land act, 9 Stat. 519, to set up in proceedings begun to enforce a tax on the land assessed under a State law for the purpose of draining and improving it, that the State law impairs the obligation of the contract between the State and the United States, and so violates the Constitution; because (1), if the swamp land act constituted a contract between the State and the United States he was no party to it; and (2), the appropriation of the proceeds of the granted swamp lands rests solely in the good faith of the State. *Mills County* v. *Railroad Companies*, 107 U. S. 557, affirmed.

The facts are stated in the opinion of the court.

Opinion of the Court.

Mr. W. C. Belcher for appellant.

Mr. A. L. Rhodes for appellee.

Mr. Justice Field delivered the opinion of the court.

By an act of the legislature of California, passed in 1868, a general system was established for reclaiming swamp and overflowed, salt marsh, and tide lands in the State, of which there is a large quantity, and thus fitting them for cultivation.

It will be sufficient for the purposes of this suit to state the general features of the system, without going much into detail. It provides for the formation of reclamation districts where lands of the kind stated are susceptible of one mode of reclamation; such districts to be established by the board of supervisors of the county in which the lands, or the greater part of them, are situated, upon the petition of one-half or more of the holders thereof. The petition being granted, the petitioners are required to establish such by-laws as they may deem necessary for the work of reclamation and to keep the same in repair; and to elect three of their number to act as a board of trustees to manage the same. This board is empowered to employ engineers and others to survey, plan, and estimate the cost of the work, and of land needed for right of way, including drains, canals, sluices, water-gates, embankments, and material for construction; and to construct, maintain, and keep in repair all works necessary for the object in view. The trustees are required to report to the board of supervisors of the county, or, if the district be in more than one county, to the board of supervisors in each county, the plans of the work and estimates of the cost, together with estimates of the incidental expenses of superintendence and repairs. The supervisors are then to appoint three commissioners, who are jointly to view and assess upon each acre to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which will result from the works; which tax is to be collected and paid into the county treasury or treasuries, as the case may be, and placed to the credit of the district, to be paid out for the work of reclamation upon the order of the trustees, when approved by

the board of supervisors of the county. If the district be in more than one county the tax is to be paid into the treasury of the county in which the land assessed is situated. If the original assessment be insufficient for the complete reclamation of the lands, or if further assessments be required for the protection, maintenance, and repair of the works, the supervisors may order additional assessments upon presentation by the trustees of a statement of the work to be done, and an estimate of its cost, such assessments to be levied, and, if delinquent, collected, in the same manner as the original assessment.

The commissioners are required to make a list of the amounts due from each owner of land in the district, and of the amount assessed against the unsold land, and file the same with the treasurer of the county in which the lands are situated. The lists thus prepared are to remain in the office of the treasurer for thirty days or longer, if so ordered by the trustees, during which time any person can pay to the treasurer the amount assessed against his land; but if at the end of the thirty days, or the extended time, the tax has not been paid, the treasurer is to transmit the list to the district attorney, who is to proceed at once against the delinquents in the manner provided by law for the collection of State and county taxes.

The political code of the State, which went into effect on the 1st of January, 1873, embraces substantially the provisions of the act of 1868. The changes are more in language than in substance. So far as subsequent proceedings are concerned the code prescribes the rule.

The Reclamation District No. 108, the plaintiff in the court below, was established in September, 1870, under the act of 1868. It embraces over 74,000 acres of land situated in the counties of Yolo and Colusa, and forming a compact body susceptible of one mode of reclamation. The trustees of the district originally estimated the cost of the reclamation works, including incidental expenses, at $140,000, and the commissioners appointed assessed that sum upon the lands in the district. The amount proved to be insufficient to complete the works, and upon the report of the trustees that the further sum of $192,000 was required for that purpose, the supervisors ordered

that amount to be assessed, and the commissioners appointed by them levied the assessment upon the lands. This assessment became delinquent, and the present suits were brought to obtain a decree that the several amounts charged upon the lands of the appellant are liens upon them, and for their sale to satisfy the charges. One of the suits is to enforce the liens on the lands in Yolo County, and the other the liens on the lands in Colusa County. On his motion they were both removed to the Circuit Court of the United States. That court held in each case that the several sums assessed were valid liens upon the lands of the appellant on which they were levied, and ordered that the lands be sold for the payment of the amounts, with interest and costs.

From these decrees the appeals are taken.

Of the several objections to the validity of the assessment urged in the court below, and pressed here, some arise under local statutes, not involving any questions of federal law; and some under the laws and Constitution of the United States. The former relate to the manner in which the reclamation district was formed, it being established by the supervisors of one county, while part of the lands are situated in another county; to the fact that the appellant derived his title to his lands under a grant from the Mexican government; and to the requirement that the amounts assessed should be collected in gold and silver coin of the United States.

There being no federal question touching these matters, we follow the decision of the State tribunals as to the construction and validity of the statutes. It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country. The system adopted in California to reclaim swamp and overflowed lands by forming districts, where the lands are susceptible of reclamation in one mode, is not essentially different from that of other States, where lands of that description are found. The

fact that the lands may be situated in more than one county, cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate.

In some States the reclamation is made by building levees on the banks of streams which are subject to overflow; in other States by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. *County of Mobile* v. *Kimball*, 102 U. S. 691, 704. The rule of equality and uniformity, prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in *Louisiana* v. *Pillsbury*, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that

he who reaps the benefit should bear the burden, must in such cases be applied.

The fact that the appellant's land was derived from a grant of the Mexican government in no respect affects the question. It is the character of the land and its susceptibility of being reclaimed under one system of works, and not the source of the owner's title, which authorize the action of the State. The lands granted by Mexico were not by the treaty, under which California was acquired, exempted from the control that the State exercises over all other lands. The objection made is founded upon the title of the act of 1868 and the language of some of its provisions, from which it is inferred that the system of reclamation prescribed was intended to apply only to lands acquired by the State under the Arkansas Swamp Act. But the Supreme Court of the State has passed directly upon this objection, in a controversy between the appellant and the supervisors of Yolo County with respect to this very land, and has held it untenable. 47 Cal. 222. Besides, the objection, if originally applicable, was obviated by subsequent legislation in 1872, prior to the assessment in question.

Nor is there anything in the objection that the law requires the assessment to be collected in gold and silver coin. The original act of 1868 did not prescribe the currency in which the charges were to be paid, but before the assessment was levied it was amended so as to require payment in gold and silver coin. The acts of Congress making the notes of the United States a legal tender do not apply to involuntary contributions exacted by a State, but only to debts, in the strict sense of that term, that is, to obligations for the payment of money founded on contracts, express or implied. This point was decided in *Lane County* v. *Oregon*, with reference to the first legal-tender act of 1862. 7 Wall. 71. Subsequent acts imparting the legal-tender quality to notes did not change the general language of that act. They make such notes a legal tender "in payment of all debts, public and private, within the United States." In the case mentioned, a statute of Oregon requiring the payment of taxes for State and school purposes to be collected in gold and silver coin was sustained on two grounds:

First, that it was the right of each State to collect its taxes in such material as it might deem expedient, either in kind, that is to say, by a certain proportion of products, or in bullion, or in coin, the court observing that the extent to which the power of taxation of the State should be exercised, the subjects upon which it should be exercised, and the mode in which it should be exercised were all equally within the discretion of its Legislature, except as restrained by its own constitution and that of the United States, and by the condition that the power could not be so used as to burden or embarrass the operations of the Federal government; and, *second*, that the legal-tender act had no reference to taxes imposed by State authority, but only to debts, in the ordinary sense of the word, arising out of simple contracts, or contracts of specialty, which include judgments and recognizances. Assessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes. They are, therefore, covered by this decision; the State could determine in what manner they should be discharged.

The objections urged to the validity of the assessment on federal grounds are substantially these: that the law under which the assessment was made and levied conflicts with the clause of the Fourteenth Amendment of the Constitution declaring that no State shall deprive any person of life, liberty, or property without due process of law; and impairs the obligation of the contract between California and the United States, that the proceeds of the swamp and overflowed lands ceded by the Arkansas Act should be expended in reclaiming them.

That clause of the Fourteenth Amendment is found, in almost identical language, in the several State Constitutions, and is intended as additional security against the arbitrary deprivation of life and liberty and the arbitrary spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in *Davidson* v. *New Orleans*, to arrive at its meaning "by the gradual process of judicial inclusion and ex-

clusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." 96 U. S. 97, 104. It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado* v. *California*, 110 U. S. 516, 536.

The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson* v. *New Orleans:* "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether

under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" The power of taxation possessed by the State may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form, and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319.

Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular

place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.*

In some States, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax-payer to be heard respecting the assessment which can be deemed es-

* That the duties of assessors in estimating the value of property for purposes of general taxation are judicial, see *Barhyte* v. *Shepherd*, 35 N. Y. 238, 250; *Hassan* v. *Rochester*, 67 id. 528, 536; *Stuart* v. *Palmer*, 74 id. 183; *Williams* v. *Weaver*, 75 id. 30, 33; Cooley, Law of Taxation, 266; Burroughs, Law of Taxation, sec. 102; *Jordan* v. *Hyatt*, 3 Barb. 275, 283; *Ireland* v. *Rochester*, 51 id. 416, 430, 431; *The State* v. *Jersey City*, 24 N. J. Law (4 Zabr.), 662, 666; *The State* v. *Morristown*, 34 N. J. Law (5 Vroom), id. 445; *Griffin* v. *Mixon*, 38 Miss. 424, 437, 438.

sential to render the proceedings due process of law. In *Davidson* v. *New Orleans* this court decided this precise point. In that case an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law, but the court refused to interfere, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition that would be at once perspicuous and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case, "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." (96 U. S., 97.)

This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defence going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defence, all his grievances. *Reclamation District No.* 108 v. *Evans*, 61 Cal. 104.

If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller, in the New Orleans case, these words as used in the Constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed.*

The objection that the law of California authorizing the assessment in question, impairs the obligation of a contract created between the United States and the State by the act of Congress of September 28th, 1850, commonly known as the Arkansas Swamp Act, is founded upon a misapprehension of its provisions. 9 Stat. 519, ch. 84 It is true the act granted to the State all the swamp and overflowed lands within its limits, on condition that the proceeds of the lands, "whether from sale or by direct appropriation in kind," should be applied, as far as necessary, in reclaiming the lands by means of levees and drains. Hence the contention of counsel is that the State is bound to carry out this condition, and apply the proceeds to the reclamation, or provide for their application to that end, and that its legislation imposing an assessment upon other lands to raise the necessary funds for that purpose, is in violation of this contract, and therefore void. The answer to this position is twofold. In the first place, if a contract was created by the Arkansas act, when the State accepted its benefits, it is for the United States to complain of the breach if there be any. The plaintiff is not a party to the contract, and is in no position to

* *Overing* v. *Foote*, 65 N. Y., 263, 269; *Stuart* v. *Palmer*, 74 id. 183; Cooley, Law of Taxation, 265–6, 298; *Thomas* v. *Gain*, 35 Mich. 155, 164; *Jordan* v. *Hyatt*, 3 Barb., 275, 283; *Wheeler* v. *Mills*, 40 id. 644; *Ireland* v. *Rochester*, 51 id. 414, 430, 431; *The State* v. *Jersey City*, 24, N. J. L. 4 Zabr. 662, 666; *The State* v. *Newark*, 31, id. 360, 363; *The State* v. *Trenton*, 36 id. 499, 504; *The State* v. *Elizabeth*, 37 id. 357; *The State* v. *Plainfield*, 38 id. 97; *The State* v *Newark*, 1 Dutch. 399, 411, 426; *Patten* v. *Green*, 13 Cal. 325; *Mulligan* v. *Smith*, 59, id., 206; *Griffin* v. *Mixon*, 38 Miss. 424, 438; *County of San Mateo* v. *Southern Pacific R. R. Co.* 8 Sawyer, 238; *County of Santa Clara* v. *Same*, 9 id.; *Darling* v. *Gunn*, 50 Ill. 424. See also *Gatch* v. *City of Des Moines*, N. W. Rep. 310, 311, 313.

invoke its protection. But, in the second place, the appropriation of the proceeds rests solely in the good faith of the State. Its discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created. This was distinctly held after elaborate consideration in the recent case of *Mills County* v. *Railroad Companies*, 107 U. S. 557, 566.

There are several other objections urged upon our consideration in the elaborate brief of the appellant's counsel, but we do not deem it necessary to consider them, for they raise only questions of local law and procedure which have been considered and determined in the courts of the State, from whose conclusions we should not depart.

Decrees affirmed.

NOTE.

Legislation of the Colonies prior to the Revolution, and of the States since, giving to the tax-payer an opportunity to be heard respecting the justice of the assessment of his property before it becomes final.

In Massachusetts, an act passed in 1692, for defraying the public and necessary charges arising within each county of the province, provided that "If any person or persons think themselves overrated in any such assessment, they shall be eased by the assessors making the same to appear, or, in default thereof, by the court of quarter sessions." (Laws of Massachusetts Bay, p. 19.)

In Connecticut, an act passed prior to 1750 made it the duty of the listers to hear complaints of parties complaining that they were overrated. "But if such listers will not give just relief, then upon application made by the aggrieved party to an assistant, or justice of the peace, with two of the selectmen of the town (notifying two or more of the listers to show reason, if any they have, why relief should not be granted them), they shall consider the case, and give such relief as they shall judge just and reasonable." (Acts and Laws of His Majesty's English Colony of Connecticut, 136 and 262.)

In South Carolina, by an act passed in 1701, for raising money for the public use and defence of the province, provision is made that the commissioners appointed by the act shall, upon complaint or appeal from any one feeling aggrieved at the rating, examine the person complaining upon his oath, touching the value of his real and personal estate, "and upon due examination abate or defaulk proportionably the said assessments, and the same so abated shall be certified by the commissioners aforesaid, or any two of them, to the receiver, and such assessment so certified as aforesaid shall be deemed firme and valid, and to that end the commissioners are hereby required to meet together for the determining of such complaint and appeal accordingly." (2 Statutes of South Carolina, 184.)

Opinion of the Court.

By other and subsequent statutes the tax-payer was allowed to "swear off" so much as he should think himself overrated for his stocks or stores, and the assessors were required to give notice for that purpose, and were authorized to administer oaths and to allow the abatement. (3 Statutes of South Carolina, 241, 260, 476, and 506.)

In Maine and Massachusetts, the tax-payer may make his complaint first to the assessor, and, if he refuse to grant the relief demanded, to the county commissioners. (Me. Rev. Statutes, 1871, p. 144; Mass. General Statutes, 1860, p. 79.)

In Rhode Island he may petition the Supreme Court or Court of Common Pleas, and the court must hear and determine his complaint. (General Statutes, p. 107.)

In Vermont, complaints may be heard before listers, and an appeal lies from their decision to the selectmen of the town. (General Statutes, 520.)

In New Hampshire, the tax-payer may apply to the selectmen of the town, and, if dissatisfied with their decision, may apply, by petition, to the Supreme Court, in the county, at a trial term, which shall make such order thereon as justice requires. (General Statutes, 123.)

In Connecticut, a board of relief, to consist of five "judicious electors," is annually elected in each town, for hearing and determining appeals from decisions of the assessors. (General Statutes, pp. 24, 159.)

In New York, complaints may be made to the board of assessors. (Rev. Statutes, 5th Ed., 911 and 912.)

In New Jersey, to the commissioners of appeal, in tax cases. (Rev. Statutes, 1142, 1148.)

In Pennsylvania and Delaware, to county commissioners. (Penn., Purdon's Dig., p. 937, § 23; Del. Rev. Statutes, 1852, p. 62, §12.)

The Delaware Act of 1796 (2 Laws of Del., 1255, § 14), provided that commissioners should give notice in each hundred, and at the time and place specified meet and "hear and determine the complaints of any person or persons that may be aggrieved, and shall generally arrange the said valuations, so that no person or persons may be unequally or overrated; *provided always*, that no person or persons shall be prevented from appealing to the Levy Court and Court of Appeals of his or their respective county as heretofore."

In Virginia and Georgia, if the tax-payer and assessor cannot agree as to valuation, each can choose an arbitrator, and they an umpire, to whom the matter of disagreement is submitted for final determination. (Geo. Code, 1873, § 840; Va. Code, 1860, p. 201.)

In Maryland, North Carolina, Florida, and Alabama the boards of county commissioners constitute tribunals for hearing and determining complaints in regard to assessments; except in Baltimore the board of control and review constitute such tribunal. (Md. Code, Sup., 1861-67, p. 279, § 175; N. C. Laws, 1874-5, p. 222, § 18; Thompson Dig. Laws of Florida, 97; Ala. Code of 1876.)

In North Carolina, under the Act of 1819, three freeholders, appointed by the Court of Common Pleas and Quarter Sessions, constitute a board of appeal for adjustment of assessments. (2 Laws of N. C., p. 1480, § 2.)

Opinion of the Court.

In Arkansas, Mississippi, and Kentucky, the county Boards of Supervisors constitute boards for the equalization of assessments. (Ark. Acts of Assembly, 1873, p. 58 ; Miss. Rev. Code, 1871, p. 351, § 1685 ; Ky. Gen'l Sts., 1873, p. 724.)

In South Carolina such a board is constituted of the county commissioner, auditor, and treasurer ; in Louisiana, of the county clerk, recorder and sheriff ; in Tennessee, of the assessor and two freeholders ; and in Missouri of the presiding judge of the county court and the county surveyor and assessor. (Rev. Sts. S. C., 69; Voorhies Rev. Sts. La., 840; 1 Sts. Tenn., § 581 Mo.; Mo. Rev. Stats., 2 vol., §§ 6719, 6720, 6726.)

In West Virginia, the aggrieved party may apply for relief to the county court with an appeal to the Circuit Court. (Rev. Sts., 1063.) In Texas he may apply to the county court, and its determinations are final. (Paschal's Dig., 869, Art. 5176.)

Boards of Equalization or Review are provided for, consisting :

In Illinois, of the assessor, clerk and supervisor. (Ill. Rev. Sts., 1874, p. 871.)

In Indiana, of the county auditor, commissioners, and appraisers. (1 Gavin & Hord's Stats. of Indiana, p. 82, § 54, 320.)

In Michigan, Iowa, and Nevada, of the boards of supervisors. (1 Compiled Laws of Mich., 366 ; Code of Iowa of 1873, p. 140 ; General Laws of Nev., § 3139.)

In California, of the boards of supervisors, except where the property assessed consists of the franchise, roadway, roadbed, rails, and rolling-stock of railroads operated in more than one county, in which case the State board of equalization acts as assessor, and over its decisions there is no revisory tribunal. (Political Code of Cal., §§ 3673, 3692.)

In Kansas and Nebraska, of county commissioners. (Kans. Comp. Laws, 1879, 953 ; Neb. Gen'l Sts., 907.)

In Ohio, of the county commissioners and county auditor, except in certain cities, where the board consists of the county auditor and persons appointed by the city authorities. (Rev. Sts., 1880, p. 731.)

In Oregon, of the county judge, assessor, and clerk. (Deady & Lane's Gen'l Laws of Oregon of 1874, 756.)

In Wisconsin, the chairman of the board of supervisors, clerk, and assessors of each town, and the mayor, clerk, and assessors of each city, and the president, clerk, and assessors of each incorporated village, constitute a board of review for such town, city, or village. (1 Taylor's Statutes, 1871, p. 406, § 53.)

The function of these boards of review, by whatever name called, is essentially the same.

Statement of Facts.

LOUISIANA *Ex rel.* NELSON *v.* POLICE JURY OF ST. MARTIN'S PARISH.

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

Argued April 25th, 1884.—Decided May 5th, 1884.

When a contract is made with a municipal corporation upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the inhibition of the Constitution.

On an appeal from a judgment ordering the issue of a mandamus to compel the collection of a tax to pay a judgment recovered against a municipal corporation, the appellate court may authorize an inquiry whether the judgment was founded upon a contract or a tort, with a view to determine the constitutional rights respecting it; but has no authority to re-examine the validity of the contract or the propriety of the original judgment, those questions having been finally adjudicated.

A judgment creditor of a municipal corporation entitled by his original contract to be paid out of specific tax levies, which agreement the corporation failed to comply with, is entitled, in mandamus proceedings, to a writ ordering the levy and collection of a sufficient tax to pay his judgment according to the assessment roll of the year in which the levy is made.

On the 29th of November, 1873, the relator, Nelson, recovered in the Third Judicial District Court for the Parish of St. Martin, in Louisiana, a judgment against the Parish for $4,500, with interest at eight per cent. per annum from October 5th, 1868. At that time the law of Louisiana provided that whenever a judgment for money was rendered by any court of competent jurisdiction against a parish of the State, the judge rendering it should, "in the same decree, order the board of assessors or parish officers, whose duty it is to assess taxes, forthwith to assess a parish tax at a sufficient rate per centum upon the assessment roll of the current year to pay and satisfy said judgment, with interest and costs." Rev. Stat. of La. sec. 2628. The law also declared that in such decree or judgment the judge should provide that the State or tax collector should "proceed forthwith to collect the tax" in the same manner that parish taxes were collected, and that the proceeds should constitute a special fund out of which said judgment, interest, and costs, should be paid, and should not be diverted to

any other purpose, provided sufficient proof was furnished to him that there were no funds in the parish treasury to satisfy the judgment. Ibid. sec. 2630. In pursuance of these provisions, the judge of the Third Judicial District Court entered, with the judgment rendered on the 29th of November, 1873, a decree for the assessment and collection of a parish tax to pay it, and directed the collector to proceed at once to collect the tax. That judgment and decree are as follows:

"In the above-entitled case, the law and evidence being in favor of plaintiff and against the defendant, it is ordered, adjudged, and decreed that said plaintiff, Thos. W. Nelson, have judgment against and recover from the defendant, Parish of St. Martin, the sum of forty-five hundred dollars, with eight per cent. interest per annum, from October 5th, 1868, and that the board of assessors, or officers whose duty it is to assess taxes, forthwith proceed to assess a parish tax, at a sufficient rate per cent. upon the assessment roll of the current year, to pay said judgment, and that the tax collector proceed forthwith to collect said tax in the same manner that parish taxes are now collected, and the amount collected to be a specific fund to pay said judgment.

"Done, read, and signed in open court, this 29th November, 1873."

From the entry of this judgment and decree to the presentation of the application for a mandamus to be issued to the officers designated, the relator in vain endeavored to have the decree executed. He made repeated applications to them to assess and collect the tax ordered, but they refused to do so; and at the extra session of the legislature of 1877, by the act known as No. 56, passed on the 10th of April of that year, the provisions of law to which we have referred were repealed. Subsequently the officers in excuse of their conduct alleged a want of authority by reason of the repeal. He therefore applied to the court for a mandamus to compel them to proceed in such assessment and collection pursuant to the decree of the court, setting forth in his petition the judgment recovered, with the accompanying decree, the refusal of those officers to carry out the directions of the decree on account of the repeal-

ing act of 1877, and averring that that act, if constitutional, left him absolutely without any remedy, as the parish was without property liable to seizure in an amount sufficient to pay it; and that the act was null and void as to him, and his rights under the decree, because in conflict with the constitution of Louisiana and that of the United States prohibiting legislation impairing the obligation of contracts; and that unless aided by the writ of mandamus he would lose the rights established by his judgment. The writ was duly served, and upon its return the president of the police jury of the parish appeared representing the assessing officers. The Parish of St. Martin also appeared and set up that the remedies invoked for the enforcement of the judgment were repealed; that the parish was largely involved in debt; that its tax was then ten mills on the dollar, and that the levying of an additional tax to pay the judgment in one instalment would not only exceed the rate of taxation fixed by article 209 of the new constitution of the State, but would absorb, or nearly so, its entire revenues. Upon these pleadings the district court ordered a peremptory mandamus directing the levy and collection of the tax. An appeal was then taken to the Supreme Court of the State, where the judgment was reversed, the court holding that the right to the mandate depended upon the question whether the judgment against the parish was founded upon a contract protected against impairment by State legislation under the federal Constitution; observing that the repealing act of 1877 should be no bar to the exercise of the remedy accorded by law to the relator in force at the time that he obtained his judgment, which "not only theoretically but practically formed part of that judgment, provided that judgment be founded on a contract;" and also that unless it was thus founded the court would be powerless to enforce its payment in the manner proposed, under the inhibition of the Constitution of 1879 limiting taxation to ten mills on the dollar of the valuation of property. As the judgment did not specify the cause of action upon which it was rendered, the court thought that it would be in furtherance of justice to give the relator an opportunity of establishing that it was upon a contract, if such were the case,

and to allow the defendants to adduce such further evidence, and make such other defences as the nature of the suit might require. 32 La. Ann. 884. The court subsequently stated that it was not its intention by its decision to open the judgment which had been rendered in 1873 in order that the issues involved and determined might be tried *de novo*, but only to allow proof of a material fact in support of the proceeding by mandamus, viz., a protected contract, that is, whether the judgment was upon a contract of that character, which was protected both by the State and Federal constitutions. 33 Ibid. 1124.

When the case went back to the District Court it was shown that the judgment was entered upon warrants drawn by the Parish of St. Martin for the sum of $4,500 for the building of a bridge over Bayou Teche within the corporation, such warrants being drawn in favor of the municipal authorities of the town of New Iberia and payable to the extent of $1,000 by a special appropriation out of the tax of 1856, and to the extent of $3,500 out of any surplus funds in the hands of the treasurer, from the taxes of 1865, 1866, 1867, and 1868. The District Court held the proof to be sufficient that the judgment was founded upon a contract, and again ordered a peremptory mandamus to be issued to levy and collect the tax.

From this decree an appeal was also taken to the Supreme Court, where it was reversed on the ground that the warrants upon which the judgment was rendered were payable out of certain funds by specific appropriation, and on the further ground that the original judgment required an immediate assessment and collection of a tax in 1873 according to the assessment roll of that year, which could not be done in 1881. The court held that as regards the levy of the tax the judgment had ceased to be executory, and had passed out of existence. It, therefore, reversed the decree and directed judgment rejecting the demand of the relator. The relator thereupon brought this writ of error. Pending the case in this court, Will Steven became assignee of Nelson, and he having died, Michael O'Brien and Wm. P. Richardson, his testamentary executors, were substituted as plaintiffs in error.

Mr. Gus. A. Breaux for defendant in error.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

In the case of *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, we held that the right to reimbursement for damages caused by a mob or riotous assemblage of people in that city, was not founded upon any contract between the corporation and the parties injured; that its liability for the damages was created by law, and could be withdrawn or limited at the pleasure of the legislature; that its creation was merely a measure of policy, and its character was not changed by the fact that the amount of damage sustained in any particular case was ascertained and established by a judgment in favor of the sufferer. So when the question arose as to the validity of legislation changing the rate of taxation by which funds could be obtained to meet a judgment in such case, the court looked beyond the judgment to the causes upon which it was founded. As the contract clause of the Constitution was intended to secure the observance of good faith in the stipulation of parties against State action, it could not be invoked when no such stipulation existed, and therefore not against legislation which interfered merely with the enforcement of claims for damages from the violence of mobs or of judgments upon such claims.

It was, therefore, entirely within the competency of the Supreme Court of Louisiana to authorize an inquiry into the cause of action on which the judgment of Nelson was rendered, when he prayed for its enforcement by proceedings which were authorized by legislation existing at its date, but subsequently repealed. Whether such repeal was effectual to deprive him of the process prayed, depended upon the question whether the judgment was founded upon a contract, the obligation of which the State was prohibited from impairing. By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement. The

usual mode by which municipal bodies obtain the funds to meet their pecuniary engagements is taxation. Accordingly, when a contract is made upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition.

The inquiry, however, which may be thus instituted into the nature of the original cause of action, does not, where the judgment was rendered upon a contract, authorize a re-examination of the validity of the contract, or of the propriety of the judgment. That would involve a retrial of the case. Here the inquiry disclosed the fact that the judgment of Nelson was founded upon treasury warrants issued by the Parish of St. Martin, in favor of the municipal authorities of New Iberia, for $4,500, for the building of a bridge over a bayou within the limits of the corporation, made payable out of certain funds, the proceeds of taxes for particular years. It may be that the funds mentioned were merely such as the authorities intended to apply to the payment of the warrants, and were not designed to be any limitation upon the right of the holder to payment for the construction of the bridge if such funds did not exist. So the district court would seem to have thought, as its judgment was general, that the plaintiff recover the amount absolutely from the parish, and this judgment had become final before the application for the writ of mandamus. The absolute liability of the parish upon such warrants was therefore no longer an open question, and the inquiry whether the judgment was founded upon a contract was answered. Further testimony on the subject was irrelevant and incompetent. The Supreme Court, however, held that the designation of the funds out of which the warrants were to be paid rendered the parish liable only if the funds were sufficient, notwithstanding the terms of the judgment. Its conclusion in this respect was wholly unauthorized, because founded upon evidence which it could not legitimately consider. The judgment being absolute, and the plaintiff therein being by law entitled at the time to a decree that the assessing and collecting officers of the parish should assess and collect a tax suffi-

cient to pay it, and such decree having been entered, and those officers having failed in their duty, the relator was entitled to the writ prayed. The Code of Procedure of Louisiana declares that the writ may be directed to public officers to compel them to fulfil any of the duties attached to their office, or which may be legally required of them. Article 834. There can be no doubt, therefore, that under this law the writ should have been granted.

The position of the court that the relator was not entitled to the writ because the decree accompanying the judgment contemplated a levy of the tax in 1873 according to the assessment roll of that year, is without force. He was entitled, and the party succeeding to his interest is entitled to a writ commanding the levy and collection of a sufficient tax to pay the judgment, according to the assessment roll of the year in which the levy is made, at any time until the judgment is satisfied; the right to demand the tax not depending upon the valuation of the taxable property for any year for general purposes. Such right was not only assured by the law in force when the contract was made, but was expressly declared in the decree accompanying the judgment and forming part of it. It is difficult to conceive a plainer case for the relief prayed.

The decree must be reversed, with directions to the Supreme Court to affirm the judgment of the Third District Court awarding the mandamus prayed; and it is so ordered.

HITZ *v.* NATIONAL METROPOLITAN BANK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 14th and 17th, 1884.—Decided May 5th, 1884.

Deed—Fraud—Husband and Wife—Judgment Lien—Tenancy by Curtesy.

In the absence of a fraud a husband who is embarrassed may convey his curtesy in the real estate of his wife to trustees for her benefit and for the benefit of their children, when a consideration is received for it which a Court of Equity may fairly take to be a valuable one.

Opinion of the Court.

When a deed in trust recites a nominal consideration as the sum paid by the trustee, it is no contradiction to show that a valuable consideration passed to the grantor from the *cestui que trust.*

A statute enacting that the property of a married woman shall not be liable for the debts of her husband exempts his estate in the curtesy in her real estate from being taken for his debts contracted after the passage of the act.

Under the recording act which took effect in the District of Columbia, April 29th, 1878, an unrecorded conveyance is subject to the lien of a judgment recovered subsequent to it, although execution was not issued and levied till after the record, unless it appears that the judgment debtor had notice of its existence before issue and levy of execution.

This was a suit in equity brought by a judgment creditor, to set aside a conveyance of real estate in Washington belonging to his wife, to trustees for the benefit of the wife and their children. The facts which made the issues appear in the opinion of the court. On the 31st of March, 1884, the court announced a decision in appellant's favor. Appellee's counsel then filed a petition for a rehearing as to the effect of the recording law of April 29th, 1878, upon the judgment and the deed. This act is set out in the opinion. The deed in question was executed and delivered before recovery of the judgment. It was recorded after the recovery, but before issue and levy of execution. The judgment creditor had no knowledge of the deed so far as shown by the record.

Mr. Enoch Totten and *Mr. R. D. Mussey* for appellant.

Mr. Leigh Robinson for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is a bill in chancery brought by the Bank against John Hitz, Jane C. Hitz, his wife, and Metzerott and Cross, trustees, to declare void a deed, so far as it affects rights of the bank, made by Hitz and wife to Metzerott and Cross, as trustees, for the benefit of the wife.

The deed was made December 9th, 1878, and filed for record in the proper office, May 13th, 1879. The property conveyed, which was real estate in the city of Washington, came to Mrs. Hitz by inheritance from her father, and by the birth of children before the married woman's act of Congress of April 10th,

1869, 16 Stat. 45. Hitz had become entitled to a life estate in it as tenant by the curtesy.

It is this right which is the subject of the present controversy.

The bank, as creditor of Hitz, obtained a judgment against him on the 28th day of April, 1879, for the sum of $10,000, with interest and costs, and on the 5th day of June a writ of execution was issued on said judgment and returned *nulla bona* the same day.

On the next day plaintiff caused another execution to be issued on the same judgment, and levied by the marshal on the interest of the said John Hitz in the property described in the trust deed of Hitz and wife to Metzerott and Cross.

We will notice the grounds on which the validity of the deed is assailed, in their order.

1. It is said that the deed was never delivered to the trustees.

But the testimony of Mr. Metzerott, complainant's witness, shows clearly that he did receive the deed and kept it for an indefinite length of time, and then placed it in a box which he bought for that purpose, and handed it to Mrs. Hitz, that she might deposit the box with this and other valuable papers in the Bank of the Metropolis. This was done.

It is also objected that it was delivered to Metzerott as an escrow, to be *recorded*, as he expresses it, only when Hitz should have made some adjustment of his indebtedness to the German-American Bank, which has never been done. It is quite obvious, and perhaps natural, that Metzerott should confound his holding the deed as an escrow and withholding it from record as meaning the same thing; and it is very clear from all his testimony and that of Mr. Cross, the other trustee, that only the latter was in question.

Both of these gentlemen had been consulted before the deed was made, and had consented to act as trustees in it. As soon as the deed was executed and acknowledged, it was placed in the hands of Metzerott, who received and held it for some time, and then gave it to the party chiefly interested for safe-keeping. Leaving out the testimony of Mrs. Hitz, of Hitz, and their sworn answers, in which they both deny that they

had ever heard of the deed being delivered as an escrow, it is plain that it was executed, delivered, and the trusteeship accepted, and the deed thus became a valid instrument as between the parties to it.

2. As regards the understanding that it was not to be recorded until Hitz's debt to the bank was adjusted, it rests upon Mr. Metzerott's testimony alone. Mrs. Hitz swears that though she was advised by Mr. Cox, her lawyer, who drew up the deed, that it was better not to record it at once, and that Mr. Metzerott expressed the same views to her, she did not adopt them, and made no promise to withhold it from record. Hitz, whose interest in the property was the thing conveyed, says that he had no such understanding, and Cross, the other trustee, knows nothing of it except what was told him by Metzerott.

There can be no reason favorable to the purpose of the deed, the interests of Mrs. Hitz, the *cestui que trust*, why it should be withheld from record, or why she should have made such a promise.

3. This brings us to the third objection to the deed, namely, that it was voluntary, was without consideration, and designed to defraud creditors.

It appears that up to a very short time before this deed was made Mr. Hitz had the entire management of his wife's affairs, and she had trusted him unreservedly. It was a complete surprise to her when she learned that with the failure of the bank, of which her husband was president and principal manager, her own fortune, inherited from her father, had also disappeared. The evidence leaves no doubt that she at once took the management of her affairs out of his hands, not even permitting him to receive or collect for her the rents of what remained, of which the property now in suit was the main part.

It appears that, to save himself from prosecution by the bank, or for other reasons, he desired to convey to the bank some real estate, the title of which was in his own name, though it had been purchased partly by her money. He wished her to join him in conveyance of this property to Keyser, the receiver, who had been appointed to close up the

affairs of the bank. He had also conveyed to Hatch and wife, for some purpose of his own, a valuable business house on Pennsylvania Avenue, which was part of her inheritance, and then had procured these persons to mortgage it to the bank of which he was president, to secure a large debt due by him to the bank. But it had been discovered that Mrs. Hitz had never signed or otherwise executed any conveyance of this lot. Mr. Hitz was in an embarrassing condition with regard to this matter. It was after some resistance on her part to making these matters straight for Mr. Hitz, that it was agreed if he would make the deed of trust by which all the estate in the lots mentioned in it, including his interest, whatever it might be, and hers also, should be secured to Mrs. Hitz and her children by the intervention of trustees, she would make good the title of the lot on Pennsylvania Avenue which he had pledged to the bank, and would join him also in the deed to Keyser, the receiver, of what was asserted to be his property.

The trust deed was, therefore, made on a valuable consideration. The value of the avenue property alone conveyed by Mrs. Hitz is sworn to be $18,000. What her interest in the other property was worth is not proved and could not easily be ascertained. No estimate of the value of Hitz's interest in the lots conveyed to the trustees is shown. When sitting as a Court of Equity we see this man trying to rectify the wrong done his wife; we are not required to scan closely the value of what she gave at the moment for his relinquishment of his marital rights in her remaining property.

The case is wholly free from fraud. Mrs. Hitz had the same right to buy his curtesy in her real estate, to have it barred by a proper conveyance, as any one else had or could have had. Her equity was as good as that of any other creditor, and he could secure her as well as he could the bank. As the present complainant had no lien on the property, the joint right of husband and wife to sell it for value was undoubted, and the right to sell to her by the intervention of trustees is equally clear. The property she gave in exchange for his interest in her lots did not go to him to be secretly used in fraud of his creditors, but was conveyed directly to creditors in satisfac-

tion of his debts. The conveyance was not without consideration and it was without fraud.

We do not concur in the view of the learned court below, that because the sum of one dollar is mentioned in this trust deed as the consideration, the true consideration cannot be shown by parol evidence. It is always understood that the one dollar in such connection is merely nominal and is never actually paid. In this case it means no more than that nothing was paid by the trustees, who took no beneficial interest.

It neither contradicts nor varies this statement to show that a valuable consideration passed from Mrs. Hitz to her husband for his conveyance of his life estate to the trustees for her benefit.

The question is unimportant in this case, because the bill of complaint calls upon the defendants to show under oath the true consideration of the deed in the following language:

"That defendants by their answers under oath may disclose what was the real and true consideration and purpose for the making of said deed."

That the answer thus called for, showing a valuable and meritorious consideration, which answer is uncontradicted by any evidence whatever, and is well supported on cross-examination of defendants in their depositions, can be disregarded as inadmissible because unfavorable to the party who demanded it, would be to permit the party to trifle with the powers of the court at its pleasure.

4. There remains to be considered the effect to be given to the fact that complainant recovered its judgment against Hitz before this deed was recorded, but issued no execution until after it had been filed according to law with the proper officer for record.

On this question a petition for a rehearing points out a mistake in the opinion of the court as originally delivered in regard to the date of the act repealing the recording statutes as found in sections 446 and 447 of the Revised Statutes, whereby we were misled to believe that the sections mentioned governed

the case. It is apparent, however, that the new statute was approved April 29th, 1878, and not 1879, and its provision as to the effect of recording or failing to record the instrument in question, which was executed in December, 1878, must be governed by that act. It is in the following language:

"That all deeds, deeds of trust, mortgages, conveyances, covenants, agreements, decrees, instruments in writing, which by law are entitled to be recorded in the office of the recorder of deeds, shall take effect and be valid, as to creditors and subsequent purchasers for valuable consideration without notice, from the time such deed, deed of trust, mortgage, conveyance, covenant, agreement, or instrument in writing shall, after having been acknowledged, proved, or certified, as the case may be, be delivered to the recorder of deeds for record, and from that time only." 20 Stat. 39, 40.

As the deed of trust in question was not recorded until several weeks after the judgment of the bank against Hitz was recovered, and as there is no evidence that the bank ever had actual notice of its existence until after execution was issued and levied on Hitz's interest in the property, we entertain no doubt but that the conveyance would be ineffectual against the bank, or any purchaser at the sale under that judgment.

But as this deed interposed no obstruction to the sale, and none to the title of a purchaser, it is not easy to see on what ground the interposition of a court of equity is sought, since the bank having levied on Hitz's interest in the property, which was a legal estate if it was anything, it could be sold under that execution, if liable to sale for his debts, without the aid of a court of equity, the whole proceeding being one at law, and its effect, when completed, a mere question of statutory construction.

It may be, however, that the bank had a right to remove the apparent cloud which this deed would throw upon the title of the purchaser at the sale, and this demands of us an examination of the argument advanced at the hearing, that this interest of Hitz in the property of his wife was not liable to sale for

his debts, by reason of section 727 of the Revised Statutes for the District of Columbia, which is as follows:

"In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

There can be no question that this statute exempts the wife's property from the control of her husband and liability for his debts as to all property coming to her from any source but him, after its enactment.

This was on the 10th of April, 1869, and it is insisted that the right of Hitz, as tenant by the curtesy, had then become vested, because the inheritance had then come to Mrs. Hitz, the marriage had taken place, and issue had been born of it.

It is argued with much force that Congress did not intend by this statute to destroy an existing vested right of the husband under such circumstances, and that if it did so intend it had not the power to do so.

We should be slow, however, to impute any such purpose to Congress unless the language in which its statutes are framed demands it. The question does not arise in the case before us.

Three distinct departures from the old law are announced in this new statute in regard to the husband's relation to his wife's property, both real and personal.

1. That her right to it shall be as absolute as if she were unmarried.

3. That it shall not be subject to the disposal of her husband.

3. That it shall not be liable for his debts.

In regard to the first of these, it may be conceded that where, at the time of the enactment of this law, the husband had acquired a vested right in the property, Congress did not mean to destroy it, and that to that extent her right would not be as absolute as if she were unmarried.

It would result from this that, as between Mrs. Hitz and her husband, his right by the curtesy would remain.

It is not necessary to decide in this case whether he could, in view of the second clause of the statute, transfer that right to another by sale or otherwise. If he retained the right to its possession and its use, so long as he lived, even after her death, it seems reasonable that a statute which limited his power over it to that use and possession would not be liable to the charge of destroying a vested right.

In regard to the third clause, that it shall not be liable for his debts, the argument is still stronger, for that divests him of no right and does him no injury. What effect it might have as against an existing creditor at the time the law was passed, as impairing the obligation of a contract, we need not decide, for it does not appear that there are now any such creditors, and it appears affirmatively that the debt of the bank in this case was created nearly ten years after Congress declared that her property should not be liable for his debts.

In regard to this clause of the statute and to its operation in this case, it is neither retrospective nor does it impair the obligation of a contract.

It is urged, however, that the plain purpose of the statute was to deprive the husband of all legal interest in the property of the wife, and it must, therefore, be construed to relate only to property acquired after the passage of the law. For this purpose, however, the first clause of the declaration, namely, that her right to such property "shall be as absolute as if she were unmarried," is amply sufficient. And if that was all that was intended the two subsequent clauses were unnecessary and tended to weaken that declaration. These latter clauses, however, and especially the last, may be applied to cases where the other would not, namely, to cases of marriage already in existence and where the husband's marital rights had attached. In this class of cases the enactment that her property should not be liable for his debts, because he held some right of present control, was in accord with the spirit of the main principle of the statute, and as applied to debts thereafter created, it did no one injustice.

It is also argued that the property exempted from his debts by the act is her property, and that the life estate of the husband is not her property.

But this is a very narrow view and is not justified by any fair grammatical construction of the language employed.

It is the right of a married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, which shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband. It was the purpose of the statute to abolish this tenancy by the curtesy, or any other interest of the husband, in *all her* property, and to place her in regard to it in the condition of a *feme sole.* And it was this same property, and not part of it, no separate interest or estate in it, which was exempted from liability for his debts. It would be a queer construction of the statute, looking at its manifest purpose, to hold that it meant, though her property shall never come under his control and he shall acquire no interest in it, and it shall never be liable for his debts, the use and possession, the rents and profits of it, may be made liable for his debts as long as he lives.

We are of opinion that the statute intended to exempt all property, which came to the wife by any other mode than through the husband, from liability to seizure for his debts, without regard to the nature or the interest which the husband may have in it, or the time when it accrued, and that in regard to such debts, created after the passage of the law, no principle of law or morals is violated by the enactment. On the contrary, if we concede, as in the present case, that the husband had acquired a tenancy by the curtesy, in her property, before such enactment, it is eminently wise and just that no other person should afterwards acquire such an interest in it as to disturb the joint possession of it, and turn the family resulting from the marriage out, that it may go to pay his debts.

The authorities cited by counsel for appellee rather sustain, and certainly do not contradict, this view of the matter.

In the case of *Rose* v. *Sanderson*, 38 Ill. 247, while the court holds that a statute, very much like the act of Congress relied on here, did not exempt from sale for the husband's

debt his life interest in her real estate, which had become vested before the passage of the act, it is apparent, from the record, that the debt for which the writ of attachment was levied on that interest, existed when the statute of exemption was passed. The case states explicitly that the act went into effect April 24th, 1861, and the attachment was levied May 10th, 1861, and the husband's right, either by the curtesy or for the wife's life, had vested long before. It might, therefore, have been held to impair the obligation of the plaintiff's contract if the act had been so construed as to exempt that interest from liability to sale for that debt.

In the case of *Stehman* v. *Huber*, 21 Penn. St. 260, it was simply held that where, on a partition of an estate in which the wife was a part owner, the husband advanced a considerable sum as owelty in her behalf, he thereby became interested in the property allotted to her and conveyed to her and to him jointly, and that the husband, by executing a conveyance of this interest to a third person, who conveyed it to the wife, could not thereby defeat the existing creditor's right to appropriate that interest to the payment of his debts.

In the case of *White* v. *Hildreth*, 32 Vt. 265, on the other hand, there came before the Supreme Court of Vermont, for construction, a statute in regard to the debts of the husband very like the act of Congress. It enacted that the rents, issues, and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate, which belonged to her before marriage, or which she may have acquired by gift, grant, devise or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband, . . . provided this act shall not affect any attachment or levy of execution already made. Compiled Statutes of Vermont of 1850, p. 403, § 15.

In the case mentioned the husband had built upon and improved the land of the wife, after which she rented it to her son, in whose hands the rent was attached by trustee process for the debt of the husband. But the court said: "The legal title to the land, with the supervening improvements and build-

ing, is still in the wife. It accrued during coverture. The rent reserved in the lease to her son, is the rent of the land she owns. The statute expressly exempts such rent from the hands of his creditors. This provision of the statute seems to answer what otherwise must have been a well-founded suggestion, viz., that though this money is payable to the wife of the defendant, still it is not the rent of the freehold which the husband held by virtue of the coverture and the birth of issue capable of inheriting, and is, in contemplation of law, entirely the husband's without invoking the wife as the meritorious cause." Here the court holds distinctly that this statute, which does not profess to abolish the tenancy by the curtesy, is still an answer to an attempt to subject the rents and profits to his debts, because it declares that the property shall be exempt from levy for his debts.

In Oregon, the Constitution of the State declared that "the property and pecuniary right of every married woman, at the time of the marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband." In the case of *Rugh* v. *Ottenheimer*, 6 Oregon, 231, it was held that this provision applied to marriages, and existing and property rights of the husband acquired before the Constitution was adopted, and that such property could not be subjected to the husband's debt, though he had wrongfully taken the title in his own name.

For these reasons, we are of opinion that the property levied on by the execution of the bank against Hitz is not subject to sale for his debt, and that the decree of the Supreme Court must be reversed and the case remanded to that court with directions to dismiss the bill.

It is so ordered.

BADGER, Collector, *v.* GUTIEREZ'S Administratrix.

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

Submitted April 7th, 1884.—Decided May 5th, 1884.

Collector of Customs—Vessels.

The papers of a vessel not under seizure in the hands of a collector of customs, but not deposited with him for purpose of entry or clearance, may not be detained by him without subjecting him to an action for the resulting damage.

When a vessel or its owner becomes subject to a statutory penalty for taking out improper papers, that does not justify a collector of customs in withholding from the vessel the papers to which it is lawfully entitled.

The facts constituting the case are stated in the opinion of the court.

Mr. Solicitor-General for appellant.

Mr. J. Ward Gurley, Jr., for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an action by defendant in error against Badger, plaintiff in error, who was collector of the port of New Orleans, for the wrongful seizure and detention of the license, enrolment, shipping articles, and other papers of the schooner Theresa G, of which he was owner. The plaintiff on the trial recovered a verdict for the sum of $3,000 damages, and on his remitting $1,000 of the verdict, a judgment was rendered for the remainder with costs.

A bill of exceptions sets forth the facts in the case as follows:

"Be it remembered that on the trial of this cause before a jury there was evidence introduced tending to show that the schooner Theresa G, whereof Frank Gutierez was master, sailed from Havana on 9th September, 1879, bound for the port of Shieldsborough; that on or about the 29th September, 1879, said vessel arrived in Grand Caillon Bayou, an inlet of the Gulf of Mexico, lying within the customs collection district of the Teche, that the

arrival of said vessel was not reported to collector of the district of the Teche, but that on the 28th October, 1879, while said vessel was lying in said bayou and in said district of the Teche, Gutierez reported the arrival of the vessel to collector's office at Shieldsborough, which was the port of her registration, and in the absence of the collector of that port, a deputy collector received from Gutierez the foreign register of said vessel, and issued to him a coasting license and enrolment.

"That on the 31st October the collector at Shieldsborough wrote to General Badger, collector port New Orleans, stating that said papers had been issued improperly in his absence, and requesting him, Badger, to get them from Gutierez; that on the 1st November, 1878, J. M. Tomlinson, chief clerk of Badger, collector, acting under instructions from Badger, found Gutierez for the purpose of inspection, obtained the papers issued at Shieldsborough from Gutierez; that from this date Badger, acting under the advice or instruction of the Secretary of the Treasury, refused to deliver the ship's papers to Gutierez, though demanded from him on the same day or subsequently.

"That on the 4th November, 1879, on information given by Badger, collector, the Theresa G was libelled for violation of sec. 2774, R. S., on part of master, and seized by marshal on 16th November; that on the 18th November, 1879, Gutierez filed his claim and bonded the vessel, and she was delivered up to him.

"That on the 18th November, 1879, Gutierez demanded from Badger the papers taken by Tomlinson, which Badger refused to deliver; that thereupon Badger reported the facts to the Secretary of the Treasury, who directed Badger to retain the papers issued at Shieldsborough, and subsequently directed Badger to send papers to Washington, D. C., which was done.

"That on 18th November, 1879, Badger stated to Gutierez that the Theresa G might be brought from Caillon Bayou to New Orleans by SW. Pass, Mississippi River, and he, Badger, thereupon sent to boarding officers written instruction to let vessel pass to New Orleans, but that Gutierez declined to bring his vessel on such permission; that this permission was declined by Gutierez on the ground that he must have in his possession documentary permission before he could safely navigate his vessel; that on January 9th, 1880, written permission was given by Badger, collector, to master of the Theresa G to bring said vessel

from Caillon Bayou to Lookout Station, in the collection district of New Orleans; that said vessel was thereupon brought to Lookout Station, and that on the 24th day of January, 1880, collector Badger granted clearance papers to said vessel.

"Be it remembered further, that at the conclusion of said trial the court charged the jury as follows: That the papers of the vessel were essential to her prosecuting navigation, and that it was not competent for the collector of the Teche district to have given to the Theresa G clearance papers under which she could have proceeded without the production of the ship's papers detained by Badger; that the defendant had the right to seize the ship, and for such seizure a judgment in another cause had established that there was probable cause, but that if the jury found from the evidence that the defendant detained the papers of the ship at a time when the ship was not under seizure, and which was not deposited with him for the purpose of the vessel's making an entry or clearance, that for such detention the plaintiff could recover damages; that this recovery could be had even if the papers had been improperly issued by the collector at Shieldsborough; that detention of the ship's papers, without giving her others, left her powerless to pursue any navigation of a vessel. To this instruction, and to each clause of the same, the attorney for the defendant, then and there and in the presence of the jury and before they withdrew to deliberate upon the case, excepted."

This instruction presents the main question to be decided. Other prayers for instructions were asked by defendant which were either modified or refused. All of these were based upon the idea that because the master of the schooner had arrived at Grand Caillon Bayou and failed to report his arrival to the collector of the Teche district in due time, she, therefore, became liable to seizure, and the defendant could take her enrolment and license, however obtained, and detain them and also her register, as long as it suited him, or that for some other irregularity in issuing them he could do the same thing.

It is to be understood that every vessel of the United States, which is afloat, is bound to have with her from the officers of her home port, either a register or an enrolment. The former is used when she is engaged in a foreign voyage or trade, and

the latter when she is engaged in domestic commerce, usually called the coasting trade. If found afloat, whether by steam or sail, without one or the other of these, and without the right one with reference to the trade she is engaged in, or the place where she is found, she is entitled to no protection under the laws of the United States, and is liable to seizure for such violation of the law, and in a foreign jurisdiction or on the high seas, can claim no rights as an American vessel.

To seize and detain these papers, therefore, is to expose her to numerous evils, and, in fact, to prevent her use by her owners, and, as the mildest evil, to tie her up so long as the detention of her papers lasts. It is to be observed, that when he procured the enrolment and license at Shieldsborough, the owner gave up his register, so that when the license and enrolment were taken from him, his vessel was left without any legal evidence whatever of her right to pursue either domestic or foreign trade. It is also to be mentioned, that it is the right of the owner to exchange a register for an enrolment, and where this is done, the register is necessarily delivered to the officer who issues the enrolment.

If this enrolment was for any reason improperly issued, there must be methods by which the act may be set aside or cancelled, or a penalty enforced for its improper use. In such case, the owner would undoubtedly be entitled to a proper issue of another enrolment, or to a return of his register.

In no event, that we can conceive of, had the defendant a right to keep from him both his register and enrolment, and leave his vessel destitute of these indispensable evidences of her national character and right to pursue her vocation.

Nor do we think that the offence he committed of remaining in Caillon Bayou justified this detention of his ship's papers. For that offence the law prescribed a penalty, which the owner was made to pay. This prosecution for that violation of the law stood on its own ground and had its own penalty, which did not include a forfeiture or seizure of the papers of the vessel.

If plaintiff had voluntarily given up his enrolment there might have been some excuse for withholding it until matters

were made right concerning the alleged irregularity of the exchange of the register for a coasting license and enrolment. But even while withholding these latter papers he was clearly entitled to his register, which was refused on demand.

But it is also apparent that the enrolment came into Badger's possession by means equivalent to a forcible seizure against the will of plaintiff.

The chief clerk of Badger hunted up Gutierez, and under pretence of inspecting these papers obtained possession of them under instruction from Badger, and refused to return them on demand, as did Badger also.

Though the Secretary of the Treasury justified these proceedings, and acting under his advice Badger refused to deliver up any of the ship's papers for a considerable time, and they were finally sent to Washington, we do not see that this made his course in seizing and detaining the papers any the less a tort, for which the Secretary could not relieve him from responsibility.

We see no error in the record, and

The judgment of the Circuit Court is affirmed.

FACTORS' & TRADERS' INSURANCE COMPANY *v.* MURPHY & Another.

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

Submitted April 18th, 1884.—Decided May 5th, 1884.

Bankruptcy—Mortgage—Sale.

This court has jurisdiction in error over a judgment of the Supreme Court of Louisana, in a suit by one citizen of that State against another for the foreclosure of a mortgage on real estate therein, when the only controversy in the case is as to the effect to be given to a sale of the property under an order of the District Court of the United States in bankruptcy, to sell the bankrupt's mortgaged property free from incumbrances.

When a mortgagee of real estate becomes owner of the equity of redemption, a court of equity will not regard the mortgage as merged by unity of possession, if it was the evident intent that the two titles should be kept distinct,

or if the purchaser has such an interest in keeping them distinct that this intent can be inferred.

A sale of real estate of a bankrupt by order of court free from the lien of a mortgage creditor is invalid, as to the creditor and as to the purpose of discharging his lien, unless he is made a party to the proceedings. *Ray* v. *Norseworthy*, 23 Wall. 128 affirmed.

In such case it is not sufficient to notify the person who holds the evidences of his debt, and claims to be his agent, if the record represents that person as acting for another party, and makes no mention of the mortgage creditor.

The real estate of a bankrupt was sold by order of court free of incumbrances and purchased by A. One of the mortgages on the estate was given to secure four notes of which at the time of the sale A held two, and B held two. A and other mortgage creditors were made parties to the proceedings, but B was not made party. C held B's notes and claimed to represent him in the proceedings, but the record only showed C as acting for D. B brought suit to foreclose the mortgage as to his two notes, claiming that as to A's notes the lien was cut off by the purchase of the equity, and as to the rest of mortgage liens as well as to A's they were discharged by the sale. Held (1) that B had the right to a decree of foreclosure. (2) That this decree should be made for the benefit of all the mortgage creditors in the order of their priority, including A. (3) That the expenses of A for taxes, prior liens, improvements, &c., growing out of the former sale should be first paid out of the proceeds of the new sale. (4) That A should account for rents and profits if there were any.

This suit was originally brought by the widow Mary Murphy, in the Fifth District Court of the Parish of Orleans, to foreclose a mortgage upon real estate in Louisiana, which had been the property of a bankrupt, and had been sold by order of the District Court of the District of Louisiana free from incumbrances, and purchased by a holder of notes secured by the same mortgage. The facts which raise the federal question are stated in the opinion of the court. The Supreme Court of the State, to which the case came on appeal, decreed a sale of the mortgaged property to satisfy Mrs. Murphy's debt and interest. This writ of error was sued out to review that judgment.

Mr. R. L. Gibson and *Mr. G. L. Hall* for plaintiff in error.

Mr. James David Coleman and *Mr. Charles W. Hornor* for defendant in error, Murphy.

Mr. Justice Miller delivered the opinion of the court.

This was a writ of error to the Supreme Court of Louisiana.

The defendant in error sued in the proper court of the State to foreclose a mortgage given by Paul Cook and Justus Vairin, Jr., to secure the payment of four notes of $10,000 each, given by them in their partnership name of Paul Cook & Co., of which she was then the holder and owner of two, all the notes being of the same date. She alleged that Cook and Vairin had been declared bankrupts, and that by certain proceedings in the bankruptcy court, and under its order, the mortgaged property had been sold free from incumbrance, and bought in by several persons who had liens on it, by whose order it was conveyed to the Factors' and Traders' Insurance Co., which held the other two notes secured by the mortgage. She further alleged that the effect of this sale was to extinguish the mortgage as to the notes held by that company, and all other liens but hers, and to make that company liable to her for the amount of these notes with a first lien on the property mortgaged. That the sale under the order in bankruptcy was not binding on her, because she was not made a party to the proceeding and had no notice of it, while it was binding on all the other lien holders whose liens were thereby discharged, leaving hers a paramount lien on the property.

The insurance company and the other parties interested answered and insisted that Mrs. Murphy was bound by the bankruptcy sale because she was represented by T. A. Archer, who, as her agent, and having possession of her notes, took part in all the proceedings, and in that character was one of the purchasers, and joined in directing the conveyance to be made to the insurance company. They admit her interest in the property in proportion to the extent of her notes, but set up certain expenses and charges on it paid by them for taxes, necessary improvements, and prior liens to the amount of $11,454.83 as a superior claim to her notes.

The testimony of Mr. Archer shows that he understood himself as acting for Mrs. Murphy, having as her agent possession of the two notes now in suit. That in that character and no other he took part in all the proceedings for the sale and purchase of the mortgaged property, and that during that time he had frequent conversations with her and explained to her what

was going on, to which she made no dissent. But he does not say that she at any time in express terms authorized him to represent her in the sale or in the proceedings connected with it. The record of those proceedings, on the contrary, affirms that Mr. Archer acted for Marshall J. Smith & Co., of which company he was a member, and no mention of Mrs. Murphy is found in the record of that case, though both Archer and Smith have sworn they had no real interest in the matter, and only appeared as representing Mrs. Murphy's notes then in their possession and with her assent.

The Supreme Court of Louisiana, on appeal, held that Mrs. Murphy was not a party to the proceeding in bankruptcy, and was in no sense bound by the sale of the mortgaged property, but that the sale had the effect of extinguishing and satisfying all the liens on the property but hers, and left her notes the only lien on it. While it held that the insurance company was not bound for the debt *in personam*, it decreed that unless the company paid her debt, with interest, costs, and five per cent. attorney's fees, the property should be sold to raise the money, and denied the company's claim for taxes and other necessary outlays for the benefit of the property.

Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the District Court of the United States, to sell the mortgaged property free from incumbrance. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under federal authority, and as the right of plaintiff in error was denied by the court the writ of error lies.

As regards the merits, it is impossible to shut one's eyes to the injustice of the decree. The plaintiffs in error, who were led to suppose that they were acting in concert with Mrs.

Murphy, or at least with the holders of her notes by her consent, join in purchasing the property for the benefit of all the lien holders, and receive the title in trust for their common benefit. It is immediately necessary, to save it from loss, to pay taxes and other prior liens and to make improvements necessary to its preservation to the extent of over $11,000, for which they advance the money. Mrs. Murphy, who was aware of all these proceedings, and that the holder of her notes co-operated in them by virtue of those notes, now, when, by reason of depreciation in the value of the property, it is insufficient to pay her debt alone, asks that the others shall be sacrificed, that it shall all go to satisfy her debt, and even the money advanced to save the property from sale for taxes and from falling to decay, which is paid by others and enures now to her benefit, shall fall upon them as a dead loss. If this be the necessary legal result of that proceeding in bankruptcy the decree of the State court must be affirmed, but it will certainly be a result at variance with the policy of a statute whose main purpose was to secure an equal distribution of an insolvent debtor's property among all his creditors.

The first question to be decided is whether Mrs. Murphy was a party to the bankruptcy proceeding, so as to bind her to the order that the sale was free from incumbrance, by which, while her lien with all others was discharged, she had a right to her proportion of the price bid for it.

We are of opinion, with the Supreme Court of Louisiana, that the record in this case does not show such service of process or other notice as makes Mrs. Murphy such a party to the bankruptcy proceeding as binds her to the sale and discharges her lien. The case of *Ray* v. *Norseworthy*, 23 Wall. 128, is conclusive on that subject, and is, we think, sound in principle. The effect of this proposition is, that after the sale was made she was at liberty to accept such a part of the sum for which the property sold as her two notes would entitle her to in their relation to all other liens on it, by which she would have ratified the sale; or to proceed in her own way to subject the property to payment of her debt, which she has done by the foreclosure suit now on review.

Opinion of the Court.

But in this suit she has not elected to proceed in disregard of that sale, whereby, when the property would be sold under her decree of foreclosure, the proceeds of it must be brought into court and distributed among the lien holders according to their priorities; but she seeks to affirm that sale as free from all incumbrances, except her own, thereby assuming the benefit of a decree to which she was not a party while denying its obligation on herself, without which the decree would not have been made.

The adoption of this view by the Supreme Court of Louisiana is based by that court upon the doctrine of confusion found in the civil code of that State.

Without examining into the decisions of the State courts on that subject, it is sufficient to say that in construing the effect of this sale under the order of the District Court of the United States, it must be decided by those general principles which govern bankruptcy proceedings under that statute, rather than the code of the State in regard to voluntary sales of mortgaged property between individuals.

In this view of the subject, it is not possible, consistently with any equitable view of the case, to hold that this sale discharged part of the liens against the property and increased thereby the value of other liens at the expense of the purchasers. That the parties who honestly bid off the property and consented to hold it discharged of the claim of the assignee, but for the benefit of all the lien holders, thereby cut themselves off from any benefit of these liens to make good a lien which had no priority over theirs. If this were done by mistake in supposing all the lien holders were represented or were consenting, the mistake should be rectified by restoring the parties to their rights as if no sale had been made. If Mrs. Murphy chooses to assert her lien and demand a new sale of the land, let her have it, but it must be subject to the rights of all parties as they stood before the other sale, which, by reason of her absence and her objections, is ineffectual to bar incumbrances, as it was intended to do.

So far as the doctrine of confusion of the Louisiana Code may be said to be the equivalent of the doctrine of merger, in

the common law and in equity, in the latter it has been uniformly held that where an incumbrancer, by mortgage or otherwise, becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest.

Applying this just principle to the case before us, it is quite apparent that no merger can be sustained.

It is clearly proved that the property was purchased, as they supposed, at the time by all the lien holders, Mr. Archer acting for Mrs. Murphy, at a sum far below the amount due on the liens, and that no money was paid except the costs of sale, or intended to be paid, but that the property should be held, as it was before the sale, for the benefit of all these lien holders, in the proportion of their interest. This was carried into effect, not by a new sale to the insurance company, as is asserted, but by a conveyance under that sale, at the request of these lien holders, to that company, as trustee, for them all.

It was not, therefore, intended to extinguish their liens by this proceeding, but to keep them alive until the property should finally be sold and the money divided. So it is equally clear that it was not for the interest of these lien holders, who were actually purchasing, to extinguish their liens and thereby make Mrs. Murphy's notes a first lien, and enable her to get all her money at their expense.

The rule on this subject is thus stated by Jones on Mortgages, sec. 848: "It is a general rule that when the legal title becomes united with the equitable, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping these titles distinct, or if there be an intervening right between the mortgage and the equity, there is no merger." And in the case of *Forbes* v. *Moffatt*, 18 Vesey, 384, Sir William Grant says: "The question is upon the intention, actual or presumed, of the person in whom the interests are united." Other authorities cited by Mr. Jones sustain the principle. *Clark* v. *Clark*, 56 N. H. 105, is directly in point. *Loud* v. *Lane*, 8 Metcalf, Mass. 517;

Campbell v. *Carter*, 14 Ill. 286; *Armstrong* v. *McAlpin*, 18 Ohio St. 184.

It is to be observed, in the present case, that, as the mortgage, which secured the two notes owned by the insurance company, was the same which secured Mrs. Murphy's notes, as between which there was no priority, it would hardly be held on the order of the court to sell the property free from *all* incumbrances, that the purchase by the insurance company merged part of the mortgage, while part was kept alive. This is expressly decided in *Winker* v. *Flood*, 103 Mass. 474.

The result of these views is, that while Mrs. Murphy is not precluded by the judicial sale, under the order of the bankruptcy court, from foreclosing the mortgage for her notes, neither are the parties who took part in that proceeding barred of the right to set up their liens, as they existed before that sale, and share in the proceeds of the new sale accordingly; and, so far as the expenditures of the insurance company, in payment of taxes and prior liens and in improvements necessary to the prevention of loss and deterioration in the property, were required for the benefit of all the lien holders, it is to be first paid out of the proceeds of the sale, and plaintiff in error should account for rents and profits, if there were any.

The decree of the Supreme Court of Louisiana is reversed, with directions to enter a decree in conformity to this opinion; and it is so ordered.

BUTCHERS' UNION SLAUGHTER-HOUSE AND LIVE-STOCK LANDING COMPANY *v.* CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

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

Argued April 9th, 10th, 1884.—Decided May 5th, 1884.

Constitutional Law.

The power of a State Legislature to make a contract of such a character that, under the provisions of the Constitution, it cannot be modified or abrogated, does not extend to subjects affecting public health or public morals, so as to limit the future exercise of legislative power on those subjects to the prejudice of the general welfare.

In 1879 the legislature of Louisiana granted the appellee exclusive privileges for stock-landing and slaughter-houses, at New Orleans for twenty-five years, which were sustained by this court in the *Slaughter-House Cases*, 16 Wall. 36. In 1881, under a provision of the State Constitution of 1874, the municipal authorities granted privileges for slaughter-houses and stock-landing at New Orleans to the appellants. The appellee as plaintiff below filed its bill in the Circuit Court to restrain the appellants from exercising the privileges thus conferred. A preliminary injunction was granted, which, on hearing, was made perpetual. From this decree the defendants below appealed. The legislation and other facts bearing upon the issues are stated in the opinion of the court.

Mr. B. R. Forman for appellant.

Mr. Thomas J. Semmes for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court for the Eastern District of Louisiana.

The appellee brought a suit in the Circuit Court to obtain an injunction against the appellant forbidding the latter from ex-

ercising the business of butchering, or receiving and landing live-stock intended for butchering, within certain limits in the parishes of Orleans, Jefferson, and St. Bernard, and obtained such injunction by a final decree in that court.

The ground on which this suit was brought and sustained is that the plaintiffs had the exclusive right to have all such stock landed at their stock-landing place, and butchered at their slaughter-house, by virtue of an act of the General Assembly of Louisiana, approved March 8th, 1869, entitled "An act to protect the health of the city of New Orleans, to locate the stock-landing and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

An examination of that statute, especially of its fourth and fifth sections, leaves no doubt that it did grant such an exclusive right.

The fact that it did so, and that this was conceded, was the basis of the contest in this court in the *Slaughter-House Cases*, 16 Wall. 36, in which the law was assailed as a monopoly forbidden by the thirteenth and fourteenth amendments to the Constitution of the United States, and these amendments as well as the fifteenth, came for the first time before this court for construction. The constitutional power of the State to enact the statute was upheld by this court.

This power was placed by the court in that case expressly on the ground that it was the exercise of the police power which had remained with the States in the formation of the original Constitution of the United States, and had not been taken away by the amendments adopted since.

Citing the definition of this power from Chancellor Kent, it declares that the statute in question came within it. "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all (he says) be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interest of the community."

2 Kent's Commentaries, 340; 16 Wall. 62. In this latter case it was added that "the regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power."

But in the year 1879 the State of Louisiana adopted a new constitution, in which were the following articles:

"Article 248. The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits; provided no monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses of any individual or corporation; provided the ordinances designating places for slaughtering shall obtain the concurrent approval of the board of health or other sanitary organization.

"Article 258. . . . The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

Under the authority of these articles of the Constitution the municipal authorities of the city of New Orleans enacted ordinances which opened to general competition the right to build slaughter-houses, establish stock landings, and engage in the business of butchering in that city under regulations established by those ordinances, but which were in utter disregard of the monopoly granted to the Crescent City Company, and which in effect repealed the exclusive grant made to that company by the act of 1869.

The appellant here, the Butchers' Union Slaughter-House Company, availing themselves of this repeal, entered upon the business, or were about to do so, by establishing their slaughter-house and stock-landing within the limits of the grant of the act of 1869 to the Crescent City Company.

Both these corporations, organized under the laws of Louisiana and doing business in that State, were citizens of the same

State, and could not, in respect of that citizenship, sue each other in a court of the United States.

The Crescent City Company, however, on the allegation that these constitutional provisions of 1879 and the subsequent ordinances of the city, were a violation of their contract with the State under the act of 1869, brought this suit in the Circuit Court as arising under the Constitution of the United States, art. I., sec. 10. That court sustained the view of the plaintiff below, and held that the act of 1869 and the acceptance of it by the Crescent City Company, constituted a contract for the exclusive right mentioned in it for twenty-five years; that it was within the power of the legislature of Louisiana to make that contract, and as the constitutional provisions of 1879 and the subsequent ordinances of the city impaired its obligation, they were to that extent void.

No one can examine the provisions of the act of 1869 with the knowledge that they were accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration.

It admits of as little doubt that the ordinance of the city of New Orleans, under the new Constitution, impaired the supposed obligation imposed by those provisions on the State, by taking away the exclusive right of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract.

We do not think it necessary to spend time in demonstrating either of these propositions. We do not believe they will be controverted.

The appellant, however, insists that, so far as the act of 1869 partakes of the nature of an irrepealable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case.

Let us see clearly what it is.

It does not deny the power of that legislature to create a corporation, with power to do the business of landing live-stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock-landing and to establish this slaughter-house.

But it does deny the power of that legislature to continue this right so that no future legislature nor even the same body can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all that was decided by this court in the Slaughter-House Cases. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done.

Nor does this proposition contravene the established principle that the legislature of a State may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. The examples are numerous where this has been done and the contract upheld.

The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well-known but undefined power called the police power. We have not found a better definition of it for our present purpose than the extract from Kent's Commentaries in the earlier part of this opinion. "The power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses," there mentioned, points unmistakably to the powers exercised by the act of 1869, and the ordinances of the city under the Constitution of 1879. While we are not prepared to say that the legislature can make

valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welware. These are the *public health* and *public morals.* The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure.

This principle has been asserted and repeated in this court in the last few years in no ambiguous terms.

The first time it seems to have been distinctly and clearly presented, was in the case of *Boyd* v. *Alabama*, 94 U. S. 645. That was a writ of error to the Supreme Court of Alabama, brought by Boyd, who had been convicted in the courts of that State of carrying on a lottery contrary to law. In his defence, he relied upon a statute which authorized lotteries for a specific purpose, under which he held a license. The repeal of this statute, which made his license of no avail against the general law forbidding lotteries, was asserted by his counsel to be void as impairing the obligation of the contract, of which his license was evidence, and the Supreme Court of Alabama had in a previous case held it to be a contract.

In Boyd's case, however, that court held the law under which his license was issued to be void, because the object of it was not expressed in the title, as required by the Constitution of the State. This court followed that decision, and affirmed the judgment on that ground.

But in the concluding sentences of the opinion by Mr. Jus-

tice Field, the court, to repel the inference that the contract would have been irrepealable, if the statute had conformed to the special requirement of the Constitution, said:

"We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals," citing *Moore* v. *The State*, 48 Miss. 147, and *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657, 663.

This cautionary declaration received the unanimous concurrence of the court, and a year later the principle became the foundation of the decision in the case of *The Beer Company* v. *Massachusetts*, 97 U. S. 25, 28.

In that case the plaintiff in error, the Boston Beer Company, had been chartered in 1828 with a right to manufacture beer, which this court held to imply the right to sell it. Subsequent statutes of a prohibitory character seemed to interfere with this right, and the case was brought to this court on the ground that they impaired the obligation of the contract of the charter.

But the court, speaking by Mr. Justice Bradley, held that, on this subject, the Legislature of Massachusetts could make no irrepealable contract. "Whatever differences of opinion," said the court, "may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. The Legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In the still more recent case of *Stone* v. *Mississippi*, 101 U. S. 814, the whole subject is reviewed in the opinion deliv-

ered by the Chief Justice. That also was a case of a chartered lottery, whose charter was repealed by a constitution of the State subsequently adopted. It came here for relief, relying on the clause of the federal Constitution against impairing the obligation of contracts.

"The question is, therefore, presented (says the opinion), whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of a people authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

But the case of the *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659, is, perhaps, more directly in point as regard the facts of the case, while asserting the same principle. The Fertilizing Company was chartered by the Illinois Legislature for the purpose of converting, by chemical processes, the dead animal matter of the slaughter-houses of the city of Chicago into a fertilizing material. Some ordinances of the village of Hyde Park, through which this dead matter was carried to their chemical works, were supposed to impair the rights of contract conferred by the charter. The opinion cites the language of the court in *Beer Company* v. *Massachusetts*, already copied here, and numerous other cases of the exercise of the police power in protecting health and property, and holds that the charter conferred no irrepealable right for the fifty years of its duration to continue a practice injurious to the public health.

These cases are all cited and their views adopted in the opinion of the Supreme Court of Louisiana in a suit between the same parties in regard to the same matter as the present

case, and which was brought to this court by writ of error and dismissed before a hearing by the present appellee.

The result of these considerations is that the constitution of 1879 and the ordinances of the city of New Orleans, which are complained of, are not void as impairing the obligation of complainant's contract, and that

The decree of the Circuit Court must be reversed, and the case remanded to that court with directions to dismiss the bill.

Mr. Justice Field concurring.

I concur in the doctrine declared in the opinion of the court, that the legislature cannot, by contract with an individual or corporation, restrain, diminish, or surrender its power to enact laws for the preservation of the public health or the protection of the public morals. This is a principle of vital importance, and its habitual observance is essential to the wise and valid execution of the trust committed to the legislature. But there are some provisions in the act of Louisiana upon which the appellees rely that have not been referred to, and which, from the interest excited by the decision rendered when that act was before us in the Slaughter-House Cases, should be mentioned in connection with the views now expressed. 16 Wall. 36.

No one of the judges who then disagreed with the majority of the court denied that the States possessed the fullest power ever claimed by the most earnest advocate of their reserved rights, to prescribe regulations affecting the health, the good order, the morals, the peace, and the safety of society within their respective limits. When such regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted. The general government was not formed to interfere with or control them. No aid was required from any external authority for their enforcement. It was only for matters which concerned all the States and which could not be efficiently or advantageously managed by them separately, that a general and common government was desired. And the recent amendments to the Constitution have not changed nor diminished their previously existing

power to legislate respecting the public health and public morals. But though this power rests with them, it cannot be admitted that, under the pretence of providing for the public health or public morals, they can encroach upon rights which those amendments declare shall not be impaired. The act of Louisiana required that the slaughtering of cattle and the preparation of animal food for market should be done outside of the limits of the city of New Orleans. It was competent to make this requirement, and, furthermore, to direct that the animals, before being slaughtered, should be inspected, in order to determine whether they were in a fit condition to be prepared for food. The dissenting judges in the Slaughter-House Cases found no fault with these provisions, but, on the contrary, approved of them. Had the act been limited to them, there would have been no dissent from the opinion of the majority. But it went a great way beyond them. It created a corporation, and gave to it an exclusive right for twenty-five years to keep, within an area of 1,145 square miles, a place where alone animals intended for slaughter could be landed and sheltered, and where alone they could be slaughtered and their meat prepared for market. It is difficult to understand how in a district embracing a population of a quarter of a million, any conditions of health can require that the preparation of animal food should be intrusted to a single corporation for twenty-five years, or how in a district of such extent, there can be only one place in which animals can, with safety to the public health, be sheltered and slaughtered. In the grant of these exclusive privileges a monopoly of an ordinary employment and business was created.

A monopoly is defined "to be an institution or allowance from the sovereign power of the State, by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." All grants of this kind are void at common law, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an

honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment.

The oppressive nature of the principle upon which the monopoly here was granted will more clearly appear if it be applied to other vocations than that of keeping cattle and of preparing animal food for market—to the ordinary trades and callings of life—to the making of bread, the raising of vegetables, the manufacture of shoes and hats, and other articles of daily use. The granting of an exclusive right to engage in such vocations would be repudiated in all communities as an invasion of common right. The State undoubtedly may require many kinds of business to be carried on beyond the thickly settled portions of a city, or even entirely without its limits, especially when attendant odors or noises affect the health or disturb the peace of the neighborhood; but the exercise of this necessary power does not warrant granting to a particular class or to a corporation a monopoly of the business thus removed. It may be that, for the health or safety of a city, the manufacture of beer, or soap, or the smelting of ores, or the casting of machinery should be carried on without its limits, yet it would hardly be contended that the power thus to remove the business beyond certain limits would authorize the granting of a monopoly of it to any one or more persons. And if not a monopoly in business of this character, how can a monopoly for like reasons be granted in the business of preparing animal food for market, or of yarding and sheltering cattle intended for slaughter?

As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self-evident"—that is so plain that their truth is recognized upon their mere statement—"that all men are

endowed"—not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights"—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime—"and that among these are life, liberty, and the pursuit of happiness, and to secure these"—not grant them but secure them—"governments are instituted among men, deriving their just powers from the consent of the governed."

Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

It has been well said that, "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." Adam Smith's Wealth of Nations, Bk. I. Chap. 10.

In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and busi-

ness could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just, and impartial laws. The act of Louisiana compelled more than a thousand persons to abandon their regular business, and to surrender it to a corporation to which was given an exclusive right to pursue it for twenty-five years. What was lawful to these thousand persons the day before the law took effect was unlawful the day afterwards. With what intense indignation would a law be regarded that should, in like manner, turn over the common trades of the community to a single corporation. I cannot believe that what is termed in the Declaration of Independence a God-given and an inalienable right can be thus ruthlessly taken from the citizen, or that there can be any abridgment of that right except by regulations alike affecting all persons of the same age, sex, and condition. It cannot be that a State may limit to a specified number of its people the right to practise law, the right to practise medicine, the right to preach the gospel, the right to till the soil, or to pursue particular business or trades, and thus parcel out to different parties the various vocations and callings of life. The first section of the Fourteenth Amendment was, among other things, designed to prevent all discriminating legislation for the benefit of some to the disparagement of others, and when rightly enforced as other prohibitions upon the State, not by legislation of a penal nature, but through the courts, no one will complain. The disfranchising provisions of the third section naturally created great hostility to the whole amendment. They were regarded by many wise and good men as impolitic, harsh, and cruel; and the manner in which the first section has been enforced by penal enactments against legislators and governors has engendered widespread and earnest hostility to it. Communities, like individuals, resent even favors ungraciously bestowed. The appropriate mode of enforcing the amendment is, in my judgment, that which has been applied to other previously existing constitutional prohibitions, such as the one against a State pass-

ing a law impairing the obligation of contracts, or a bill of attainder, or an *ex post facto* law. The only provisions deemed necessary to annul legislation of this kind have been such as facilitated proceedings for that purpose in the courts; no other can be appropriate against the action of a State. Thus enforced there would be little objection to the provisions of the first section of the amendment. No one would object to the clause forbidding a State to abridge the privileges and immunities of citizens of the United States, that is, to take away or impair their fundamental rights. No one would object to the clause which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor to the provision which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws. If the first section of the amendment is thus applied as a restriction against the impairment of fundamental rights, it will not transfer to the federal government the protection of all private rights, as is sometimes supposed, any more than the inhibition against impairing the obligation of contracts transfers to the federal government the cognizance of all contracts. It does not limit the subjects upon which the States can legislate. Upon every matter, in relation to which previously to its adoption they could have acted, they may still act. They can now, as then, legislate to promote health, good order and peace, to develop their resources, enlarge their industries, and advance their prosperity. It only inhibits discriminating and partial enactments, favoring some to the impairment of the rights of others. The principal, if not the sole, purpose of its prohibitions is to prevent any arbitrary invasion by State authority of the rights of person and property, and to secure to every one the right to pursue his happiness unrestrained, except by just, equal, and impartial laws.

The first section of the amendment is stripped of all its protective force, if its application be limited to the privileges and immunities of citizens of the United States as distinguished from citizens of the States, and thus its prohibition be extended only to the abridgment or impairment of such rights, as the right to come to the seat of government, to secure any claim

they may have upon that government, to transact any business with it, to seek its protection, to share its offices, to engage in administering its functions, to have free access to its seaports, to demand its care and protection over life, liberty, and property on the high seas, or within the jurisdiction of a foreign government, the right to peaceably assemble and petition for redress of grievances, and the right to use the navigable waters of the United States, which are specified in the opinion in the Slaughter-House Cases as the special rights of such citizens. If thus limited, nothing was accomplished by adopting it. The States could not previously have interfered with these privileges and immunities, or any other privileges and immunities which citizens enjoyed under the Constitution and laws of the United States. Any attempted impairment of them could have been as successfully resisted then as now. The Constitution and laws of the United States were as much then as now the supreme law of the land, which all officers of the State governments were then, as now, bound to obey.

Whilst, therefore, I fully concur in the decision of the court that it was entirely competent for the State to annul the monopoly features of the original act incorporating the plaintiff, I am of opinion that the act, in creating the monopoly in an ordinary employment and business, was to that extent against common right and void.

Bradley, J. (with whom agree Harlan and Woods, JJ.), concurring.

I concur in the judgment of the court in this case, reversing the judgment of the Circuit Court. I think that the act of the Legislature of Louisiana incorporating The Crescent City Live-Stock Landing and Slaughter-House Company, and granting to said company for twenty-five years the exclusive right to erect and maintain stock-landings and slaughter-houses within the limits of the parishes of Orleans, Jefferson, and St. Bernard, was not a valid contract, binding upon the State of Louisiana and protected by the Constitution of the United States from alteration or repeal; but my reasons for this opinion are different from those stated in the opinion of the court. They are

not based on the ground that the act was a police regulation. The monopoly clause in the act was clearly not such. It had nothing of the character of a police regulation. That part of the act which regulated the position on the river, relatively to the city of New Orleans, in which slaughter-houses and stock-landings should be built, was a police regulation, proper and necessary to prevent the offal of such establishments from floating in the water in front of the city. But such a regulation could be complied with by any butcher erecting a slaughter-house, or by any wharfinger erecting a stock-landing; and so could every other real police regulation contained in the act. The police regulations proper were hitched on to the charter as a pretext. The exclusive right given to the company had nothing of police regulation about it whatever. It was the creation of a mere monopoly, and nothing else; a monopoly without consideration and against common right; a monopoly of an ordinary employment and business, which no legislature has power to farm out by contract. Suppose a law should be passed forbidding the erection of any bakery, or brewery, or soap manufactory within the fire district, or any other prescribed limits in a large city;—that would clearly be a police regulation; but would it be a police regulation to attach to such a law the grant to a single corporation or person of the exclusive right to erect bakeries, breweries, or soap manufactories at any place within ten miles of the city? Every one would cry out against it as a pretence and an outrage.

I hold it to be an incontrovertible proposition of both English and American public law, that all *mere* monopolies are odious and against common right. The practice of granting them in the time of Elizabeth came near creating a revolution. But Parliament, then the vindicator of the public liberties, intervened and passed the act against monopolies. 21 Jac. I. c. 3. The courts had previously, in the last year of Elizabeth, in the great *Case of Monopolies*, 11 Rep. 84 *b*, decided against the legality of royal grants of this kind. That was only the case of the sole privilege of making cards within the realm; but it was decided on the general principle that all monopoly patents were void both at common law and by statute, unless granted to the

introducer of a new trade or engine, and then for a reasonable time only; that all trades, as well mechanical as others, which prevent idleness, and enable men to maintain themselves and their families, are profitable to the commonwealth, and therefore the grant of the sole exercise thereof is against not only the common law, "but the benefit and liberty of the subject." It was in view of this decision, and in accordance with the principles established by it, that the act of 21 James I. was passed abolishing all monopolies, with the exception of "letters patent and grants of privileges, for the term of fourteen years or under, of the sole working or vending of any manner of new manufactures to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patent and grants shall not use." As a mere declaration of the common and statute law of England, the case of Monopolies, and the act of 21 James I. would have but little influence on the question before us, which concerns the power of the legislature of a State to create a monopoly. But those public transactions have a much greater weight than as mere declarations and enactments of municipal law. They form one of the constitutional landmarks of British liberty, like the Petition of Right, the Habeas Corpus act, and other great constitutional acts of Parliament. They established and declared one of the inalienable rights of freemen which our ancestors brought with them to this country. The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and *the pursuit of happiness*." This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution. It is what no legislature has a right to do; and no contract to that end can be binding on subsequent legislatures.

I do not mean to say that there are no exclusive rights which can be granted, or that there are not many regulative restraints on civil action which may be imposed by law. There are such. The granting of patents for inventions, and copyrights for books, is one instance already referred to. This is done upon a fair consideration and upon grounds of public policy. Society gives to the inventor or author the exclusive benefit for a time of that which, but for him, would not, or might not, have existed; and thus not only repays him, but encourages others to apply their powers for the public utility. So, an exclusive right to use franchises, which could not be exercised without legislative grant, may be given; such as that of constructing and operating public works, railroads, ferries, &c. In such cases a part of the public duty is farmed out to those willing to undertake the burden for the profits incidentally arising from it. So, licenses may be properly required in the pursuit of many professions and avocations which require peculiar skill or supervision for the public welfare. But in such cases there is no real monopoly. The profession or avocation is open to all alike who will prepare themselves with the requisite qualifications, or give the requisite security for preserving public order; except in certain cases, such as the sale of intoxicating drinks, where the interests of society require regulation as to the number of establishments as well as the character of those who carry them on. All such regulations as are here enumerated are entirely competent to the legislature to make. But this concession does not in the slightest degree affect the proposition (which I deem a fundamental one), that the ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects—the liberty of pursuit.

But why is such a grant beyond the legislative power, and contrary to the Constitution?

The Fourteenth Amendment of the Constitution, after de-

claring that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, goes on to declare that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

I hold that a legislative grant, such as that given to the appellees in this case, is an infringement of each of these prohibitions. It abridges the privileges of citizens of the United States; it deprives them of a portion of their liberty and property without due process of law; and it denies to them the equal protection of the laws.

1. I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. It was held by a majority of the court in the former decision of the *Slaughter-House Cases*, 16 Wall. 36, 57, that the "privileges and immunities of citizens of the United States" mentioned and referred to in the Fourteenth Amendment, are only those privileges and immunities which were created by the Constitution of the United States, and grew out of it, or out of laws passed in pursuance of it. I then held, and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which Mr. Justice Washington enumerates the right of protection; the right to pursue and obtain happiness and safety; the right to pass through and reside in any State for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; and to take, hold, and dispose of property, either real or personal. *Corfield* v. *Corryell*, 4 Wash. C. C. 371, 381. These rights are different from the concrete rights which a man may have to a specific chattel or a piece of land, or to the performance by another of a particular contract, or to

damages for a particular wrong, all which may be invaded by individuals; they are the capacity, power, or privilege of having and enjoying those concrete rights, and of maintaining them in the courts, which capacity, power, or privilege can only be invaded by the State. These primordial and fundamental rights are "the privileges and immunities of citizens," which are referred to in the Fourth Article of the Constitution and in the Fourteenth Amendment to it. In the former it is declared that "the citizens of each State shall be entitled to ALL PRIVILEGES AND IMMUNITIES OF CITIZENS in the several States;" that is, in the other States. It was this declaration which Justice Washington was expounding when he defined what was meant by "privileges and immunities of citizens." The Fourteenth Amendment goes further, and declares that "no State shall abridge the privileges and immunities of citizens of the United States;" which includes the citizens of the State itself, as well as the citizens of other States.

In my opinion, therefore, the law which created the monopoly in question did abridge the privileges of all other citizens, when it gave to the appellees the sole power to have and maintain stock-landings and slaughter-houses within the territory named, because these are among those ordinary pursuits and callings which every citizen has a right to follow if he will, subject, of course, to regulations equally open to all.

2. But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it,—it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And, if a man's right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans, were deprived, by the law in question, of their property, as well as their liberty, without due process of law.

3. But still more apparent is the violation, by this monopoly law, of the last clause of the section—"no State shall deny to any person the equal protection of the laws." If it is not a

denial of the equal protection of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition.

Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market, and in many other ways. If by legislative enactment they can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended. In my judgment, the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced.

EX PARTE: HITZ, Petitioner.

ORIGINAL.

Argued March 4th, 5th, 1884.—Decided May 5th, 1884.

Certiorari—Diplomatic privilege.

A writ of certiorari when applied for by a defendant is not a writ of right but discretionary with the court.

On an application by a person indicted for an offence committed while president of a national bank against the provisions of § 5209 for certiorari to bring up the indictment on the ground that when the alleged offence was committed he was a political agent of a foreign government, the application was refused when it appeared that his own government had requested his resignation prior to the finding of the indictment, although it was not actually given till subsequent thereto, and that the political department of the Government of the United States had refused him the privilege of free entry of goods usually accorded to a diplomatic representative.

This was an application by Mr. John Hitz for a writ of certiorari commanding the Supreme Court of the District of Co-

lumbia to certify to this court an indictment and the proceedings thereunder against him in that court, on the ground that when the indictment was filed, and when the offences therein charged where committed, he was the diplomatic representative of the Swiss Confederation, duly accredited to and received and recognized by the United States, under the title of Political Agent. The indictment was filed on the 17th of June, 1881.

From the return which was made to the rule to show cause it appeared that the indictment was for an offence against the provisions of § 5209 of the Revised Statutes alleged to have been committed by Mr. Hitz while and as president of the German-American National Bank of Washington. It also appeared that he was for many years the Consul General of the Swiss Confederation within the United States, and that on the 28th of February, 1868, he was accredited to the United States by the same government as Political Agent. On the 30th of May, 1881, he was requested by the Swiss Confederation to resign both these offices, and this he did on the 15th of June. On the 20th of June his resignations were accepted.

Mr. O. D. Barrett and *Mr. Benjamin F. Butler* for petitioner.

Mr. R. Ross Perry and *Mr. A. S. Worthington* opposing.

Mr. Chief Justice Waite delivered the opinion of the court. He stated the facts in the foregoing language and continued:

Precisely what the relations of Mr. Hitz to the United States were as Political Agent of the Swiss Confederation we have not been advised, and on application to the Department of State, made on the suggestion of the court by the counsel in this proceeding, we are informed that the records of the department show nothing upon this subject except a letter from him under date of March 30th, 1868, enclosing his letter of credence, and soliciting an interview with the Secretary of State for its formal presentation; the answer of Secretary Seward according such an interview, and fixing the 2d of April as the time; and a letter from Secretary Fish to Mr. Hitz, under date of June 28th, 1870, informing him that he

(the Secretary) did not find in his relations to the United States any ground for continuing the privilege to him of a free entry of goods imported for his use.

Under these circumstances, as the writ of certiorari, when applied for by a defendant, is not a writ of right, but discretionary with the court (Bac. Ab. Certiorari A), we deny this application, leaving the parties to such remedies as they may be entitled to elsewhere, or under any other form of proceeding.

Petition dismissed.

CITY AND COUNTY OF SAN FRANCISCO & Another *v.* SCOTT.

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

Submitted January 18th, 1884.—Decided May 5th, 1884.

Jurisdiction.

The decision of the State Courts of California upon the question whether an alcalde in San Francisco after the conquest and before the incorporation of San Francisco, and before the adoption of a State Constitution by California, could make a valid grant of pueblo lands presents no federal question, and is not reviewable here.

The facts are stated by the court in its opinion.

Mr. William Craig, *Mr. Harry I. Thornton*, and *Mr. J. H. Meredith* for plaintiffs in error.

Mr. Sidney V. Smith Jr. for defendant in error.

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

There is no federal question in this case. The right of San Francisco under the treaty of Guadalupe Hidalgo to the lands in dispute as pueblo lands is not denied. Precisely what that right was may not be easy to state. Mr. Justice Field, speaking for the court, said, in *Townsend* v. *Greely*, 5 Wall. 336, "It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in

truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country." This definition was accepted as substantially accurate in *Grisar* v. *McDowell*, 6 Wall. 363, 372, and *Palmer* v. *Low*, 98 U. S. 1, 16.

The act of July 1, 1864, c. 194, sec. 5, 13 Stat. 333, simply released to the city all the right and title of the United States in the lands, *Hoadley* v. *San Francisco*, 94 U. S. 4, 5, and thus perfected the incomplete Mexican title for the uses and purposes specified. *Palmer* v. *Low*, *supra*. Its effect was to surrender all future control of the United States over the disposition and use of the property by the city.

The only controversy in this case is as to the effect of the alcalde grant of the pueblo title; and the precise question submitted to the Supreme Court of the State for determination was, "whether, after the conquest . . . and before the incorporation of the city of San Francisco, and before the adoption of the constitution of the State of California, a person exercising the functions of an alcalde of the pueblo of San Francisco . . . could make a valid grant of pueblo lands, as such officers had been before such conquest accustomed to do," and, if so, what would be the effect of such a grant? This does not depend on any legislation of Congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a question of general public law, as to which the decisions of the State Court are not reviewable here. This has been many times decided. *Delmas* v. *Insurance Company*, 14 Wall. 661; *Tarver* v. *Keach*, 15 Wall. 67; *New York Life Insurance Company* v. *Hendren*, 92 U. S. 286; *Dugger* v. *Bocock*, 104 U. S. 596; *Allen* v. *McVeigh*, 107 U. S. 433.

It follows that we have no jurisdiction, and the writ of error is

Dismissed.

EDRINGTON *v.* JEFFERSON & Another.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Argued April 24th, 25th, 1884.—Decided May 5th, 1884.

Removal of Causes.

When all the defendants in a cause in a State Court have appeared and answered, without filing counter claims or raising new issues, the cause is ready for trial and can be tried within the meaning of § 3 of the Act of March 3, 1875, 18 Stat. 471.

When a cause is at issue and ready for trial in a State Court, and the limitation provisions of the Removal Act of March 3, 1875, take effect, the right of removal is not revived by subsequent amendments of the pleadings, by leave of court, which make new issues, nor by the appearance of new parties whose interests are represented by a party previously in the record.

When a cause is improperly removed from a State Court and a motion to remand it is overruled, that judgment is error which may be corrected here.

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

Mr. A. H. Garland (*Mr. U. M. Rose* was with him) for appellant.

Mr. D. E. Myers (*Mr. William M. Sneed* was with him) for appellees.

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

In the view we take of this case, it is only necessary to consider the following facts:

James H. Edrington and J. T. Jefferson were partners in business at Memphis, Tennessee. Upon the dissolution of the firm, on or about the 19th of March, 1874, Edrington and his wife, who is the appellant in this case, conveyed certain lands in Arkansas, known as the Whitmore and Fain plantations, to John W. Jefferson, a brother of J. T. Jefferson, in trust to secure the payment of fourteen notes, amounting in the aggregate to $28,754.21, executed by James H. Edrington to the trustee for the benefit of some of the creditors of the firm whose names were set out in a schedule attached. By the

terms of the trust, the trustee was empowered to advertise and sell the property, if default should be made in the payment of the notes. James H. Edrington died on the 12th of August, 1874, having made a will, by which he devised his property to his widow, for certain purposes, and appointed her the executrix. The will was admitted to probate, and letters testamentary granted to Mrs. Edrington on the 31st of August.

On the 2d of December, 1874, John W. Jefferson, the trustee, advertised the trust property for sale on the 21st of January, 1875, for default in the payment of the notes. On the 11th of December, Mrs. Edrington, in her own right and as executrix, began this suit in the Circuit Court of Mississippi County, Arkansas, against John W. Jefferson, the trustee, John Matthews, George W. L. Crook, and Emily R. Hazard and John Hazard, administrators of James H. Hazard, deceased, to enjoin the sale and obtain a settlement of the partnership accounts, the allegations being, among others, that the deed of trust was procured by the fraud of J. T. Jefferson, when James H. Edrington was sick and incapable of transacting business, and that in equity J. T. Jefferson should pay the debts secured thereby. Matthews, and the representatives of James H. Hazard, were made parties as the holders of prior incumbrances on the trust property. Among other allegations in the bill was one to the effect that the trustee advertised the sale at the instigation of J. T. Jefferson, rather than of the creditors who were the beneficiaries under the trust. On the filing of the bill, a preliminary injunction was granted and served on the trustee.

No summons was issued or served on any of the defendants, but on the 1st of March, 1875, John W. Jefferson and J. T. Jefferson both appeared and filed separate answers to the complaint, in which they met all the charges in the bill, and, among other things, alleged that the prior incumbrances had been paid. Each answer concluded with a prayer in the usual form, that the respondent be dismissed with his costs. On the 3d of March the defendant John Matthews was appointed receiver of the property. At the same time the bill was dismissed as to Crook; and the Washington Fire and Marine In-

surance Company, the Planters' Insurance Company, J. C. Ward & Co., Appleton, Noyes & Co., and the North American Tie Company, creditors of Edrington & Jefferson and beneficiaries under the trust, were, on motion, admitted as defendants in the suit, and given twenty days to file their answers and cross-bills. On the 4th of March, 1875, the cause was continued by consent of parties until the next term. At the September term, 1875, F. Banksmith & Co. and Taylor Brothers, other creditors and beneficiaries, were admitted as defendants, and they, with the other creditors who had been admitted before, were allowed ninety days to answer and file cross-bills. Several orders connected with the administration of the cause were passed at this term on motion of the different parties. It does not appear from the record that the original complaint was ever amended so as to name the intervening creditors as defendants, or to make any charges against them, other than such as were contained in the complaint when the answers of the original defendants, the Jeffersons, were filed. On the 26th of February, 1876, in vacation, the Washington Fire and Marine Insurance Company, and the other creditors who had been formally admitted as defendants, with some other creditors, also beneficiaries under the trust, filed an answer to the original complaint and a cross-bill. To the cross-bill, all the defendants in the original bill, except Crook, were made defendants, and also the infant children of James H. Edrington, and all the creditors of Edrington & Jefferson, beneficiaries under the trust, who were not complainants. The prayer was that the claims of the alleged prior incumbrancers might be discharged or made subordinate to the trust; that the amount due the several creditors might be ascertained; and that the property might be sold to pay what was found due.

Answers were filed to the cross-bill by some of the persons named as defendants, and at the May term of the court, after several orders of administration, the cause was continued. After this continuance, and in vacation, other answers were filed to the cross-bill. Testimony was taken and filed at the November term. On the 15th of November, 1876, the com-

plainants in the cross-bill dismissed their bill as to all the defendants therein named, except Mrs. Edrington, her children, and the several alleged prior incumbrancers, and thereupon, on the 16th of November, John W. Jefferson, J. T. Jefferson, and the several creditors who had answered the original complaint, filed their petition for the removal of the cause to the Circuit Court of the United States for the Western District of Arkansas. In their petition they set forth the citizenship of the parties as in different States, and "that said suit cannot and could not be tried at the present term of this court, as the same is not ready for trial or in a condition to be tried." It is also stated that "in said suit there is a controversy wholly between petitioners, and the said Nancy A. Edrington, individually and as said executrix, John Matthews, and the children and heirs of James H. Edrington, deceased, which can be fully determined as between them without the presence of the other parties."

The cause was docketed in the District Court for the Eastern District of Arkansas on the 9th of March, 1877, and on the 13th of March, Mrs. Edrington moved to remand the case on the ground, among others, that the petition for removal was not filed on or before the first term at which the cause could have been tried. On the 10th of October, 1877, additional grounds for remanding were presented, but, on the 11th of October, the motion was denied.

At the October term, 1879, a decree was entered dismissing the original bill of Mrs. Edrington and finding that all the incumbrances upon the property prior to the trust deed had been fully paid and discharged. The decree then found the amount due on the trust notes, for principal and interest, and ordered a sale of the trust property, free of all alleged prior incumbrances, to pay what was due. Under this decree a sale was made and confirmed by the court at the March term, 1880.

From the decree of the October term, 1879, Mrs. Edrington took this appeal, and, among other things, assigns for error the refusal of the court to remand the cause upon her motion.

We are of opinion that the petition for removal was filed too

late, and that the motion to remand should have been granted. As Mrs. Edrington was kept in the District Court, and forced to a hearing there, she has the right, having saved her point on the record, to have that error corrected here after final decree below. *Removal Cases*, 100 U. S. 475; *Railroad Company* v. *Koontz*, 104 U. S. 16.

By the laws of Arkansas there were two terms of the State Circuit Court during the year 1875, one beginning on the first Monday in March, and the other on the first Monday in September. There were also two terms in 1876, one in May and the other in November. All the contesting defendants to the original complaint filed answers and ended the pleadings, so far as they were concerned, on the 1st of March, 1875. As these answers contained no counter claim or set off, the issues were complete between the original parties at that time, and the plaintiff or the defendants could either of them demand a trial at the next term, which was in November, 1875. When these answers were filed, John W. Jefferson, the trustee, represented all the creditors who were beneficiaries under the trust. His pleading was in law their pleading, and bound them as well as him. Some of the creditors were admitted as defendants, not because they were necessary parties to the suit, but that they might be present to protect their own interests, if necessary. To let them in no amendment of the complaint was needed, because the original allegations against their trustee were in reality allegations against them. They were given twenty days' time to answer for themselves and to file a cross-bill. They failed to avail themselves of this rule, and consequently were in default at the next term. The case, therefore, stood for trial at the next term, with issues joined between the plaintiff and the representative of the creditors on the record. As far as the trustee was concerned, that was the last term at which he could ask for a removal, whether the pleadings were amended and new issues raised or not. The case stood for trial on its merits, with pleadings completed. Some of the creditors who were beneficiaries had already appeared. Others were admitted at that term. They made no complaint of the conduct of their representative upon the

record. His pleadings were their pleadings, and the issues which he had presented for trial were their issues. The trustee did not see fit to take steps at that time for a removal; neither did they. When the term ended, the term at which the cause, as a cause, could be first tried had passed by, and all right of removal under the act of March 3d, 1875, then in force, was gone.

It is true that the creditors got leave to file pleadings within ninety days, and that their answers and cross-bills were in before that time expired, but this operated only as an amendment of the original pleadings and created no new right of removal. As was said in *Babbitt* v. *Clark*, 103 U. S. 612, "the act of Congress does not provide for the removal of a cause at the first term at which a trial can be had on the issues as finally made up by leave of court or otherwise, but at the first term at which the cause, as a cause, could be tried."

Without considering any of the other questions presented by the record,

We reverse the decree, and remand the cause to the District Court, with instructions to send the case back to the State court from which it was improperly removed.

GREENWOOD & Others *v.* RANDALL.

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

Argued April 9th, 1884.—Decided May 5th, 1884.

Practice.

If a record fails to present in proper form the questions argued by counsel, the judgment will be affirmed.

Mr. E. W. Toole for plaintiff in error, submitted on his brief.

Mr. Samuel Shellabarger for defendant in error.

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

This judgment is affirmed. The record fails entirely to present in proper form any of the questions which have been argued for the plaintiff in error. *Affirmed.*

Syllabus.

NICKLE and Another *v.* STEWART and Another.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued April 17th, 1884.—Decided May 5th, 1884.

Review.

A bill presented as a bill of review showing no errors of law on the face of the record and not alleging a discovery of new matter since the rendering of the decree, the court below properly refused leave to file it.

Mr. J. W. Davis for appellants.

No appearance for appellees.

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

Without intending to decide that an appeal lies to this court from an order of a circuit court, or of a district court exercising circuit court powers, refusing leave to file a bill of review, we hold that the refusal in this case was right. The bill as presented has none of the characteristics of a bill of review. No errors of law appearing on the face of the record are assigned, and there is no allegation of any discovery of new matter since the decree was rendered.

Affirmed.

BURNHAM and Another *v.* BOWEN.

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

Argued April 10th, 1884.—Decided May 5th, 1884.

Railroad.

Debts contracted by a railroad corporation as part of necessary operating expenses (for fuel, for example), the mortgage interest of the company being in arrear at the time, are privileged debts, entitled to be paid out of current income, if the mortgage trustees take possession or if a receiver is appointed in a foreclosure suit.

If the current income of the road is diverted to the improvement of the prop-

erty by the trustees in possession or by the receiver, and the mortgage is foreclosed without payment of such debts for operating expenses, an order should be made for their payment out of the fund if the property is sold, or if a strict foreclosure is had they should be charged upon income after foreclosure.

An assignee of such a debt has the same rights as the original holder.

When commercial paper is the evidence of such a debt it is no waiver of the privilege to renew the paper at maturity.

It is not intended to decide that the income of a railroad in the hands of a receiver for the benefit of mortgage creditors can be taken away from them and used to pay the general creditors.

The facts are stated in the opinion.

Mr. John W. Cary for appellants.

Mr. James Hagerman (*Mr. D. B. Henderson* and *Mr. T. B. Daniels* were with him) for appellees.

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

The facts presented by this appeal are as follows:

On the 1st of June, 1871, the Chicago, Dubuque and Minnesota Railroad Company executed a trust deed, in the nature of a mortgage, conveying all its railroad property and "all the revenues and income" thereof to John A. Burnham, Stephen V. R. Thayer, and James H. Blake, trustees, to secure an issue of bonds amounting in the aggregate to $4,125,000. No interest was paid on these bonds, but the company remained in peaceable possession and operated its road, until the early part of the year 1875, when the trustees commenced a suit for the foreclosure of the mortgage in the Circuit Court of Dubuque County, Iowa, and had a receiver appointed. In the order appointing the receiver no special provision was made for the payment of debts owing for current expenses. The receiver took possession on the 13th of January, and from that time operated the road under the direction of the court.

When the receiver took possession the company was indebted to the Northern Illinois Coal and Iron Company for coal used in running the locomotives. In the agreed facts, upon which the case was heard below, it is stated that the coal was furnished during the year 1874, but the precise time in the year is

not given. From what does appear, however, we are satisfied that, at the time of the appointment of the receiver, this was one of the current debts for operating expenses made in the ordinary course of a continuing business, to be paid out of current earnings, and that the payment would have been made at the time agreed on if the company had remained in possession. The renewed acceptances, given after the receiver was appointed, indicate that the originals were for different amounts, maturing a month apart, thus implying monthly settlements of monthly accounts, with a somewhat extended credit to meet the business requirements of what may have been, and probably was at the time, an embarrassed railroad company.

On the 5th of January, 1876, E. H. Bowen, who was then the holder of the acceptances, presented a petition to the State Court for the allowance and payment of his claim out of the funds in the receiver's hands. The claim was allowed, but in connection with the allowance the following entry was made:

"This allowance not intended to allow or establish any lien, but simply to allow them [the acceptances] to be presented and determined as to their rights of payment on final hearing."

After this was done the cause was removed to the Circuit Court of the United States for the District of Iowa, and docketed there on the 11th of January. The receiver appointed by the State Court continued in possession and operated the road until June 23d, 1876, when another was put in his place. The net earnings of the road while in the hands of the receivers amounted to more than $25,000.

In 1871 the company purchased lands in Dubuque for its depot and offices, and secured the purchase-money by a mortgage on the property. This debt being unpaid, a suit for the foreclosure of the mortgage was begun, which resulted in a decree of sale on the 5th of June, 1876, to pay the amount due, being $7,898. By order of the Circuit Court of the United States this amount was paid from the earnings of the receivership in monthly instalments, beginning on the 5th of June and ending on the 4th of September, 1876. In addition to this, $14,897.94 was paid on a judgment rendered against the company January 8th, 1875, for the right of way over certain

property in Brownsville. Of this amount, $5,000 was paid June 28th, and the remainder November 1st, 1876. Other judgments for rights of way, amounting in the agregate to $3,020.55, were paid, some in 1875, and others in 1876.

On the 28th of October, 1876, a decree was entered in the suit for the foreclosure of the trust mortgage, finding due upon the bonds $5,980,166, and barring the redemption if payment of this amount was not made in ninety days. It was also further ordered that the trustees have immediate possession of the mortgaged property from the date of the decree and of the *net* income from the commencement of the suit. The decree also contained this provision:

"It is further decreed that this cause, with all the matters in controversy between the plaintiffs and all and any of the defendants and intervenors and claimants, is continued until the next term of this court, and such rights and claims and matters in controversy are in no wise affected or determined by this decree."

Default was made in the payment of the mortgage debt and the property was put into the possession of the trustees by the receivers under the decree of strict foreclosure. Among the property which went into the hands of the trustees under this decree were the depot and offices in Dubuque, which had been relieved of incumbrance by the payments from the income of the receivership, and the several rights of way also paid for from the same fund.

The original petition of intervention filed in the cause by Bowen, the appellee, for the payment of his acceptances for coal, was lost from the files, and on the 18th of October, 1878, on leave of the court, another was substituted in its place, asking that a judgment might be rendered in his favor against the railroad company for the payment of the amount due, "and that such judgment be declared a lien on the property and road of said company in the hands of said trustees and their grantees." On the 30th of October, 1880, a decree was entered finding due Bowen, on his claim, as of that date, the sum of $6,515.42, and declaring that the mortgaged property in the hands of the trustees under the decree of foreclosure was

equitably bound for the payment thereof, "said property having passed to said trustees subject to the rights and equities of said Bowen, intervenor, and said trustees, and all parties holding under them, taking said property subject to such rights and equities on part of said Bowen, intervenor." Provision was then made for a sale of the property if the claim was not paid. From this decree the trustees appealed.

In our opinion the view which the Circuit Court took of this case was the correct one. The company had never paid its bonded interest. From the very beginning it was in default in this particular, yet the mortgage trustees suffered it to keep possession and manage the property. The maintenance of the road and the prosecution of its business were essential to the preservation of the security of the bondholders. The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently it almost always happens that the current income is incumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived.

As was said in *Fosdick* v. *Schall*, 99 U. S. 235, 252, "the income [of a railroad company] out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income." Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should

be paid from the income, before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a "going concern," not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it.

In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there is nothing whatever to indicate that this debt would not have been paid at maturity from the earnings if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors.

It is said, however, that as no part of the income, before the appointment of the receiver, was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was effected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and

preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick* v. *Schall* the "current debt fund," as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick* v. *Schall*, which we see no reason to modify in any particular.

But it is further insisted that, even though the court did err in using the income of the receivership to pay the fixed prior charges on the mortgaged property, and thus increase the security of the bondholders, there is no power now to order a sale of the property in the hands of the trustees to pay back what has thus been diverted. In *Fosdick* v. *Schall*, p. 254, it was said that if in a decree of foreclosure a sale is ordered to pay the mortgage debt, provision may be made for a restoration from the proceeds of the sale of the fund which has been diverted, and this clearly because, in equity, the diversion created a charge on the property for whose benefit it had been made. Here the parties interested preferred a decree of strict foreclosure, which the court gave, but in giving it saved the rights of all intervenors, and continued the case for the final determination of all such questions. The present appeal is from a decree which grew out of this reservation. As the diversion of the fund created in equity a charge on the property as security for its restoration, it is clear that if the mortgagees prefer to take the property under a decree of strict foreclosure, they take it subject to the charge in favor of the

current debt creditor whose money they have got, and that he can insist on a sale of the property for his benefit if they fail to make the payment without. The agreed facts show that $9,897.94 of the income of the receivership was paid on the judgment for the right of way November 1, 1876, which was after the decree of strict foreclosure was entered.

Lastly, it is claimed that the appellee is barred by his laches, and because he is the assignee of the original creditor. It was decided in *Union Trust Company* v. *Walker*, 107 U. S. 596, that the assignment of a claim of this kind carried with it the right of the original holder to claim payment out of the fund upon which it is charged. When the receiver was appointed the debt was evidenced by business paper maturing at a future date. It was no waiver of any claim on the fund which might come into the hands of the receiver to renew the paper at maturity for the convenience of the holder. It was undoubtedly given originally to enable the coal company to use it as commercial paper if occasion required, and the renewal may have become desirable on account of the use which had been made of it. The original petition of intervention was not filed until January 5th, 1876, but it was before any application of the income of the receivership for the special benefit of the mortgagees, and before the decree of foreclosure was passed, and the rights of the intervenor were saved by that decree. The petition was pending from the time it was filed. The loss of the original petition did not abate the suit. The substitution of the new petition for the old was nothing else in effect than a restoration of the lost paper to the files.

We do not now hold, any more than we did in *Fosdick* v. *Schall*, or *Huidekoper* v. *Locomotive Works*, 99 U. S. 258, 260, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use. *The decree of the Circuit Court is affirmed.*

Syllabus.

KILLIAN, Administrator, *v.* CLARK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted April 17th, 1884.—Decided May 5th, 1884.

Appeal.

Grigsby v. *Purcell*, 99 U. S. 505, that "an appeal will be dismissed, when, at the term to which it was returnable, the transcript was, by reason of the laches of the appellant, not filed, or the cause docketed in this court" cited and affirmed.

Mr. William J. Miller for appellants.

Mr. Francis Miller for appellee.

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

This appeal is dismissed. The decree appealed from was entered on the 20th of May, 1878, and an appeal allowed these appellants in open court on the 22d of May. No bond for the appeal was given until the 7th of October, 1881, the day on which the cause was for the first time docketed here. The appeal of May 22d, 1878, became inoperative by reason of the failure to give the necessary bond and docket the case here during the October term, 1878, *Grigsby* v. *Purcell*, 99 U. S. 505, and the acceptance of the bond in October, 1881, cannot have the effect of an allowance of a new appeal, because it was more than two years after the decree had been entered.

Dismissed.

WHITE *v.* KNOX, Comptroller.

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

Argued April 10th, 1884.—Decided May 5th, 1884.

National Bank

A creditor of an insolvent national bank, who establishes his debt by suit and judgment after refusal by the Comptroller of the Currency to allow it, is

entitled to share in dividends upon the debt and interest so established as of the day of the failure of the bank; and not upon the basis of the judgment if it includes interest subsequent to that date.

The facts are stated in the opinion of the court.

Mr. S. V. White for himself—plaintiff in error.

Mr. Nathaniel Wilson for defendant in error.

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

This was a suit for mandamus to compel the Comptroller of the Currency to pay a dividend on a debt of the Miners' National Bank of Georgetown, Colorado, an insolvent national bank. The question argued in this court arises on the following facts:

The Miners' National Bank of Georgetown was put into insolvency by the Comptroller of the Currency, and a receiver appointed about the 20th of December, 1875. It owed a large amount of debts, and among the rest about $60,000 to White, the relator, which the comptroller refused to allow. White thereupon brought suit to have his claim adjudicated, and on the 23d of June, 1883, he recovered a judgment against the bank for $104,523.72, that being the amount of his claim with interest added to the date of the judgment. Between the time of the failure of the bank and the judgment, the comptroller had paid to the other creditors, under the requirements of section 5236 of the Revised Statutes, ratable dividends, amounting in the aggregate to sixty-five per cent. on the amounts due them respectively, as of the date when the bank failed. As soon as the claim of White was adjudicated, the comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent. on that amount. The sum paid in this way was $46,560.75, which it is conceded, was the true amount due him on the basis of distribution assumed by the comptroller. White claimed that the dividend should be paid on the face of the judgment, which would have given him $67,940.41. The difference between the amount claimed and that paid is $21,379.66. The present suit was brought to compel the payment of this difference. The court

below decided in favor of the comptroller, and White sued out this writ of error for the review of a judgment to that effect.

The pleadings are somewhat inartificially drawn, but both parties ask that all matters of form may be disregarded, and their rights determined upon the fact, about which there is no disagreement.

Section 5236 of the Revised Statutes, under which the question to be decided arises, is as follows:

"From time to time . . . the comptroller shall make a ratable dividend of the money . . . paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated."

The comptroller decided that the payment to White should be on the basis of the amount due him on his adjudicated claim as of the date of the failure of the bank, because the dividends to the other creditors had been calculated in that way, and all he was entitled to was a share in the proceeds of the assets equal to what had been distributed to others during the pendency of his litigation. In this we think the comptroller was right. Dividends are to be paid to all creditors ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment.

If the comptroller is satisfied with the proof which is furnished to him he can allow the claim, and when the allowance is made the creditor becomes entitled at once to participate in all dividends that may be declared. If the comptroller declines to recognize the claim as valid, it must be established by the adjudication of some competent court before it can share in the distribution of assets. When adjudicated in favor of the cred-

itor it is established as a claim against the bank and must be treated accordingly by the comptroller.

The business of the bank must stop when insolvency is declared. Rev. Stat. sec. 5228. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date before the percentage of dividend is calculated, it should be upon all, otherwise the distribution would be according to different rules, and not ratably as the law requires.

It is insisted, however, on the part of the relator, that he is entitled to dividends on his judgment, as that is the amount adjudicated to him, and the advantage he will get in this way is no more than just, because of the trouble and expense he was put to in carrying on his litigation, and the delay he has suffered in getting his money. The question here is not whether he should be paid interest on the several items of percentage which make up the aggregate of sixty-five per cent., from the time of the payments of dividends to other creditors until his claim was adjudicated, but whether the amount of his judgment must be taken as the sum on which his dividend is to be paid. As has already been seen, the dividends are to be paid on the adjudicated claim, not on the amount due upon the claim when adjudicated. The judgment established the claim as a claim against the bank at the time of the insolvency, and the amount due when the judgment was rendered. Thus the claim was adjudicated, and the amount due at the date of the judgment ascertained; but for the comptroller to pay the relator on the amount due him at that time, and the other creditors on the amount due them eight years before, when the insolvency occurred, would certainly not be making ratable dividends from the assets on all claims against the bank. It was clearly right, therefore, to ascertain from

the judgment how much was due on this claim at the date of the insolvency and make the distribution accordingly.

The trouble and expense which the relator has been put to for the establishment of his claim are but incidents to the business in which he was engaged. It was the duty of the comptroller, if not satisfied of the correctness of the claim when presented, to disallow it, and, if an attempt was made to obtain its adjudication, to make such defence as in his judgment was proper. No provision is made by law for the payment of the expenses of the claimant in his litigation beyond the taxable costs, and necessarily that loss must fall on him as it does on every one who has the misfortune to be driven to the courts for the judicial determination of his rights.

The court below having refused the mandamus, its judgment to that effect is

Affirmed.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY *v.* BURTON.

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

Submitted April 21st, 1884.—Decided May 5th, 1884.

Evidence—Naturalization.

It is not necessary that a transcript of a decree of naturalization should be accompanied by a certificate that the judge of the court was commissioned and qualified, in order to entitle it to be received in evidence.

The defendant in error commenced this action against the plaintiff in error as a common carrier in a State court. The cause was removed to the Circuit Court of the United States on the allegation that the plaintiff below was an alien. In the Circuit Court the plaintiff below moved to remand the cause, averring that he was a citizen by reason of the naturalization of his father. Proof was offered of the father's naturalization, which was received by the court against the objection of the defendant below, and an order was made remanding the cause. The

defendant below brought the case here by writ of error to review that order. The defendant in error moved to dismiss the writ of error and to affirm the judgment.

Mr. Enoch Totten for defendant in error in support of the motion.

No brief filed in opposition.

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

The order remanding this case is affirmed. The act of March 3d, 1875, c. 137, sec. 5, 18 Stat. 470, makes it the duty of the Circuit Court to remand a suit which has been removed from a State court when it satisfactorily appears that the "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court." The exemplification of the record of the naturalization of Moses Burton, which was offered in evidence, did not require, to complete its authentication, the certificate of the clerk under the seal of his office that the judge of the court was duly commissioned and qualified. The certificates may be to some extent defective in form, but we think the record as a whole could properly be considered by the judge on the question of remanding the cause.

Affirmed.

BAINES, Administrator *v.* CLARKE & Another.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued April 25th, 1884.—Decided May 5th, 1884.

Contract—Interest.

A conveyed to B a large quantity of land for $5 an acre, to be paid in instalments with legal interest on deferred payments from June 3d, 1873. Suits were pending as to some of the lands, and it was agreed that if recovery should be had against A as in any of the suits, the land so recovered should not form part of the land sold, and the last instalment of $50,000 was agreed to be reserved until decision of the suits and ascertainment of quantity.

Opinion of the Court.

Held, (1) That A was entitled to interest according to the agreement on deferred payments as to all lands of which he was in possession whether in suit or not; (2) that as to all lands held adversely he was entitled to interest from the entry of judgment in his favor in the ejectment suits; (3) as to lands within the bounds of the description, the title to which was acquired by him after its date, to interest only from the date of the acquisition of the title; (4) and as to the last instalment of the deferred payments, to interest from June 3d, 1873.

The facts are stated in the opinion of the court.

Mr. Caleb Boggess and *Mr. S. A. Miller* for appellant.

Mr. William Pinkney Whyte for appellees.

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

On the 2d of February, 1874, John D. Lewis conveyed to George W. Norris and Henry Clarke three certain tracts of land embraced within the exterior boundaries of a survey of 40,000 acres granted by the Commonwealth of Virginia to Jacob Skyles on the 11th of July, 1798. The instrument by which the conveyance was made was signed by both parties, and contained not only a grant of the land, but an agreement on the part of the grantees for the payment of the purchase-money. That agreement was as follows:

"The consideration of this deed is five dollars per acre as aforesaid, to be paid as follows: $50,000 in cash, the receipt whereof is hereby acknowledged; $25,000 to be paid on the 1st day of October, 1874; $25,000 on the 1st day of April, 1875; $50,000 on the 1st day of January, 1876; and $50,000, or whatever may be the balance due, on the 1st day of January, 1877, with legal interest on all the deferred payments from the 3d day of June, 1873, said interest to be paid semi-annually, commencing on the 1st day of July, 1874. And it is further understood and agreed by the parties to this deed that an accurate survey of the lands hereby granted shall be made under the direction and superintendence of S. A. Miller, of Charleston, to ascertain the true quantity of lands intended to be granted, such survey to be made by running the exterior lines embracing the said three lots made by Surveyor and

Commissioner Thomas S. A. Matthews previous to the sale, and now of record in the proceedings aforementioned, and as described and set forth in this deed, and in the deed from James M. Laidly, survey commissioner of himself and said Matthews, under the decrees and orders in said proceedings for the sale of Jacob Skyles's survey of 40,000. And, as it is further known that there are sundry suits pending in the Circuit Court of Kanawha County between the said John D. Lewis, as defendant, and Hale and McMullin, George Belcher, W. A. McMullin, J. L. McMullin, and George W. Morrison, as plaintiffs, all of which are now submitted to arbitration by an order of said Circuit Court; it is further agreed that any recovery of any land within the boundaries aforesaid shall be and constitute no part of the lands herein sold and granted, but be deducted therefrom at the said rate of five dollars per acre, the said John D. Lewis agreeing to use all diligence in the prosecution of said suits, so as to obtain a speedy trial; . . . it is further understood and agreed that the last payment, or balance of $50,000, due 1st January, 1877, and interest, is reserved until the decision of said suits and the ascertainment of quantity; and the said John D. Lewis hereby reserves a claim upon the land hereby granted for the payment of the purchase-money, and the interest thereon of all the deferred instalments as hereinbefore provided."

The cash instalment of $50,000 was paid, as was also the instalment of $25,000 due on the 1st of October, 1874. Default having been made in the payment of the amount falling due on the 1st of April, 1875, and the interest maturing July 1st, 1875, Lewis filed this bill in the Circuit Court of Kanawha County, West Virginia, on the 17th of August, 1875, to enforce his vendor's lien.

The survey made pursuant to the agreement showed that there were within the exterior boundaries of the tracts conveyed 39,000 acres, but it is not claimed that payment is to be made for more than 36,244 acres, the title having failed to all the rest.

The suits pending at the time the sale was made involved the title to 19,716 acres, but of this amount only 165 acres were in

the actual possession of any one adversely to Lewis. On the 24th of November, 1874, the reference which had been made of the suits to arbitration, mentioned in the agreement, was set aside by order of the court, on account of the failure of the arbitrators to act. At the June term, 1875, of the court a special jury was summoned for the trial of the causes on the 22d of the month, but, before that day arrived, the court adjourned for the term. In January, 1876, one of the suits was tried, but the jury failing to agree, the suits were all continued. On the 30th May, 1876, another agreement for submission to arbitration was entered into, and on the 24th August, 1876, an award was filed, but for some reason it was not confirmed by the court until December, 1877, when judgments were entered in accordance with its requirements. On the 23d of January, 1880, the several plaintiffs in the ejectment suits applied to the Court of Appeals of West Virginia for the allowance of writs of error to review these judgments, but the applications were all refused on that day.

There is in the record evidence of the recovery of a judgment, in the District Court of the United States for the District of West Virginia, by Coles P. Huntington, on the 13th of October, 1875, against John Lewis Taylor, for the recovery of the possession of four hundred acres of land. The judgment was recovered by default, and it does not appear when the suit was begun, or by what right Taylor was in possession. At the next term of the court, Clarke & Norris appeared and asked that the verdict and judgment be set aside, and a new trial ordered. They alleged that the judgment might affect their rights, and that they had no notice of the suit. This motion was taken under advisement by the court, but there is no evidence showing what disposition has been made of it. The court below deducted this recovery from the land to be paid for, and rendered a decree upon the following basis:

Land to be paid for.....35,575 acres.
In litigation at the time of the sale.....19,716 acres.

As to the lands not in dispute, the decree was for the contract price per acre, with interest from June 3d, 1873, to

March 2d, 1881, deducting payments as they had been made. As to the lands in dispute, it was for the agreed price, and interest from January 23d, 1880, the date of the refusal of the Court of Appeals to allow the writs of error, until March 2d, 1881.

The difference between the 36,244 acres claimed by the appellant, and 35,775 allowed by the court, or 469 acres, arises from the failure of the court to correct a former allowance of 200 acres for one of the parcels to which the title had failed, when by actual survey since that time it has been found to contain only 131 acres—a difference of 69 acres—and the deduction of the Huntington recovery of 400 acres from the amount to be paid for.

The questions presented here are:

1. As to the error of 69 acres;

2. As to the deduction of 400 acres recovered by Huntington; and

3. As to the time from which interest shall be charged on the price of the lands in dispute when the sale was made.

As to the 69 acres, we think the claim of the appellant, the representative of Lewis, is right. The report of the master shows the facts, and it is evident that in the original interlocutory decree the amount was fixed by the deduction of an estimated quantity contained in one of the disputed tracts, and not by an actual survey. The survey having since been made and the true quantity ascertained, the decree ought to be made to conform to the actual facts.

As to the Huntington recovery of 400 acres, the testimony is so meagre and indefinite that we are not inclined to disturb the decree below. There has been a judgment for the recovery of the possession, and it was obtained at a time when Lewis was in litigation about his titles. No notice of the suit was ever served on Clarke & Norris. It does not appear that Taylor was in possession through them, and, under the circumstances of the case, Lewis was as much bound to defend as they were.

As to the interest, we think the court was in error. The master has found, and about this there is no dispute, that Lewis

was in actual possession of 34,267 acres. By this we suppose is meant that to this extent the tract was not actually held adversely to Lewis by any one. Clearly, therefore, Clarke & Norris could enter at any time. The principal pending litigation was against Lewis to get him out of possession, not by him to get into possession. Of the remaining 1,977 acres, Lewis had no title to 1,412 acres, and he was actually out of possession of 165. The Huntington 400 acres made up the rest. As to the price of the acres to which Lewis had title, and of which he was in possession, actual or constructive, we think he is entitled to interest on all deferred payments from June 3d, 1873. As to all acres to be paid for which were held adversely, interest should be charged from the time of the judgments in the ejectment suits upon the award of the arbitrators, which was December 20th, 1877. As to the lands to which title was acquired after the conveyance, interest should only be calculated from the date of the acquisition of title. No interest should be calculated on the cash payment of $50,000 at the time of the conveyance. This seems to us to be in accordance with the true construction of the contract of purchase as it was reduced to writing by the parties. We can take notice of no understandings prior to the writing as to what the contract was to be. The conveyance was of all the lands inside the exterior lines of the tracts to which Lewis had title, and for these five dollars per acre was to be paid, with interest from June 3d, 1873, on the deferred payments. This language is plain and unambiguous. The fact of adverse claims to portions of the property was understood by all, and this condition of things was specially provided for in the agreement of purchase. The payments were to be at the rate of five dollars per acre for all the land the title to which was eventually secured. Lewis was to use due diligence in the prosecution of the suits so as to obtain a speedy trial. We find nothing in the record to show that he was at fault in this particular. As the original arbitrators failed to perform their duties, that submission was set aside. A trial to a jury was then had without any practical result, when a new submission was agreed on, and an award promptly obtained. There was some delay in securing final

judgments upon this award, but we see no evidence of such neglect on the part of Lewis in this particular as amounts to a breach of his contract. He certainly could not control the conduct of his adversaries in their applications for the allowance of writs of error, and, therefore, is not chargeable with damages for the delay in that particular. He secured his judgments, and the Court of Appeals has refused to disturb them.

We come now to consider the effect of the last clause in the agreement, which is in these words: "It is further understood and agreed that the last payment or balance of $50,000, due January 1st, 1877, and interest, is reserved until the decision of said suits, and the ascertainment of quantity." This shows that the parties were of opinion that the lands when surveyed, and all the suits decided, would not fall more than 10,000 acres short of the estimated quantity. It also shows that it was anticipated the suits might not all be decided until after January 1st, 1877, the date of the maturity of the last instalment, because the payment of that instalment, whatever should be its amount, was postponed until the quantity was ascertained and the suits decided. The only provision as to delay in securing title was that the suits should be prosecuted with diligence, and that the last instalment was not to be demanded until the events had happened which were to settle finally its amount. When paid, however, the last instalment was to carry interest from the 3d of June, 1873, like all the rest. If it had appeared that Lewis delayed unreasonably the prosecution of the suits, or the ascertainment of the quantity, we might have stopped the interest as compensation for his neglect in such particulars; but the only delay in the prosecution of the suits which could by any possibility be made the cause of complaint was that between the filing of the awards and the judgments thereon. On full consideration, however, we are of opinion that Lewis ought not be made responsible for this. By a failure to serve the necessary notices, the judgments were delayed one term of the court. This appears to have been by accident rather than design, and it was long after Clarke & Norris were in default for a failure to perform their agreement.

In our opinion the decree should have been in favor of the

appellant in accordance with the statement of account made by the master numbered 22, save only that no interest should be charged on $50,000 of the purchase-money represented by what was accepted as the cash payment. By the express terms of the agreement interest was only to be paid on the deferred instalments.

The decree is reversed as to the amount found due, and affirmed in all other respects, and the cause is remanded, with instructions to modify the decree as originally entered by inserting the amount ascertained to be due on the principle of accounting as indicated in this opinion, and for further proceedings according to law.

HARRINGTON & Another *v.* HOLLER.

IN ERROR TO THE SUPREME COURT OF WASHINGTON TERRITORY.

Submitted April 21st, 1884.—Decided May 5th, 1884.

Practice.

A decision of the Supreme Court of a Territory dismissing a writ of error to a District Court because of failure to docket the cause in time is not a final judgment or decision within the meaning of the statutes regulating writs of error and appeals to this court. Mandamus is the proper remedy in such case.

This came up on motion to dismiss the writ of error.

Mr. John H. Mitchell for defendant in error moving.

Mr. S. S. Burdett for plaintiff in error opposing.

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

This motion is granted on the authority of *Insurance Company* v. *Comstock*, 16 Wall. 258, and *Railroad Company* v. *Wiswall*, 23 Wall. 507. An order of the Supreme Court of Washington Territory dismissing a writ of error to a District Court, because of the failure of the plaintiff in error to file the transcript and

have the cause docketed within the time required by law, is not a final judgment or a final decision within the meaning of those terms as used in sections 702 and 1911 of the Revised Statutes regulating writs of error and appeals to this court from the Supreme Court of the Territory. Section 702 provides for the review of final judgments and decrees by writ of error or appeal, and section 1911 regulates the mode and manner of taking the writ or procuring the allowance of the appeal. The use of the term "final decisions" in section 1911 does not enlarge the scope of the jurisdiction of this court. It is only a substitute for the words "final judgments and decrees" in section 702, and means the same thing.

The dismissal of the writ was a refusal to hear and decide the cause. The remedy in such a case, if any, is by mandamus to compel the court to entertain the case and proceed to its determination, not by writ of error to review what has been done. *Ex parte Bradstreet*, 7 Pet. 647; *Ex parte Newman*, 14 Wall. 165.

Dismissed.

FRIEND & Another *v.* WISE.

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

Submitted April 21st, 1884.—Decided May 5th, 1884.

Jurisdiction.

In ejectment in which several defendants are joined who hold separate tracts adversely to the plaintiff, this court will not dismiss the writ of error because each separate tract is not of the jurisdictional value, if their combined values are sufficient to give jurisdiction.

Motion to dismiss, with which a motion to affirm was united.

Mr. Henry Beard and *Mr. Charles H. Armes* for defendant in error in support of the motion.

Mr. William J. Johnston for plaintiffs in error, opposing.

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

Opinion of the Court.

These motions are denied. The value of the two sections of land which are in dispute is conceded to be more than $5,000. The complaint alleges a joint entry and ouster, and the answer does not set up separate claims to distinct parcels of the land by the several defendants. The judgment for the recovery of the possession is against all the defendants jointly. In this respect the case is entirely different from those of *Tupper* v. *Wise* and *Lynch* v. *Bailey*, 110 U. S. 398. We have jurisdiction therefore.

The questions arising on the merits are, some of them, of a character that ought not to be disposed of on a motion to affirm.

KILLIAN *v.* EBBINGHAUS.

ORIGINAL.

Submitted April 21st, 1884.—Decided May 5th, 1884.

Mandate—Practice.

An appeal was taken from the court below by appellant under an incorrect description, not corresponding with the title in the court below. Under this incorrect title proceedings were conducted to final judgment here and a mandate issued. That mandate is now recalled and a new one issued conforming the title and description to those in the court below.

This was a motion to correct an error in the mandate issued on the judgment reported in *Killian* v. *Ebbinghaus*, 110 U. S. 568.

Mr. Garnett and *Mr. Robinson* for the motion.

Mr. Cuppy and *Mr. Dye* opposing.

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

This suit was brought against the trustees of the German Evangelical Concordia Church, then in possession of the premises in dispute. They answered by that name, setting up their title to the property and their claim to the possession. The record shows a notice by Ebbinghaus, the appellee and com-

plainant below, to the trustees of the German Evangelical Lutheran Concordia Church. The final decree was against the "trustees or authorities of the said Concordia Church, whether under the name of the trustees of the German Evangelical Concordia Church, or under the name of the trustees of the German Lutheran Evangelical Concordia Church." The trustees appealed, but in their appeal bond they described themselves as trustees of the German Lutheran Evangelical Concordia Church. The case was entered here promptly and docketed in the name of *John G. Killian et al., trustees of the German Lutheran Evangelical Concordia Church Appellants* v. *John W. Ebbinghaus, trustee.* Both parties appeared and argued the case, as presented by the record, on its merits. No objection was made to the form of the appeal. A mandate which was sent to the court below described the appeal as "taken by John G. Killian *et al.*, trustees of the German Lutheran Evangelical Concordia Church." As in this there was error, the mandate has been recalled, and we now order that a new mandate issue describing the cause below as between John W. Ebbinghaus, trustee, complainant, and John G. Killian *et al.*, trustees of the German Evangelical Concordia Church, and August Sievers *et al.*, trustees of the First Reformed church defendants (Equity, No. 5,688) and the appeal as "taken by John G. Killian *et al.*, trustees of the German Evangelical Concordia Church."

It is so ordered.

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ANNUITY.

See DEVISE, 1;
EQUITY, 1;
LIEN.

APPEAL.

A plaintiff demanding judgment on a note for $7,500, recovered only $702; judgment being against him as to the remainder of the claim on matter of law. He appealed. The defendant took a cross-appeal. On motion to dismiss the cross-appeal for want of jurisdiction, *Held*, That it was incident to the plaintiff's appeal; and that appeal being sustained in part and overruled in part the whole cause was remanded. *Walsh* v. *Mayer*, 31.

See PRACTICE, 3.

BANK.

The rule that the relation between a bank and its general depositors is that of debtor and creditor, which was laid down in *Marine Bank* v. *Fulton Bank*, 2 Wall. 252, is affirmed and applied to deposits arising from collections on behalf of another bank, a correspondent. *Phœnix Bank* v. *Risley*, 125.

See CONFISCATION, 1; CORPORATION; INTERNAL REVENUE, 3; NATIONAL BANK.

BANKRUPTCY.

1. One hypothecating, to secure a debt due from himself, securities which had been pledged to him to secure the obligation of another, and failing to return them when such obligation is discharged, does not thereby create a debt by fraud, or in a fiduciary capacity, which is exempted by § 5117 Rev. Stat. from the operation of a discharge in bankruptcy. *Hennequin* v. *Clews*, 676.
2. A sale of real estate of a bankrupt by order of court free from the lien of a mortgage creditor is invalid, as to the creditor and as to the purpose of discharging his lien, unless he is made a party to the proceedings. *Ray* v. *Norseworthy*, 23 Wall. 128, affirmed. *Factors' & Traders' Ins. Co.* v. *Murphy*, 738.
3. In such case it is not sufficient to notify the person who holds the evidences of his debt, and claims to be his agent, if the record represents that person as acting for another party, and makes no mention of the mortgage creditor. *Id.*
4. The real estate of a bankrupt was sold by order of court free of encumbrances and purchased by A. One of the mortgages on the estate was given to secure four notes, of which at the time of the sale

A held two, and B held two. A and other mortgage creditors were made parties to the proceedings, but B was not made party. C held B's notes and claimed to represent him in the proceedings, but the record only showed C as acting for D. B brought suit to foreclose the mortgage as to his two notes, claiming that as to A's notes the lien was cut off by the purchase of the equity, and as to the rest of mortgage liens as well as to A's they were discharged by the sale. *Held* (1) that B had the right to a decree of foreclosure. (2) That this decree should be made for the benefit of all the mortgage creditors in the order of their priority, including A. (3) That the expenses of A for taxes, prior liens, improvements, &c., growing out of the former sale should be first paid out of the proceeds of the new sale. (4) That A should account for rents and profits if there were any. *Id.*

See EVIDENCE, 2;
JURISDICTION, A, 9;
LIMITATIONS, 7.

BOND.

See ACTION, 2;
OFFICER OF THE COURT, 1;
UNITED STATES.

CALIFORNIA.

See JURISDICTION, A, 7;
SWAMP LANDS.

CASES LIMITED, QUESTIONED, OR OVERRULED.

CERTIFICATE OF STOCK.

See CORPORATION.

CERTIORARI.

A writ of certiorari when applied for by a defendant is not a writ of right but discretionary with the court. *Ex parte Hitz*, 776.

CLAIMS AGAINST THE UNITED STATES.

If a treasury agent for the collection of cotton, who was convicted by a military commission of defrauding the United States, and was sentenced to pay a fine, and paid the fine and was then released, consents after his release that the money may pass into the treasury, he cannot

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

to A, a certificate of stock to an equal amount in a national bank of which B was cashier, received from him such a certificate, written by him in one of the printed forms which the president had signed and left with him to be used if needed in the president's absence, and certifying that A was the owner of that amount of stock "transferable only on the books of the bank on the surrender of this certificate," as was in fact provided by its by-laws. B did not surrender any certificate to the bank, or make any transfer to A upon its books; never repaid the money lent, and was insolvent. The bank never ratified, or received any benefit from, the transaction. *Held*, That A could not maintain an action against the bank to recover the value of the certificate. *Held, also*, That the action could not be supported by evidence that in one or two other instances stock was issued by B without any certificate having been surrendered; and that shares, once owned by B, and which there was evidence to show had been pledged by him to other persons before the issue of the certificate to A, were afterward transferred to the president, with the approval of the directors, to secure a debt due from B to the bank, without further evidence that such issue of stock by B was known or recognized by the other officers of the bank. *Moores* v. *Citizens' National Bank of Piqua*, 156.

See EQUITY, 2, (5); REMOVAL OF CAUSES, 2, 3; EXECUTOR AND ADMINISTRATOR, 1, 2; STATUTES, A, 1.

COSTS.

1. Under the act of March 3d, 1875, 18 Stat. 470, costs may be awarded in a court of the United States against a party wrongfully removing a cause from a State court, when the cause is remanded for want of jurisdiction. *Mansfield, Coldwater & Lake Michigan Railway* v. *Swan*, 379.
2. A judgment of this court remanding to a Circuit Court a cause wrongfully removed into it, with directions to remand it to the State court, is an exercise of jurisdiction. In such case costs will be awarded against the party wrongfully removing the cause, when justice and right require. *Id.*

COURT AND JURY.

1. When in the course of dealings A gives to B one series of his own notes payable to his own order to be used for purchase of an article on his account; another series of like notes as accommodation paper to be protected by the other party at maturity; and a third series, part of which is accommodation paper and a part is issued for the purchase of the article, it is for the jury to say, on a suit against A by a bank to which B had hypothecated one of the third series as collateral, whether B had the right to pledge it for his own debt. *Corn Exchange Bank* v. *Scheppen*, 440.

That under § 2505 of the Revised Statutes (now § 2503, by virtue of § 6 of the act of March 3d, 1883, chap. 121, 22 Stat. 521), exempting from duty "wearing apparel in actual use and other personal effects (not merchandise), . . . of persons arriving in the United States," the proper rule to be applied was to exempt from duty such of the articles as fulfilled the following conditions: (1) Wearing apparel owned by the passenger, and in a condition to be worn at once without further manufacture; (2) brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; (3) suitable for the season of the year which was immediately approaching at the time of arrival; (4) not exceeding in quantity or quality or value what the passenger was in the habit of ordinarily providing for himself and his family at that time, and keeping on hand for his and their reasonable wants in view of their means and habits in life, even though such articles had not been actually worn. *Astor* v. *Merritt*, 202.

DAMAGES.

1. Where a person is induced by false representations to buy an article at an agreed price, to be delivered on his future order, the measure of damages, in an action to recover for the injury caused by the deceit, is the diminution caused thereby in the market price at the time of delivery. *Cooper* v. *Schlesinger*, 148.
2. The measure of damages in an action against a common carrier for loss of goods in transit is their value at the point of destination with legal interest. *Mobile & Montgomery Railway Co.* v. *Jurey*, 584.

See INSURANCE, 3;
PATENT, 6, 7.

DECEIT.

See COURT AND JURY, 2.

DEED.

1. A conveyance of specifically described real and personal estate to a trustee on the trust that he shall sell the same and any and all property belonging to the grantor not exempt from execution, which by any oversight may have been omitted in the foregoing list, and apply the proceeds to the payment of the grantor's debts passes all the estates and interest in property which the grantor at the date held and could alien, or which were then liable at law or in equity for the payment of his debts. *Spindle* v. *Shreve*, 542.
2. When a deed in trust recites a nominal consideration as the sum paid by the trustees, it is no contradiction to show that a valuable

DIPLOMATIC PRIVILEGE.

On application by a person indicted for an offence committed while president of a national bank against the provisions of § 5209 Rev. Stat., for certiorari to bring up the indictment on the ground that when the alleged offence was committed he was a political agent of a foreign government, the application was refused when it appeared that his own government had requested his resignation prior to the finding of the indictment, although it was not actually given till subsequent thereto, and that the political defendant of the Government of the United States had refused him the privilege of free entry of goods usually accorded to a diplomatic representative. *Ex parte Hitz*, 766.

DISTRICT OF COLUMBIA.

See DEED, 3.

DIVORCE.

See DOWER.

DONATION INTER VIVOS.

In Louisiana a donation of land *inter vivos*, reserving the use to the donor until his death, is void if made without consideration:—if made with a partial consideration, the value of the object given exceeding by one-half or more that of the charges or services—*quære* whether the gift will not be of a mixed nature, one part sale and valid, and one part donation and invalid. *Johnson* v. *Waters*, 640.

DONATION MORTIS CAUSA.

In Louisiana a donation to take effect at the death of the donor, so far as it is gratuitous, is a donation *mortis causâ*, which can be made only by will and testament, or by an instrument clothed with the forms required for validity as such, and clearly showing by its provisions that it is a disposition by will. *Johnson* v. *Waters*, 640.

DOWER.

1. A divorce from the bond of matrimony bars the wife's right of dower, unless preserved by the *lex rei sitæ*. *Barrett* v. *Failing*, 523.
2. Under § 495 of the Oregon Code of Civil Procedure, as amended by the statute of December 20th, 1865, providing that whenever a marriage shall be declared void or dissolved the party at whose prayer the decree shall be made shall be entitled to an undivided third part in fee of the real property owned by the other party at the time of the decree, in addition to a decree for maintenance under § 497, and that it shall be the duty of the court to enter a decree accordingly, a wife obtain-

ERROR.

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

ILLINOIS.

Under § 18, chap. 3, of the Revised Statutes of Illinois, of 1874, a husband is entitled to administration on the estate of his wife, if she left property in Illinois. *New England Mutual Life Insurance Co.* v. *Woodworth*, 138.

IMPROVEMENTS.

1. The defendants in a suit in chancery having acquired their title under a deed of trust executed after the original bill was filed, and before the grantor in such deed was served with process in this suit, it was held that they, being in fact purchasers in good faith, were not chargeable with notice of the intention of the plaintiff to bring his suit, within the provisions of the Revised Code of Mississippi, of 1871, chap. 17, article 4, § 1557, in regard to allowances for improvements on land to purchasers in good faith, until they were served with process on the supplemental bill. *Canal Bank* v. *Hudson*, 66.
2. The meaning of the words "good faith" in the statute, and as applicable to this case, defined. *Id.*
3. The amount allowed by the Circuit Court, for improvements, upheld as proper, under the special circumstances. *Id.*

See EQUITY, 1;
HOT SPRINGS RESERVATION, 3.

INDIAN TREATIES.

See PUBLIC LANDS, 2.

INSANITY.

See EVIDENCE, 6.

INSURANCE.

1. A policy of life insurance containing a provision that a default in payment of premiums shall not work a forfeiture, but that the sum insured shall then be reduced and commuted to the annual premiums paid, confers the right on the assured to convert the policy at any time, by notice to the insurer, into a paid-up policy for the amount of premiums paid. *Lovell* v. *St. Louis Mutual Life Insurance Co.*, 264.
2. The neglect to pay a premium on a policy of life insurance will not work a forfeiture of the policy if the neglect was caused by a representation made in good faith, but without authority by an agent of the insurer that it would be converted by his principal into a paid-up policy on the basis of the premiums already paid in. *Id.*
3. On the termination of its business by a life insurance company, and the transfer of its assets and policies to another company, each policy-holder may, if he desires, terminate his policy and maintain an

INTERNAL REVENUE.

INTERPRETATION OF STATE LOCAL LAW.

JUDGMENT.

JURISDICTION.

GENERALLY.

A. Jurisdiction of the Supreme Court.

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NATURALIZATION.

See EVIDENCE, 7.

NEBRASKA.

PARTNERSHIP.

PATENT.

PHOTOGRAPH.

See COPYRIGHT.

PLEADING.

1. In New York, under § 500 of the Code of Civil Procedure, an answer which makes certain statements, and then denies every allegation of the complaint, "except as hereinbefore stated or admitted," amounts to a sufficient general denial of all allegations of the complaint not admitted, to authorize evidence to be given to show any of such allegations to be untrue. *Burley* v. *German American Bank*, 216.
2. An objection that such denial is indefinite or uncertain must be taken by a motion made before trial, to make the answer definite and certain, by amendment, and cannot be availed of by excluding evidence at the trial. *Id.*
3. A complaint which sets forth as cause of action a subject which is prescribed, without setting forth the matter which takes it out of the prescription, may be amended so as to set that matter forth, if the answer admits its truth. *Johnson* v. *Waters*, 640.

See EQUITY, 2, (1);
JURISDICTION, B, 2;
PARTIES, 2.

PRACTICE.

1. When a cause is properly removed from a State court to a Federal court, and the State court nevertheless proceeds with the case, and forces to trial the party upon whose petition the removal was made, the proper remedy is by writ of error after final judgment, and not by prohibition or punishment for contempt. *Insurance Company* v. *Dunn*, 19 Wall. 214, and *Removal Cases*, 100 U. S. 457, again reaffirmed. *Chesapeake & Ohio Railroad Co.* v. *White*, 134.
2. If a record fails to present in proper form the questions argued by counsel, the judgment will be affirmed. *Greenwood* v. *Randall*, 775.
3. *Grigsby* v. *Purcell*, 99 U. S. 505, that "an appeal will be dismissed, when, at the term to which it was returnable, the transcript was, by reason of the laches of the appellant, not filed, or the cause docketed in this court" cited and affirmed. *Killian* v. *Clark*, 784.
4. A decision of the Supreme Court of a Territory dismissing a writ of error to a District Court because of failure to docket the cause in time is not a final judgment or decision with the meaning of the statutes regulating writs of error and appeals to this court. Mandamus is the proper remedy in such case. *Harrington* v. *Holler*, 796.
5. An appeal was taken from the court below by appellant under a incorrect description, not corresponding with the title in the court below. Under this incorrect title proceedings were conducted to final judgment here and a mandate issued. That mandate is now recalled and a

B. IN CIRCUIT COURTS OF THE UNITED STATES.

C. IN THE SUPREME COURTS OF TERRITORIES.

The Supreme Court of a Territory states as conclusion of law matter which should be stated as finding of fact. This court treats it as a finding of fact, under the act of April 7th, 1874, 18 Stat. 27. *Eilers* v. *Boatman*, 356.

PRINCIPAL AND AGENT.

1. The lawful representative of a deceased person who ratifies sales of property made by an agent of executors in their own wrong may maintain an action at law against the agent for money had and received to recover the proceeds of the sale in his hands. *Gaines* v. *Miller*, 395.
2. The ratification extends to all the dealings on the subject between the agent and his principals; and if the principals have converted the simple debt into a judgment, the lawful representative is bound by it. *Id.*

PROXIMATE CAUSE.

PUBLIC LANDS.

1. The aim of Congress in statutes relieving parties from the consequences of defects in title has been to protect *bona fide* settlers, and not intruders upon the original settlers, seeking by violence, or fraud, or breach of contract to appropriate the benefit of their labor. The legislation in this respect and the decisions of this court upon it reviewed. *Rector* v. *Gibbon*, 276.
2. The location of land scrip upon lands reserved for Indians under the

QUO WARRANTO.

RAILROAD.

REBELLION.

REMOVAL OF CAUSES.

REVIEW.

SOLICITOR AND CLIENT.

See EQUITY, 2, (3).

SPANISH GRANTS.

In an order by a Spanish governor of Louisiana recognizing an Indian grant and directing the issue of "a complete title," these words, as translated, refer to the instruments which constitute the evidence of title, and not to the estate or interest conveyed. *Slidell* v. *Grandjean*, 412.

See HOUMAS GRANT;
USAGE AND CUSTOM.

STATUTES.

A. CONSTRUCTION OF STATUTES.

1. If a statute confers upon a judgment creditor of a corporation an equitable remedy on the issue of an execution on the judgment and its return unsatisfied, and in a revision of the statutes the same equitable remedy is given, but without mention of the issue and return of execution, it is not to be presumed that the legislature intended by the omission to abrogate or modify an established rule of equity, that when it is attempted by equitable process to reach equitable interests fraudulently conveyed, the bill should set forth a judgment, issue of execution thereon, and its return unsatisfied. *Taylor* v. *Bowker*, 110.
2. In case of doubt, a legislative grant should always be construed most strongly against the grantee. *Slidell* v. *Grandjean*, 412.
3. When a statute authorized the creation of a commission of three to decide upon land grants, a majority of whom "shall have power to decide," "which decisions shall be laid before Congress," "and be subject to their determination," their decisions have no binding force until acted upon by Congress. *Id.*
4. An act confirming "the decisions in favor of land claimants made by" A, B, and C, reciting their names, does not confirm a decision made by A and B and dissented from by C, although the act under which the commission was created provided that a majority of the commissioners should have power to decide. *Id.*
5. A legislative confirmation of a grant of land of which no quantity is given, no boundary stated, and no rule for its ascertainment furnished, is void for uncertainty. The distinction between such a confirmation and that passed upon in *Langdeau* v. *Hanes*, 21 Wall. 521, pointed out. *Id.*

See MUNICIPAL CORPORATION, 4, 5;
RAILROAD, 1, 2;
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B. STATUTES OF THE UNITED STATES.

C. STATUTES OF STATES AND TERRITORIES.

SUBROGATION.

See INSURANCE, 7.

SUNDAY.

See CONTRACT, 5, 6.

SUPERSEDEAS.

A supersedeas will not be vacated when the writ of error is sued out and served within twenty days after the decision of a motion for rehearing, presented in season and disposed of by the court. *Texas & Pacific Railway Co.* v. *Murphy*, 488.

SUPREME COURT.

In cases coming from the Circuit Courts, this court will determine from its own inspection of the record, whether they are of the class excluded by statute from the cognizance of those courts; this, although the question of jurisdiction is not raised by the parties. *Börs* v. *Preston*, 252.

SURETY.

See OFFICER OF THE COURT, 1.

SURPLUS REVENUE.

The Secretary of the Treasury is not authorized to use the revenues of the United States, accrued since January 1st, 1839, in order to deposit with the States in the fourth instalment of surplus revenue according to the provisions of the act of June 23d, 1836, 5 Stat. 55. *Ex parte Virginia*, 43.

SWAMP LANDS.

TAX.

See CONSTITUTIONAL LAW, A, 3, 4, 5; EQUITY, 1; LEGAL TENDER; SWAMP LANDS, 1, 3.

TENNESSEE.

See MUNICIPAL CORPORATIONS.

TRIAL.