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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1884

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

ATTORNEY-GENERAL.

Benjamin Harris Brewster.

SOLICITOR-GENERAL.

Samuel Field Phillips.

REPORTER.

J. C. Bancroft Davis.

CLERK.

James H. McKenney.

MARSHAL.

John G. Nicolay.

THE CHIEF JUSTICE heard argument in no case reported in this volume, after December 12, 1884, by reason of indisposition.

For Amendment to Admiralty Rules, and Proceedings at Unveiling of the Statue to Chief Justice Marshall, see Appendix.

ERRATA.

Page 31, line 21.—For "Pope's" read "Polk's."

Page 50, line 14.—For "*Mackey*" read "*Markey*."

Page 199, line 17—For "1862" read "1863."

Page 219, line 12 from bottom.—For "McCreary" read "McCrary."

Page 255, line 8.—For "*National* v. *Bank*, 102 U. S. 165" read "*National Bank*, 102 U. S. 163."

Page 255, lines 9 and 20.—For "*McNeil*" read "*McNiel*."

Page 279, line 15.—For "Beame's" read "Beawes"; for "fig." read "par."

Page 287, line 7 from bottom.—For "Newark" read "New York."

Page 341, line 16.—For "Burrows" read "Burrow."

Page 384, line 6.—For "McMulan" read "McMullan."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1884.

UNITED STATES *v.* MORTON.

APPEAL FROM THE COURT OF CLAIMS.

Submitted October 15, 1884.—Decided October 27, 1884.

The time of service of a cadet in the Military Academy at West Point, from July 1st, 1865, to June 15th, 1869, is to be regarded as "actual time of service in the army," within the meaning of the acts of February 24th, 1881, and June 30th, 1882, 21 Stat. 346, and 22 Stat. 118, in computing his increase of pay "for each term of five years of service," under § 1262 of the Revised Statutes.

Charles Morton was appointed a conditional cadet in the service of the United States on March 6th, 1865, and was admitted as a conditional cadet on July 1st, 1865, into the United States Military Academy at West Point, and received his warrant as a cadet, signed by the Secretary of War, in January, 1866, stating that he had been appointed by the President a cadet of the United States Military Academy, to rank as such from July 1st, 1865. On the 1st of July, 1865, when he was so admitted as a conditional cadet, he entered into an agreement, as required by law, bearing that date, and subscribed and sworn to by him, which stated, that, "having been selected for an appointment as cadet in the Military Academy of the United States," he engaged, with the consent of his father, in the event of his receiving such appointment, that he would "serve

in the army of the United States" for eight years, unless sooner discharged by competent authority. The instrument embodied also the oath required by the act of July 2d, 1862, 12 Stat. 502, to be thereafter taken and subscribed by every person "elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States," "before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof." Part of the oath was, "that I will well and faithfully discharge the duties of the office on which I am about to enter." He remained at the Academy from July 1st, 1865, until June 15th, 1869, when he was duly graduated therefrom. He was commissioned as a second lieutenant in the third regiment of cavalry, to date from June 15th, 1869, and thereafter as a first lieutenant in the same regiment, to take effect from September 25th, 1876. He held the latter position down to March 31st, 1883. He faithfully discharged the duties imposed on him by these various appointments, being continuously in the service of the United States, in a military capacity, from July 1st, 1865, to March 31st, 1883. In computing his service pay, he was not allowed credit for the time he was a cadet at West Point as part of his time of service in the army. He brought suit in the Court of Claims, against the United States, in July, 1883, to recover $169.07, as withheld from him in respect of time between February 24th, 1881, and March 31st, 1883, and, on the foregoing facts, that court rendered a judgment in his favor for that amount (see 19 C. Cl. 200), from which the United States appealed.

Mr. Solicitor General, in submitting the case on behalf of the appellant, rested upon the opinion of Attorney-General McVeagh, dated May 14th, 1881, under which the Executive Departments acted in rejecting the appellee's claim. In this opinion, among other things, it was said—"The question submitted by you is whether the period passed by a cadet at West Point receiving his military and other instruction at that Acad-

emy is to be computed as 'actual time of service in the army;' and I have no difficulty whatever in answering this question in the negative." Attorney-General Cushing said: "We see by the statute that the internal military organization of the Academy is for the purpose of military instruction. *It is not actual service in the army.*" 7 Opins. Att'ys-General, 333. If it had been the intention of Congress to enact that the period passed by the cadets at West Point should be placed upon the footing of *actual service in the army*, it would have been perfectly easy to have said so by language incapable of being misunderstood; and it seems to me that it is extremely undesirable to torture the language of Congress in order to find in it, by relation to some other statute, a technical effect, when the apt words to express such an intention readily occur to every unbiased mind. It is very true that the corps of cadets at West Point constitute part of the army, but it does not follow that a cadet pursuing his studies at West Point is in *actual service in the army*, within the meaning of the clause in the army appropriation bill; and, if Congress at any time desires to add this advantage to those already possessed by the young men who are educated at the public expense at the Military Academy, it will be very easy for it to do so by declaring that the time passed by cadets at the Military or Naval Academy shall be computed as "actual time of service in the army or navy;" but, until language clearly indicative of this meaning is used it would be, in my judgment, very unwise to endeavor to extract it from a clause in the army appropriation bill treating only of the army as in actual service in the ordinary meaning of the phrase.

Mr. S. S. Henkle for appellee.

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

It is provided as follows by § 1262 of the Revised Statutes: "There shall be allowed and paid to each commissioned officer below the rank of brigadier-general . . . ten per centum of their current yearly pay for each term of five years of ser-

vice." In the acts of February 24th, 1881, 21 Stat. 346, and June 30th, 1882, 22 Stat. 118, making appropriations for the support of the army, under the head, "For pay of the army," gross sums are appropriated for, among other things, this purpose: "Additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the army or navy, or both, shall be allowed all officers in computing their pay." The only question for decision is, whether the time of service as a cadet is to be regarded as "actual time of service in the army."

The view acted on by the accounting officers of the government in dealing with the officer under § 1262 of the Revised Statutes, and § 24 of the act of July 15th, 1870, 16 Stat. 320, of which § 1262 was a re-enactment, was to allow only for length of service as a commissioned officer in the regular army. By § 7 of the act of June 18th, 1878, 20 Stat. 150, it was provided that officers of the army who had served "as enlisted men in the armies of the United States, regular or volunteer," should be credited with the full time they had served as such enlisted men, "in computing their service for longevity pay." Under this statute the practice was not to regard an officer who had served as a cadet as having thereby served as an enlisted man in the army, 16 Opin. Att'ys-General, 611; and the Court of Claims, in *Babbitt* v. *The United States*, 16 C. Cl. 202, supported that view. After the passage of the act of February 24th, 1881, the accounting officers of the government administered it as not requiring that the time of service as a cadet should be allowed as "actual time of service in the army." This was done in pursuance of the advice of Attorney-General McVeagh.

But an examination of the legislation of Congress shows that the cadets at West Point were always a part of the army, and that service as a cadet was always actual service in the army. Cadets are first mentioned in the act of May 9th, 1794, 1 Stat. 366, which provided for organizing, by voluntary enlistment, a corps of artillerists and engineers, of which a part was to be thirty-two cadets, ranking as sergeants, but spoken of as officers. These were part of the army. By § 6 of the act of

July 16th, 1798, 1 Stat. 605, cadets are called non-commissioned officers in the army of the United States, and their pay is fixed at $10 per month and two rations per day.

By the act of March 16th, 1802, entitled "An Act fixing the military peace establishment of the United States," 2 Stat. 132, it was provided (§ 1) that the military peace establishment of the United States should embrace a regiment of artillerists, of which a part should be forty cadets. By §§ 4 and 5 the pay and rations of the cadets were fixed. By § 26 provision was made for organizing a corps of engineers, consisting of officers, and ten cadets, whose pay was fixed; and by § 27 the corps was to be stationed at West Point, New York, and to constitute "a military academy," and the officers and cadets were to be "subject, at all times, to do duty in such places and on such service" as the President should direct. Clearly, all these cadets were a part of the army.

By §§ 1 and 2 of the act of April 12th, 1808, 2 Stat. 481, additional military forces were to be raised, comprising, in infantry, riflemen, artillery, and dragoons, one hundred and fifty-six cadets, the cadets, (§ 4), to receive the like pay, &c., with the cadets of the then existing military establishment, and being classed by themselves and not as either officers or non-commissioned officers, and, (§ 5), to be subject, with the then existing cadets, to the rules and articles of war, which had been established or might thereafter, by law, be established.

By § 2 of the act of April 29th, 1812, 2 Stat. 720, entitled "An Act making further provision for the corps of engineers," it was provided that the Military Academy should consist of the corps of engineers and certain professors. By § 3 it was enacted that the cadets theretofore "appointed in the service of the United States, whether of artillery, cavalry, riflemen or infantry," or that might in future be appointed, as thereinafter provided, should not exceed two hundred and fifty, and might be attached by the President, as students, to the Military Academy, and be subject to the established regulations thereof; "that they shall be arranged into companies of non-commissioned officers and privates, according to the directions of the commandant of engineers, and be officered from the said corps,

for the purposes of military instruction; that there shall be added to each company of cadets four musicians; and the said corps shall be trained and taught all the duties of a private, non-commissioned officer, and officer, be encamped at least three months of each year, and taught all the duties incident to a regular camp; that the candidates for cadets be not under the age of fourteen nor above the age of twenty-one years; that each cadet . . . shall sign articles, with the consent of his parent or guardian, by which he shall engage to serve five years, unless sooner discharged; and all such cadets shall be entitled to and receive the pay and emoluments now allowed by law to cadets in the corps of engineers." This was the organization of the Military Academy substantially as it has since continued.

By § 1 of the act of March 3d, 1815, 3 Stat. 224, entitled "An Act fixing the military peace establishment of the United States," it is directed that the corps of engineers, as then established, be retained; by § 4, that the compensation, &c., of the cadets and others "composing the military peace establishment" should be the same as prescribed by the before mentioned acts of 1802 and 1808; and by § 7, that the several corps authorized by the act "shall be subject to the rules and articles of war."

By § 28 of the act of July 5th, 1838, 5 Stat. 260, it was enacted that "the term for which cadets hereafter admitted into the Military Academy at West Point shall engage to serve, be and the same is hereby increased to eight years, unless sooner discharged."

By § 1 of the act of July 28th, 1866, 14 Stat. 332, it was provided that the military peace establishment of the United States should thereafter consist of so many regiments of artillery, of cavalry and of infantry, "the professors and corps of cadets of the United States Military Academy," and such other forces as should be provided for by that act, "to be known as the army of the United States." This enactment remained in force, and is reproduced in § 1094 of the Revised Statutes, which says that "the army of the United States shall consist of," with other constituents, "the professors and corps of cadets of the United States Military Academy."

From this review of the statutes, it cannot be doubted that, before the passage of the act of July 28th, 1866, as well as afterwards, the corps of cadets of the Military Academy was a part of the army of the United States, and a person serving as a cadet was serving in the army; and, that the time during which the plaintiff in the present case was serving as a cadet, was, therefore, actual time of service by him in the army.

The practical construction of the requirement of the act of 1838, that the cadet should engage to serve for eight years, shown by the fact that the form of the engagement in this case was to "serve in the Army of the United States for eight years," is a circumstance of weight to show that the government, from the beginning, treated the plaintiff as serving in the army. The service for which he engaged began on the 1st of July, 1865, and the eight years ran from that time. That being his status, the acts of 1881 and 1882, in speaking of "actual time of service in the army," cover the time of his service as a cadet.

In *United States* v. *Tyler*, 105 U. S. 244, it was held that an officer retired from active service, who was declared by statute to be a part of the army, who could wear its uniform, whose name was required to be borne on its register, who might be detailed by his superior officers to perform specified duties, and who was subject to the rules and articles of war, was in the military service; and that the increase of pay given for each term of five years of service, by § 1262 of the Revised Statutes, and by § 24 of the act of July 15th, 1870, 16 Stat. 320, from which that section was taken, applied to the years so passed in the service after, as well as before, retirement. Under the statutes involved in the present case, a cadet at West Point is serving in the army as fully as an officer retired from active service is serving in the army, under the statutes which apply to him so far as the question of longevity pay is concerned.

The judgment of the Court of Claims is affirmed.

WOODWORTH *v.* BLAIR & Others.

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

Submitted October 17, 1884.—Decided October 27, 1884.

In a suit in equity to foreclose a mortgage from a railroad corporation of its whole railroad, franchise, lands and property, which have since been put in the possession of a receiver, an intervening prior mortgagee of part of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to his mortgage.

This was an appeal, by a prior mortgagee of a tract of land occupied by the Chicago and Pacific Railroad Company, from decrees in a suit in equity to foreclose two mortgages of its whole railroad. The material facts appearing by the record were as follows:

On October 1st, 1872, and on November 6th, 1874, the corporation made to a trustee, to secure the payment of its bonds, two mortgages of all its railroad, right of way, franchise, road bed, stations and station houses, depot grounds, and other property, already or thereafter owned, possessed or acquired through or by reason of the construction of its railroad. After breach of the conditions of those mortgages, the bondholders filed bills in equity for the appointment of a receiver and for the foreclosure of the mortgages, which were by order of court consolidated as one suit.

Pending that suit, and after a receiver had been appointed and had taken possession, the appellant filed an intervening petition, alleging that on February 1st, 1872, at the request of the corporation and for its benefit, she sold and conveyed to Thomas S. Dobbins, its president, a tract of land in Chicago, in consideration of a certain sum in money, and of ten promissory notes made by Dobbins, payable in ten successive years, and secured by a mortgage from him of the land, which was duly recorded on September 5th, 1872; that the corporation entered upon the land and laid tracks upon it, and continued to use and occupy it until the appointment of the receiver, and the receiver

since continued to use it for the benefit of the railroad, and neglected to pay the notes and interest; and praying that the amount thereof might be paid out of any funds in the hands of the receiver, or out of the proceeds of sale under any decree to be rendered in the case. This petition was referred to a master, who reported that the amount due to the appellant was $59,910.10.

The court declined to order the payment of the appellant's claim, and dismissed her petition, without prejudice; and in the principal suit entered a decree for the foreclosure by sale of the whole railroad, including the road bed, stations and station houses, depot grounds and other property, without prejudice to her mortgage.

From that decree the appellant prayed an appeal to this court, and offered a bond in order to make the appeal a supersedeas. The court allowed the appeal and approved the bond, and ordered that the appeal should not operate as a supersedeas or delay of the sale, but only delay the distribution of so much of the proceeds of the sale as was necessary to fully secure the amount due on her mortgage.

The master afterwards reported that a sale had been made, in accordance with the decree of foreclosure, for the sum of $916,100; and the court overruled exceptions taken by the appellant to the master's report, and confirmed the sale. The corporation afterwards paid into court the amount of the bid, interest and commissions, as required by the decree and by the statute of Illinois; and the court found that the corporation had done what was needful to effect a redemption, and reserved for further consideration the time and terms on which a delivery of the property to the corporation should be directed.

Mr. Henry Crawford for appellant.—It is undoubtedly true that when the debt secured by a senior lien is not due, and that creditor is not before the court, a junior encumbrancer may foreclose the equity of redemption as against his own lien, and leave the holder of the first encumbrance to enforce his rights. But no case can be cited where a court of equity authorized a junior mortgagee to restrict a foreclosure proceeding to the enforce-

ment of his own lien, when a receiver had taken possession of the whole property, and a senior mortgagee with a debt matured was party to the suit. A court of equity having the parties before it and the custody and possession of the property, should adjudicate and determine the amount and order of preference of all liens, irrespective of their relation of priority to the encumbrance of the original complainants, leaving the question of payment to be determined by the amount of the sale proceeds. Considering the peculiar nature of railway property, the proper method to enforce the lien would be by sale of the whole line, considered as one property, incapable of severance. The land purchased of the appellants lost its separate charac ter and became a necessary portion of the whole line, incapable of being dislocated or sold. Consequently the purchase lien is enforceable only against the whole railway as a unit. *Muller* v. *Dows*, 94 U. S. 444, 449; *Neilson* v. *Iowa Eastern Railway Company*, 44 Iowa, 71; *Brooks* v. *Railway Company*, 101 U. S. 443; *Meyer* v. *Hornby*, 101 U. S. 728; *Dayton, Xenia & Belpre Railroad Company* v. *Lewton*, 20 Ohio St. 401. The appellant's superior equity is clear as against the bondholders under the general mortgage. It is prior in time and stronger in right. The general mortgage attaches itself only to such interest in the property as the mortgagor acquires, and if that property is already subject to mortgages and liens it does not displace them. *United States* v. *New Orleans Railroad*, 12 Wall. 362; *Ketchum* v. *St. Louis*, 101 U. S. 306. The bondholders having ratified the original transaction with appellant, cannot now be heard to dispute either the amount or priority of the debt or its lien on the whole trust property. Bigelow on Estoppel, 511; *Pfeiffer* v. *Sheboygan & Fond Du Lac Railroad Company*, 18 Wis. 155; *Farmers' Loan & Trust Company* v. *Fisher*, 17 Wis. 114, 117; *Dayton, Xenia & Belpre Railroad Company* v. *Lewton*, 20 Ohio St. 401; *Western Pennsylvania Railroad Company* v. *Johnston*, 59 Penn. St. 290; *Miltenberger* v. *Logansport Railroad Company*, 106 U. S. 286, 308. The court holds by its receiver for the benefit of whomsoever in the end it shall be found to concern, *Fosdick* v. *Schall*, 99 U. S. 235, 251; and has cognizance in a suit for foreclosure of

a railway, of all questions relating to priority of lien on the property in litigation. *United States* v. *New Orleans Railroad*, 12 Wall. 362. See also *Codwise* v. *Gelston*, 10 Johns. 507, 521; *Wiswall* v. *Sampson*, 14 How. 52.

Mr. E. Walker for appellees.

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

Assuming, as the appellant contends, that her conveyance to Dobbins, and the mortgage back by him, should be considered in equity as if made to and by the railroad corporation, no ground is shown for reversing the decree below.

The appellant's mortgage covered only the tract of land specifically described therein, and did not affect the title of the corporation in other lands and in so much of its road as was not laid over the land mortgaged to her. The case differs in this respect from the cases cited by her counsel, in which a mechanic's lien given by statute for work done on part of a railroad was held to extend to the whole road. *Brooks* v. *Railway Company*, 101 U. S. 443; *Meyer* v. *Hornby*, 101 U. S. 728.

As a general rule, a prior mortgagee is not a necessary party to a bill to foreclose a junior mortgage, where the decree sought is only for a foreclosure of the equity of redemption from the prior mortgage, and not of the entire property or estate. *Jerome* v. *McCarter*, 94 U. S. 734. In a suit to foreclose a mortgage of the whole railroad, franchise and property of a railroad corporation, it would often produce great delay and embarrassment to undertake to determine the validity and extent of all prior liens and encumbrances on specific parts of the corporate property before entering a final decree.

The course pursued by the Circuit Court in the present case, dismissing the intervening petition of the appellant, without prejudice, and ordering a foreclosure by sale, subject to her mortgage, of the entire railroad and other property included in the railroad mortgages, to foreclose which the principal suit

had been brought, judiciously and effectively secured the rights of all parties.

The price obtained by the sale of the railroad and other property, subject to her mortgage, must have been less than if they had been sold free of that mortgage; and to order the amount of that mortgage to be paid out of the proceeds of the sale would *pro tanto* benefit the purchaser if the sale was carried out, or the railroad corporation in case of redemption, to the corresponding detriment of the holders of bonds secured by the railroad mortgages.

The railroad corporation, after having redeemed its property from the railroad mortgages, will hold it subject to any valid lien of the appellant, just as it did before the proceedings for foreclosure were instituted.

Decree affirmed.

NEW ORLEANS, MOBILE & TEXAS RAILWAY CO. *v.* THE STATE OF MISSISSIPPI, *ex rel.* The District Attorney.

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

Argued October 15, 1884.—Decided October 27, 1884.

The act of February 7th, 1867, of the Legislature of Mississippi (Laws of 1867, 332), and the act of August 19th, 1868, of the Legislature of Louisiana (Acts of La. 1868, No. 28, p. 32), and the act of Congress of March 2d, 1868 (15 Stat. 38), relating to the construction and maintaining of bridges over navigable waters on the route of a railroad between Mobile and New Orleans, when taken together so far as the last two may be considered in this case, do not release the plaintiff in error from the obligation imposed upon it by the said act of the Legislature of Mississippi to maintain a drawbridge with a space of sixty feet for the passage of vessels, across the channel of Pearl River, in its main channel, constituting the dividing line between Mississippi and Louisiana.

This was a petition for mandamus by the Attorney-General of the State of Mississippi on behalf of the State, brought in the courts of that State, and removed to the Circuit Court of

the United States for the Southern District thereof, to compel the plaintiff in error, as defendant below, to remove a bridge alleged to have been constructed by it without a draw across Pearl River, and in lieu thereof to construct and maintain a bridge which should have, in the central part of the channel, a drawbridge, which when open should give a space of sixty feet for the passage of vessels. A demurrer was interposed by defendant below, and an answer filed, without prejudice, to the demurrer. The contentions between the parties are stated in the opinion of the court. Each party in its contentions referred to the following statutes, which are also referred to in the opinion of the court.

I. The following clauses in an act of the Legislature of Mississippi, approved February 7th, 1867, relating to plaintiff in error:

"And it is also provided that said company is authorized and empowered to construct and maintain its said railroad over and across any of the waters of this State on the line of the same by bridges; *Provided, however*, That in the central portion of the channel of the Pearl River, of the Bay of St. Louis, of the Bay of Biloxi, and of the East Pascagoula River, and in each of them, said company shall construct and maintain a drawbridge, which, when open, shall give a clear space for the passage of vessels, of not less than sixty feet in width, and said company, after the construction of the said drawbridges, shall at all times thereafter, provide that said drawbridges shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay; *Provided, however*, That in case the company shall locate the line of their road across the channel of the Rigolet, at a point south of or below the principal entrance of Pearl River into the Rigolet, then the said company shall not be required to construct a drawbridge across any bayou leading into Pearl River, or across any small pass or mouth of said river. It is also provided that such part of this section as relates to Pearl River, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the

same, or said company has built such a bridge across said Pearl River, for its said railroad, as shall be in accordance with this section, and also with any authority or power granted to said company by the said State of Louisiana in the premises, and such drawbridge may be built in the centre of the channel of said Pearl River, or in that portion of the same within the territory of the State of Louisiana or of this State, as most convenient for public use." Laws of Miss. 1867, pp. 332, 335, 336.

II. The following clauses in an act of the Legislature of Louisiana, approved August 19th, 1868, in reference to the same company:

"And it is also provided that said company is authorized and empowered to construct and maintain its said railroad over and across the waters of the State of Louisiana, known as the Pass Chef Menteur, Little Rigolet, Great Rigolet, or that part of Lake Pontchartrain east of the west line of Point aux Herebs, and the West Pearl River, and other streams and bayous between Lake Pontchartrain and Pearl River, and Pearl River, by bridges; *Provided, however*, That in the channel of that part of Lake Pontchartrain hereinbefore named there shall be constructed and maintained by said company a drawbridge, which, when open, shall give a clear space for the passage of vessels of not less than one hundred feet in width; and in the channel of the Pearl River the said company shall construct and maintain a drawbridge, which, when open, shall give clear space for the passage of vessels of not less than sixty feet in width, except in case the company shall locate their road across the Great Rigolet at a point south of (or below) the principal entrance of Pearl River into the Great Rigolet, when the company shall only be required to construct one drawbridge, which shall be in the channel of the Great Rigolet, as hereinbefore named; and said company, after the construction of the said drawbridges or drawbridge, shall at all times thereafter, provide that said drawbridges or drawbridge shall be opened for the passage of any and all vessels through the same without unnecessary delay. *It is also provided*, That such part of this section as relates to Pearl River, if the line of the road shall be located across the said river at a point where it constitutes

the boundary line between the State of Louisiana and the State of Mississippi, shall not take effect until the State of Mississippi has consented to and authorized the same, or said company has built such a bridge across said Pearl River for its said railroad as shall be in accordance with this section and also with any authority or power granted to said company by the State of Mississippi in the premises; and such drawbridge may be built in the centre of the channel of said Pearl River, or in that portion of the same within the territory of the State of Mississippi or of this State, as most convenient for public use." Acts of La. 1868, No. 28, p. 32.

III. The following clause in the act of Congress of March 2d, 1868:

"That the New Orleans, Mobile & Chattanooga Railroad Company is hereby authorized and empowered to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans and Mobile for the use of said company, the passage of its trains of cars, passengers, and mail and merchandise thereon. And said Railroad Company, and its bridges aforesaid, when constructed, completed and in use in accordance with this act and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures and a post-road, and are hereby declared as such. *Provided, however*, That the said company, in the construction of its bridges over and across the waters known as the Pascagoula River, the Bay of Biloxi, and the Bay of St. Louis, shall construct and maintain drawbridges in the channels thereof, which, when open, shall give a clear space for the passage of vessels of not less than eighty feet in the channels of the East Pascagoula River and of the Bay of Biloxi and of the Bay of St. Louis, and of not less than one hundred feet in the channel of the Great Rigolet; and said company shall at all times open the said drawbridges, and shall provide reasonable and necessary facilities for the passage of all vessels requiring the same, except during and for ten minutes prior to and after the time of the passage of the mail and passenger trains of said company." 15 Stat. 38.

The Circuit Court overruled the demurrer of the defendant below, and sustained the demurrer of the plaintiff below, and gave judgment accordingly. This writ of error was sued out to review that judgment.

Mr. Gaylord B. Clark and *Mr. Thomas L. Bayne* for plaintiff in error cited *Miller* v. *Mayor of New York*, 109 U. S. 385, and cases there cited; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; 18 How. 421; *Clinton Bridge Case*, 10 Wall. 454; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *South Carolina* v. *Georgia*, 93 U. S. 4; *Ex parte Yarbrough*, 110 U. S. 651, 654; Rev. Code Miss. 1880, §§ 2542, 2551; Bouvier Law Dict. Tit. Mandamus; High Extraordinary Remedies, §§ 1, 431, 539, 548; *State* v. *Zanesville & Maysville Turnpike Co.*, 16 Ohio St. 308; *United States* v. *McDaniel*, 7 Pet. 15; *Edwards* v. *Darby*, 12 Wheat. 207, 210; *Burgess* v. *Seligman*, 107 U. S. 20, 34, 35; *Carroll County* v. *Smith*, 111 U. S. 556, 562, 563.

Mr. J. Z. George for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This case has been heretofore in this court upon a question of jurisdiction, and is reported as *Railroad Co.* v. *Mississippi*, 102 U. S. 135. The Supreme Court of Mississippi, in accordance with our decision, reversed the judgment of the inferior State court, with directions to set aside all orders made subsequent to the presentation of the company's petition and bond for the removal of the cause, and to proceed no further. The case was thereafter tried in the Circuit Court of the United States. The object of the suit is, by mandamus, to compel the railroad company, whose line extends from Mobile to New Orleans, to construct and maintain in the channel of Pearl River, where that stream is crossed by the company's road, on the line between Mississippi and Louisiana, a drawbridge, which, when open, will give a clear space of not less than sixty feet in width for the passage of vessels. It would seem from the uncontroverted allegations of the petition that the bridge originally constructed by the company across Pearl River had no draw, although the channel, at that point, according to the

Coast Chart, has about forty-five feet depth of water, and the river is nearly three hundred yards in width. But, in the answer filed in the Circuit Court, it was averred, and the demurrer to it admitted, that there was, at that time, a draw which gave a clear space, for the passage of vessels, of thirty-four to thirty-six feet in width.

By the final judgment, a peremptory mandamus was awarded requiring the company to remove the present bridge, and in lieu thereof construct and maintain one, giving a clear space of not less than sixty feet in width. It is provided in the judgment that such drawbridge may be built "either in the centre of the channel of Pearl River, or in that portion of the same within the territory of the State of Louisiana," or of Mississippi, as "may be most convenient for public use."

The controlling question is, whether the railroad company is under any legal obligation to construct and maintain a drawbridge of the kind specified in the judgment of the Circuit Court.

The company was incorporated by an act of the General Assembly of Alabama, approved November 24th, 1866, with authority to construct a railroad from the city of Mobile to any point on the line between Alabama and Mississippi; and also, in continuation thereof, a railroad through Mississippi and Louisiana, with such rights, privileges and franchises as might be granted to the corporation by the latter States. Laws of Ala. 1866–7, p. 6. Its existence as a corporation was recognized and approved by an act of the Legislature of Mississippi, approved February 7th, 1867, by which it was permitted to have, exercise, and enjoy, within that State, the rights, powers, privileges and franchises granted to it by the State of Alabama, subject to the conditions, provisions and restrictions presented in said act and by the general laws of Mississippi. By the same act the company was authorized to construct and maintain a railroad from any point on the line between Mississippi and Louisiana, thence towards and to any point on the line between Mississippi and Alabama, and extend the same, as contemplated in its act of incorporation, from the western boundary of the State to New Orleans, and from its eastern

boundary to Mobile. It was given a right of way across the waters, water-courses, rivers, bays, inlets, streets, highways, turnpikes or canals within Mississippi, subject, however, to the condition that "the said company shall *preserve* any water-course, street, highway, turnpike or canal which its said railroad may so pass upon, along, intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; or if temporarily impaired in and during the construction of said railroad, the said company shall restore the same to its former state, or to such state that its usefulness and convenience to the public shall not be unnecessarily or materially impaired or injured."

But that part of the act which has special reference to the issues in this case, and upon the construction and effect of which depend the rights of the parties, is given in the statement preceding this opinion.

It will be observed that reference is made to "the central portion of the channel of the Pearl River," and, also, to "the principal entrance of Pearl River into the Rigolet." It was not disputed in argument that two distinct localities are here described. Pearl River is about 375 miles in length. It rises in the centre of Mississippi, and is navigable, by small craft, in good stages of water, as far as Jackson, the capital of the State. Running southwardly, it empties by one of its mouths into Lake Borgne, and by other mouths into the Rigolet—commonly called the Great Rigolet. The main or eastern branch of the Pearl, emptying into Lake Borgne, constitutes, for about one hundred miles above its mouth, to the 31° of north latitude, the dividing line between Mississippi and Louisiana. 3 Stat. 348. The other branch, constituting a water-way between the main river and the Great Rigolet, is wholly within the State of Louisiana. It is clear that the words "in the central portion of the channel of the Pearl River" have reference to the main or eastern branch, which constitutes the dividing line between Mississippi and Louisiana, and consequently, that it was in the channel of that branch (if the road was located across it) that the company was required to construct and maintain a drawbridge, giving a clear space of not less than sixty feet in width.

But the company's contention is, that the Legislature of Mississippi intended to relieve it from all obligation to construct a drawbridge in that branch of Pearl River, upon its locating the road at some point "south of or below the principal entrance of Pearl River" into the Great Rigolet; this, because, in that contingency, the act expressly declares that the company "shall not be required to construct a drawbridge across any bayou leading into Pearl River, or across any small pass or mouth of the said river." This construction of the statute necessarily implies that the Legislature of Mississippi —although carefully providing that the water-courses and other highways of the State, across which the road was constructed, should be preserved against material or permanent impairment of their usefulness to the public—was willing, in consideration merely of the road being located in Louisiana, south of or below the principal entrance of the Pearl River into the Great Rigolet, to have the mouth of the main or eastern branch of that river closed entirely against vessels engaged in commerce. We say "closed entirely," because the position of the company is, that the present drawbridge was constructed by it voluntarily, and without any legal obligation whatever to do so; and that it has the right, consistently with the restrictions imposed upon it by the Mississippi act, to span Pearl River with a bridge having no draw, and, consequently, with a bridge that would wholly prevent vessels passing from Lake Borgne into Pearl River, or from Pearl River into Lake Borgne.

There is just enough in the peculiar and confused wording of the Mississippi statute to furnish plausible ground for such a construction of its provisions. But we are satisfied that the State did not intend to put it in the power of the railroad company to destroy, for all purposes of navigation, that branch of Pearl River which empties into Lake Borgne. There is no ground to infer from the words of the act that a drawbridge, of the kind indicated, "in the central portion of the channel of Pearl River," was deemed of any less consequence than like drawbridges in the Bay of St. Louis, the Bay of Biloxi, and East Pascagoula River. By language almost too clear to require construction it was made a condition of the exercise,

within Mississippi, of the corporate privileges and franchises of the company, that it should construct and maintain in each of those water-ways across which its road might be located, a drawbridge which, when open, would give a clear space of not less than sixty feet in width.

This construction finds strong support in the clause immediately succeeding that which refers to the possible location of the road at a point south of the principal entrance of the Pearl River into the Great Rigolet. If the line of the road was located across the Pearl River at a point where it constitutes the dividing line between Mississippi and Louisiana, then the section, so far as it related to Pearl River, was not to take effect until Louisiana gave its assent or the company built such a bridge across the Pearl River as was in accordance as well with that section as with the authority granted to the company by Louisiana; in which event "such drawbridge may be built in the centre of the channel of said Pearl River or in that portion of the same within the territory of the State of Louisiana or of this State as may be most convenient for public use." So far from the Legislature being willing to dispense with a draw sixty feet in width across the channel of Pearl River, upon the location of the road south of the principal entrance of Pearl River into the Great Rigolet, it would seem that great care was taken to secure the assent of Louisiana to just such a bridge across Pearl River as the Mississippi act contemplated.

The error in the argument in behalf of the company is in assuming it to be indisputably clear that the words "mouth of said river," in the clause or proviso relating to the location of the road south of the principal entrance of Pearl River into the Rigolet, refers to the mouth of that branch of Pearl River which empties into Lake Borgne. That construction of the words "mouth of said river" implies that there was some provision of the Mississippi act requiring the company to construct its drawbridge at the junction between Pearl River and Lake Borgne. But no such provision is contained in the act. Had the road not been located south of the principal entrance of Pearl River into the Great Rigolet, the company could have

constructed its drawbridge in the channel of the main river at any point above its mouth on the line between Mississippi and Louisiana. We incline to the opinion that the words "mouth of said river" were intended to refer to one of the mouths of that branch of the Pearl emptying into the Great Rigolet. The Pearl formed, or was supposed to form, a junction with the Great Rigolet by more than one mouth. There is a principal entrance or mouth, or the Mississippi Legislature supposed there was, and there is, or there was supposed to be, a small pass or small mouth of that branch of the Pearl in the same locality. If the road was located across the channel of the Great Rigolet south of, or below, the *principal* entrance of the Pearl River into the Great Rigolet, the water-way connecting Pearl River and the Great Rigolet would not be materially obstructed by the railroad bridge across the latter; and it would, consequently, not be vital to the people of Mississippi, interested in the navigation of the river, that drawbridges should be constructed across bayous leading into Pearl River, in that locality, or across any small pass or [small] mouth of said river, near the line upon which the road was located. As the location of the road south of the principal entrance of Pearl River into the Rigolet would secure unobstructed navigation between the Great Rigolet and the main river, through that branch of Pearl River which empties into the Great Rigolet, the Legislature of Mississippi was willing to declare that the construction and maintenance of drawbridges across "any bayou leading into Pearl River, or across any small pass or [small] mouth of said river," was not a condition precedent to the exercise by the company, within her limits, of its corporate franchises and privileges. Such, we think, is the more reasonable construction of the clause in the Mississippi act upon which the company rests its claim of exemption from the duty to construct and maintain such a drawbridge as is described in the final judgment.

It was claimed in argument that the provisions of an act passed August 19th, 1868, by the Legislature of Louisiana, in reference to this railroad company, sustains the construction of the Mississippi act for which the railroad company contends.

So much of the Louisiana act as bears upon this point is also given in the statement preceding this opinion.

If the provisions of the Louisiana act may be consulted in determining the construction of the statute of Mississippi, we do not perceive anything in them which should lead to a conclusion different from that already indicated. The slight difference in the phraseology of the two acts does not justify the belief that the Louisiana Legislature contemplated that the railroad company might cross the Pearl River, on the boundary line between that State and Louisiana, by a bridge which contained no draw. When the Louisiana act provided that, upon the location of the road across the Great Rigolet, at a point south of the principal entrance of Pearl River into the Great Rigolet, "the company shall only be required to construct *one drawbridge, which shall be in the channel of the Great Rigolet*," it was not meant to dispense with the drawbridge required to be maintained in the channel of the Pearl River at the point where the road crossed that stream on the dividing line between Louisiana and Mississippi. As already stated, the location of the road below the principal mouth by which the Pearl emptied into the Great Rigolet, secured navigation through *that mouth*, against obstruction; consequently, a drawbridge would be unnecessary across other and smaller mouths by which the Pearl formed a junction with the Great Rigolet. To avoid the possibility of any one claiming that drawbridges should be constructed over *all* the mouths of the Pearl, large and small, crossed by the road in the vicinity of its junction with the Great Rigolet, it was provided that in the event the road passed below the principal entrance of Pearl River into the Great Rigolet, only one drawbridge need be maintained in that locality and that one over the Great Rigolet.

One other point, pressed upon our attention, remains to be considered. By an act of Congress, approved March 2d, 1868, 15 Stat. 38, this railroad company was empowered and authorized to construct and maintain bridges over navigable waters of the United States on its route between New Orleans and Mobile. That act declared that the railroad and its bridges,

when constructed, completed and in use, in accordance with that act, "and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures and a post-road, and are hereby declared as such." The same act declares, by way of proviso, that the company in the construction of its bridges over and across the waters known as East Pascagoula, the Bay of Biloxi, the Bay of St. Louis, and the Great Rigolet, shall construct and maintain drawbridges in the channels thereof, which, when open, shall give a clear space for the passage of vessels, of not less than eighty feet in the channels of East Pascagoula River, of the Bay of Biloxi, and of the Bay of St. Louis, and of not less than one hundred feet in the channel of the Great Rigolet.

There is nothing in this legislation by Congress which, expressly or by implication, diminishes in any degree the legal obligation of the railroad company to maintain such a drawbridge in the channel of Pearl River, on the line between Mississippi and Louisiana, as is required by the laws of those States. Nor does the act of Congress affect the authority of any court of competent jurisdiction, as to the parties, to compel the discharge of that obligation. While Congress provided that the drawbridges over the East Pascagoula River, the Bay of St. Louis and the Bay of Biloxi, should give a clear space of eighty, rather than sixty, feet in width for the passage of vessels, it did not dispense with the requirement in the statutes of Mississippi and Louisiana of a drawbridge in the channel of Pearl River. Presumably, Congress was of opinion that a drawbridge in that river, giving a clear space of sixty feet, was ample for all purposes of navigation. Hence, the act of March 2d, 1868, made no specific reference to Pearl River. The duty imposed by the States upon the railroad company, in respect of a drawbridge in Pearl River, was the same after, as it was before, the passage of the act of Congress; for that act, in express words, declares the railroad and its bridges to be lawful structures and a post-road, "when constructed, completed and in use," in accordance with the act of Congress "and the laws of the several States through whose territory the same shall

pass." Mississippi gave its consent to the exercise and enjoyment by this company of its corporate powers within her limits upon the condition, among others, that it should construct and maintain a drawbridge of a particular kind in the channel of Pearl River where that stream is crossed by the company's road. That condition not having been performed, the State has a right to ask the aid of the court in compelling its performance. And, in granting the relief asked, no right belonging to the company, under the Constitution or laws of the United States, has been violated or withheld.

Judgment affirmed.

MOFFAT & Another *v.* UNITED STATES.

MOFFAT *v.* UNITED STATES.

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

Submitted October 16, 1884.—Decided October 27, 1884.

The presumption of the regularity of all proceedings prior to the issue of a patent for public lands, which is made against collateral attacks by third parties, does not exist in proceedings where the United States assail the patent for fraud in their officers in its issue, and seek its cancellation.

The United States do not guarantee the integrity of their officers, nor the validity of the acts of such, and are not bound by their misconduct or fraud.

A land patent issued to a fictitious person conveys no title which can be transferred to a person subsequently purchasing in good faith from a supposed owner.

The procuring of the issue of a patent at the Land Office by means of false documents which purport to show official proceedings and acts by subordinate officers which are fictitious, is a fraud upon the jurisdiction of the Land Office, and not a mere presentation of doubtful and disputed testimony. *United States* v. *Throckmorton*, 98 U. S. 61, and *Vance* v. *Burbank*, 101 U. S. 514, distinguished.

These were suits to cancel two patents of the United States for land in Colorado, bearing date on the 4th of October, 1873, and purporting to be issued, one to a person by the name of

Philip Quinlan, and the other to a person by the name of Eli Turner, upon proof of settlement and improvement by them under the pre-emption laws. Their cancellation was sought on the ground that the patentees named were fictitious parties; that no settlement or improvement on the lands was ever made; that the documents alleging settlement and improvement were fabricated by the register and the receiver of the land office of the district embracing the land covered by the patents, to defraud the government of the property.

The two suits presented substantially the same facts, differing only as to the parties concerned in the proceedings and the land patented, and were considered together by the court.

The bill in the first case alleged substantially as follows: That the register and the receiver of public moneys of the land office at Pueblo, in Colorado, conspiring to defraud the government of a patent for the land upon the pretext that the same was due to some person, who had performed the duties required of him by the acts of Congress in that behalf, had written out in the form prescribed by law, a declaratory statement in the fictitious name of Philip Quinlan, representing that he had declared his intention to claim the land as a pre-emptioner; and also an affidavit, purporting to be signed by him and sworn to before the register, stating that he had made a settlement upon the land, and improved it in good faith, in order to appropriate it to his exclusive use and benefit, and not for the purpose of sale or speculation; that he had not, directly or indirectly, made an agreement with any person, or in any manner, whereby the title he might acquire would inure, in whole or in part, to the benefit of any one except himself; that they had also prepared an affidavit, purporting to be signed and sworn to before the register by two other fictitious persons, named Michael Quinlan and Orrin R. Peasley, in which it was stated, among other things, that the supposed Philip Quinlan was a single man, over the age of twenty-one years, a citizen of the United States, and an inhabitant of the land; that no other person resided thereon entitled to the right of pre-emption; that he had made a settlement thereon on the 1st of May, 1872, had built a house and made other improve-

ments, and had lived in the house and made it his exclusive home from the 15th of May, 1872, to that date, May 8th, 1873, and had ploughed, fenced, and cultivated eighteen acres of the same. The bill also alleged that at that time the receiver was the owner of a certain amount of Agricultural College scrip issued by the State of Florida; and, for the purpose of locating the land with it in the name of the said Quinlan, the register and the receiver had inserted in a blank indorsement his fictitious name and residence, and in that name had located the scrip on the land; and, also, that they had done divers other acts to cause the plaintiff to believe that the supposed Philip Quinlan was a real person, who had actually appeared before them and made the statements and proof required by law and the regulations of the land office to entitle him to the pre-emption of the land, and had sworn to such proof before the register; that they had prepared duplicate certificates in the form prescribed by law, setting forth that the said supposed person, represented by said fictitious name, had located the Agricultural College scrip, and made due proof of his right to pre-empt said land and receive a patent therefor, and forwarded one of them to the General Land Office at Washington, and requested a patent for the land to be issued in the name of the said supposed person; that in June, 1873, an agent of the defendant, David H. Moffat, Jr., appeared before the officers of the said General Land Office and presented to them the other duplicate certificate, and also requested them to issue the patent desired, and transmit the same to him (the agent); and that said officers, confiding in the honesty and integrity of the receiver and the register, and believing the statements contained in the supposed proof forwarded to them, had issued the patent and transmitted it to said agent. The bill further alleged that no person by the name of Quinlan had ever settled upon the land, or appeared and presented himself before the register and the receiver at any time, or made any declaratory statement or proof of pre-emption, either as a pre-emptor or witness, and charged that said papers were made by the register and the receiver for the purpose of fraudulently depriving the United States of their title to the land and vesting the

same in the defendant Moffat; that said Moffat then had the patent and claimed to hold the legal title by virtue of certain mesne conveyances, namely: one executed on the 23d day of May, 1873, in the name of said supposed Philip Quinlan to a fictitious person by the name of Henry H. Perry, and a conveyance by said fictitious person, dated the 23d day of June, 1873, to himself; that the deeds from said supposed parties and the patent had been placed on record in the office of the recorder of the county in Colorado where the land was situated, and constituted a cloud upon the title of the complainant; that on the 15th of September, 1873, said Moffat executed a deed conveying an undivided half of the property covered by the patent to Robert E. Carr, as trustee, and that the deed was on record. And the bill charged that the said Moffat was well aware at the time he received the conveyances and the said patent, of the fraudulent means by which the patent was obtained; that no valuable consideration passed from Carr to him; and that Carr also was fully informed that the supposed pre-emption and proceedings were false and fraudulent. The plaintiff therefore prayed that the patent might be set aside and declared void and delivered up to be cancelled, and that the deeds from Quinlan to Perry, and from Perry to Moffat, and from Moffat to Carr, might also be adjudged void.

In the second case the bill, as finally amended, alleged a similar conspiracy to defraud the government of a patent for another tract of land in the name of another fictitious person upon proofs by other supposititious persons, the pretended pre-emptor being Eli Turner, and the pretended witnesses to prove compliance with the pre-emption law being Simeon D. Porter and Anson Beck. The bill also alleged a conveyance from the pretended Eli Turner to a fictitious person, by the name of Thomas Harris, in June, 1873, and a conveyance from Harris to the defendant Moffat in the same month, and that such proceedings were had, that on the 4th of October, 1873, a patent was issued for the land in the name of Eli Turner. And the bill charged that Moffat was cognizant of the false and fraudulent character of the alleged pre-emption of Turner, and of the proofs offered in its support, and prayed, as in the first case.

that the patent be set aside and cancelled, and the deeds of the supposed Turner and Harris be adjudged void.

The defendants answered the bills in both cases, denying their material allegations, and the charges of conspiracy and fraud, to which answers replications were filed. The testimony taken fully established the truth of the allegations and charges, except as to the knowledge by Moffat and Carr of the alleged frauds; and the Circuit Court decreed the cancellation of the patents and the mesne conveyances purporting to pass the title from the pretended patentees to Moffat, and from him to Carr. From these decrees the defendants appealed, and sought a reversal on four grounds, which were substantially as follows:

First. That the evidence that the patentees were fictitious parties was insufficient to overcome the presumption arising from the patents themselves, and the certificates of the register and the receiver;

Second. That as the frauds alleged were committed by public officers, the receiver and the register, the government was bound by their acts, and the court erred in not giving effect to the patents and conveyances, so as to protect the defendants claiming under them;

Third. That Moffat and Carr were innocent purchasers for value, and, as such, were protected against the consequences of the alleged fraudulent methods by which the patents were issued; and

Fourth. That no offer was made in the bill in either case to return the scrip received by the government for the land.

Mr. L. C. Rockwell for appellants.—I. The decree was not warranted by the evidence. A patent raises a presumption of an actual grantee which can only be overcome by proof. *Thomas* v. *Wyatt*, 31 Missouri, 188. The issue of a patent by the officer appointed for that purpose presupposes a compliance with the rules prescribed for that duty. *Polk's Lessee* v. *Wendall*, 9 Cranch, 87; *Polk's Lessee* v. *Wendell*, 5 Wheat. 293.—II. The entry of the lands and the patent issued by the government are declarations by it that all the steps required by law antecedent to the entry of the lands and the issue of the

patent have been complied with, and the government is conclusively bound by those declarations as against a *bona fide* purchaser for value. Rev. Stat. §§ 2262, 2264; *Vance* v. *Burbank*, 101 U. S. 514; *Steele* v. *Smelting Company*, 106 U. S. 447; *Smelting Company* v. *Kemp*, 104 U. S. 636; *French* v. *Fyan*, 93 U. S. 169, and cases cited. The principle settled in *Knox County* v. *Aspinwall*, 21 How. 539, is applicable to and conclusive of this case. See also *Coloma* v. *Eaves*, 92 U. S. 484; *Marcy* v. *Oswego*, 92 U. S. 637; *Humboldt* v. *Long*, 92 U. S. 642; *Patterson* v. *Winn*, 11 Wheat. 380, 387; *Patterson* v. *Jenks*, 2 Pet. 216, 237; *United States* v. *Arredondo*, 6 Pet. 691, 729. Where one of two innocent persons must suffer by the deceit of another, he who puts trust and confidence in the deceiver must lose, rather than a stranger. *Carpenter* v. *Longan*, 16 Wall. 271; *N. Y. & N. H. Railroad Company* v. *Schuyler*, 34 N. Y. 30, 69; *Griswold* v. *Haven*, 25 N. Y. 595, 599.—III. Defendants below were entitled to be treated as innocent purchasers for value. The fraud, if any, was practised on the government by its register and receiver, and the United States is bound by it. It does not affect Moffat and Carr. *United States* v. *Throckmorton*, 98 U. S. 61, 64. As to the effect of an official certificate of the register, see Laws Colorado, ch. xxxii., § 1080; *Gallipot* v. *Manlove*, 1 Scam. 156; *Witherspoon* v. *Duncan*, 4 Wall. 210.—IV. No offer is made in the bill to return the scrip or money received for the land. This is inequitable, and the decree is wrong and should be reversed for want of equity in the bill. When the government goes into a court of justice it is to be treated like any other litigant, and its rights, with few exceptions, are governed by the same rules of law that pertain to citizens. *The Siren*, 7 Wall. 152; *Floyd Acceptances*, 7 Wall. 666; *Brent* v. *Bank of Washington*, 10 Pet. 569.

Mr. Assistant Attorney-General Maury for appellee.

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

These cases present the same questions, and may be consid-

ered together. In our judgment none of the positions of the appellants justifies our interference with the decrees of the court below. The presumption as to the regularity of the proceedings which precede the issue of a patent of the United States for land, is founded upon the theory that every officer charged with supervising any part of them, and acting under the obligation of his oath, will do his duty, and is indulged as a protection against collateral attacks of third parties. It may be admitted, as stated by counsel, that if upon any state of facts the patent might have been lawfully issued, the court will presume, as against such collateral attacks, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent, and seeking its cancellation for fraud in the conduct of their officers. In such a suit the burden of proof is undoubtedly, in the first instance, on the government to show a fatal irregularity or corrupt conduct on their part; but when a case is established, which, if unexplained, would warrant a conclusion against them, the burden of proof is shifted, and they must show such integrity of conduct and such a compliance with the law as will sustain the patent. Its validity is, then, determinable, like any other controverted fact, upon the weight of evidence produced in support of and against their action.

There was no presumption here in favor of the officers which the testimony produced by the complainant did not entirely rebut and overthrow. Numerous witnesses, living in the immediate neighborhood of the land, testified that they were well acquainted with it, had been frequently upon it, that no one resided there, and that no improvements were made as stated in the pre-emption papers. They also testified that they never knew nor heard of persons by the names of the alleged pre-emptors, nor of the persons whose names were used in the attempted proof of settlement and cultivation. Neither the register nor the receiver came forward to disprove the conclusions which this testimony justified, that the pretended pre-emptors and patentees were fictitious persons. The suggestion that real parties may have appeared before the register and the receiver as pre-emptors and witnesses, having the names used,

though usually known by different names, is far-fetched, and merits no consideration where the fact, with reasonable explanation for the use of the unusual names, was not established, nor proof adduced of the settlement on, and improvement of, the land. No such attempt was made, and if it had been it would, according to the evidence received, have signally failed.

The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The government does not guarantee the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but the servants of the law, and, if they depart from its requirements, the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it. The language used in the case of Pope's Lessee against Wendell sanctions no such doctrine. (5 Wheat. 293, 304.) It was there used with reference to collateral attacks upon patents, in cases where the irregularities were committed by officers in the exercise of their admitted jurisdiction, and can have no application to the acts of officers in fabricating documents in the names of persons having no real existence.

The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected. A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the applica-

tion of this doctrine of a *bona fide* purchaser there must be a genuine instrument having a legal existence, as well as one appearing on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be. Even in the case of negotiable instruments, where the doctrine is carried farthest for the protection of subsequent parties acquiring title to the paper, it cannot be invoked if the instrument be not genuine, or if it be executed without authority from its supposed maker. *Floyd's Acceptances*, 7 Wall. 666, 676; *Marsh* v. *Fulton County*, 10 Wall. 676, 683.

As to the position that no offer is made in the bills to return the scrip received for the land, only a word need be said. The pretended patentees, who are supposed to have given the scrip, being mere myths, having no actual existence, it would be idle to offer to return it to them; and for the same reason they can have no agents to act in their behalf.

A strenuous effort is made by counsel to bring these cases within the doctrine declared in *United States* v. *Throckmorton*, 98 U. S. 61, and *Vance* v. *Burbank*, 101 U. S. 514, but without success. It was held in those cases that the fraud which will justify the setting aside of the judgment of a tribunal specially appointed to determine particular facts, must be such as prevented the unsuccessful party from fully presenting his case, or which operated as an imposition upon the jurisdiction of the tribunal. Mere false testimony, or forged documents, are not enough if the disputed matter has been actually presented to and considered by the tribunal. Here officers, constituting a special tribunal, entered into a conspiracy; and the frauds consist of documents which they had fabricated, and presented with their judgment to those having appellate and supervisory authority in such matters; and thus a fictitious proceeding was imposed upon the latter as one which had actually taken place. It was a fraud upon the jurisdiction of the officers of the Land Department at Washington, and not the mere presentation to them of doubtful and disputed testimony.

Decrees affirmed.

SKIDMORE & Others *v.* PITTSBURG, CINCINNATI & ST. LOUIS RAILWAY COMPANY.

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

Submitted October 17, 1884.—Decided October 27, 1884.

The legal title to real estate acquired subsequent to the lease by a lessor owning the equitable title at the date of the lease, inures to the benefit of the lessee as against a judgment creditor of the lessor whose judgment is subsequent to the lease.

This was an action of ejectment, and the material facts found by the court below, on which the case comes here for decision, were as follows: In the spring of 1868, the Columbus, Chicago and Indiana Central Railroad Company purchased the premises in dispute upon time contracts, by which the purchase money was to be fully paid within four years and a conveyance made when the payments were completed. Immediately on making the purchase the company went into possession of the premises, "and erected thereon its engine houses and certain shops, structures, and side tracks necessary for the operation of its railroad." On the 1st of February, 1869, the Pittsburg, Cincinnati & St. Louis Railway Company "became the lessee of the railway and property of the C., C. & I. C. Ry. Co. for the term of ninety-nine years, and immediately thereafter entered into the possession of said railroad and all its lands and property, including the property in controversy." The lease was recorded in Cook County, Illinois, where the premises are situated, on the 21st of July, 1873. It did not purport to convey after-acquired property, but the premises in question were, and since the lease was made have been, occupied and used by the lessee for railway purposes "the same as though they were included in the lease."

On the 2nd of February, 1872, the purchase money having been paid in full, according to the terms of the contract, a deed was executed conveying the premises to the Columbus, Chicago and Indiana Central Company in fee simple. On the 19th of

April, 1873, William B. Skidmore, since deceased, recovered a judgment against the last named company in the Cook County Circuit Court. Execution, issued on this judgment, was levied on the premises on the 10th of June, 1873. Under this execution the property was sold to William B. Skidmore on the 10th of July, and a conveyance made to Harriet Skidmore, Lemuel Skidmore and William B. Skidmore, his heirs, in due course of proceeding, on the 3d of May, 1876. The heirs, who are the plaintiffs in error, claiming under this title, brought this suit against the Pittsburg, Cincinnati & St. Louis Company, which was in possession, to recover the property. Upon these facts the court below gave judgment in favor of the railway company, and to reverse that judgment this writ of error was brought.

Mr. George Willard and *Mr. George Driggs* for plaintiffs in error.—As the questions raised a rule of property, this court will follow the statutes and decisions of the State. *Ross* v. *Barland*, 1 Pet. 655; *Miles* v. *Caldwell*, 2 Wall. 35; *Nichols* v. *Levy*, 5 Wall. 433; *Williams* v. *Kirtland*, 13 Wall. 306; *Boyce* v. *Tabb*, 18 Wall. 546; *Brine* v. *Insurance Company*, 96 U. S. 627; *Taylor* v. *Ypsilanti*, 105 U. S. 60; *Hammock* v. *Loan and Trust Company*, 105 U. S. 77.—I. The title which the plaintiffs in error exhibited in themselves is paramount to the title exhibited by the defendants in error, under the decisions of the courts and the statutes of the State of Illinois. Rev. Stat. Ill. 1874, ch. 77, §§ 1, 3, 4, 10, 11, 16, 17, 30, 32, 33; ch. 90, § 29; *Palmer* v. *Forbes*, 23 Ill. 301; *Hunt* v. *Bullock*, 23 Ill. 320; *Bruffett* v. *Great Western Railroad Company*, 25 Ill. 353; *Titus* v. *Mabee*, 25 Ill. 257; *Titus* v. *Ginheimer*, 27 Ill. 462; *Maus* v. *Logansport, Peoria & Burlington Railroad Company*, 27 Ill. 77; *Smith* v. *Chicago, Alton & St. Louis Railroad Company*, 67 Ill. 191; *Peoria & Springfield Railroad Company* v. *Thompson*, 103 Ill. 187; *Cooper* v. *Corbin*, 105 Ill. 224. The rights of the defendant in error are equitable, whereas the rights of the plaintiffs in error are legal; and in ejectment legal rights must be held to prevail over equitable rights. *Chinquy* v. *Catholic Bishop of Chicago*, 41 Ill. 148; *Roundtree* v. *Little*,

54 Ill. 323; *Fischer* v. *Eslaman*, 68 Ill. 78. As between the Columbus, Chicago & Indiana Central Railway Company, as mortgagor, and Roosevelt and Fosdick, as mortgagees, the former, before execution of the sheriff's deed, must be deemed the owner of the fee. *Fitch* v. *Pinckard*, 4 Scam. 69; *Hall* v. *Lance*, 25 Ill. 277; *Moore* v. *Titman*, 44 Ill. 367.—II. The plaintiffs in error showed a right of possession in themselves. The defendant in error as lessee could not question the title of its lessor. A mortgage, even after condition broken, is not such an outstanding title that a stranger can take advantage of it to defeat a recovery by the mortgagor or one claiming under him. *Hall* v. *Lance*, 25 Ill. 277. A parol contract relating to an interest in lands for a longer term than one year is void. Rev. Stat. Ill., which has received construction in *Comstock* v. *Ward*, 22 Ill. 248; *Wheeler* v. *Frankenthal*, 78 Ill. 124; *Perry* v. *McHenry*, 13 Ill. 227. The altering of a written contract by parol makes it all parol. *Vicary* v. *Moore*, 2 Watts, 451; *Dana* v. *Hancock*, 30 Vt. 616; *Briggs* v. *Vermont Central Railroad Company*, 31 Vt. 211. See also *Barnett* v. *Barnes*, 73 Ill. 216; *Hume* v. *Taylor*, 63 Ill. 43; *Chapman* v. *McGrew*, 20 Ill. 101; *Baker* v. *Whiteside*, 1 Ill. (Breese), 132; *Longfellow* v. *Moore*, 102 Ill. 289. The defendant's possession was in fact the possession of the lessor, and it operated the road for the lessor and not in its stead. *Pittsburg, Cincinnati & St. Louis Railway Company* v. *Campbell*, 86 Ill. 443; *Peoria & Rock Island Railroad Company* v. *Lane*, admr., 83 Ill. 448; *Rockford, Rock Island & St. Louis Railroad Company* v. *Heflin*, 65 Ill. 366; *West* v. *St. Louis, Vandalia & Terre Haute Railroad Company*, 63 Ill. 545; *Chicago & Rock Island Railroad Company* v. *Whipple*, 22 Ill. 105; *Ohio & Mississippi Railroad Company* v. *Dunbar*, 20 Ill. 623; *Railroad Company* v. *Barron*, 5 Wall. 90; *Pennsylvania Company* v. *Roy*, 102 U. S. 451; *Illinois Central Railroad Company* v. *Kanouse*, 39 Ill. 272; *Toledo, Peoria & Warsaw Railway Company* v. *Rumbold*, 40 Ill. 143. We invoke the aid which the principle established by these cases affords.

No counsel appeared for defendant in error.

Syllabus.

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

The judgment below was clearly right. The Columbus, Chicago & Indiana Central Company was, in equity, the owner of the property when the lease was made and when the Pittsburg, Cincinnati & St. Louis Company went into possession under it. The deed executed in February, 1872, pursuant to the contract of purchase, converted the equitable title of the Columbus, Chicago & Indiana Central Company into a legal title, which at once, by operation of law, inured to the benefit of the Pittsburg, Cincinnati & St. Louis Company under its lease. All the rights of William B. Skidmore, as against the property, accrued long after those of the Pittsburg, Cincinnati & St. Louis Company and are subject to the title of that company. Such being the case, it is entirely unnecessary to inquire whether the Skidmores acquired a valid title to the property as against the Columbus, Chicago & Indiana Central Company. The Pittsburg, Cincinnati & St. Louis Company is entitled to the possession, whether that title be good or bad.

The judgment is affirmed.

DAVIES, Collector, *v.* CORBIN & Others.

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

Submitted April 14, 1884.—Decided October 27, 1884.

An order awarding a peremptory writ of mandamus which directs the collector of taxes of a county to collect a tax that had been duly levied and extended on the county tax books is a final judgment subject to review when the other conditions exist.

The power to review the judgment in a proceeding for mandamus to enforce the collection of a tax to pay all judgment creditors of a specified class, depends upon the amount of the whole tax ordered to be collected, and not upon the amount of the judgment debts due to each or any individual petitioner.

Motion to dismiss. The facts on which the motion was founded

were these: Each of the defendants in error recovered a separate and distinct judgment in the Circuit Court of the United States for the Eastern District of Arkansas against the county of Chicot. The aggregate of all the judgments was much more than $5,000, but the amount due upon each is not stated. After the judgments were recovered, the several plaintiffs commenced proceedings in the Circuit Court to compel the county court of the county to levy a tax for the payment of the amounts due them respectively. The result of these proceedings was that, after the several writs of mandamus were issued, "by the consent of the relators, and by and with the approval and consent of the Circuit Court, it was agreed that if the county court . . . would levy a tax of ten mills upon the property of said county and collect the same, said tax to be distributed *pro rata* among the judgments so recovered by the relators and others against said county" in the Circuit Court, "that such levy, collection and distribution would be accepted by the relators and the other judgment creditors, as a sufficient compliance by said county court with the commands of the said writs of mandamus." The county court carried out this agreement and levied the tax, which was in due form of law extended on the tax books and placed in the hands of Davies, the collector of the taxes of the county, for collection with the other taxes for that year. After the tax book was delivered to the collector he undertook the collection thereof, as he was bound in law to do, and proceeded until, "on the 29th day of January, 1884, being the last day of the January term of the Chicot County Court, there was filed in open court a complaint in equity, by one Alice R. Hamlet, against" him, "setting up among other facts, that she was the owner of certain lands in Chicot County, assessed, for the year 1883, at $400; that no valid assessment had been made of said lands for various reasons therein set forth; that the board of equalization for said county, which met on the 19th day of June, 1883, was illegally organized, and proceeded, in violation of law, to alter and change the assessments of real and personal property turned over to it by the clerk of said county; and averring that assessments were not legally *equalized*, and that there

is no valid assessment of property in said county for the year 1883, and that the taxes levied on said assessments cannot be legally enforced by sale or otherwise, against the objection of the tax-payers of said county." The complaint further set forth "the various assessments or rates of taxes levied by the county court for different purposes for the year 1883, including ten mills to pay the judgments against said county" in the Circuit Court. Under this complaint "a temporary restraining order was made by the Hon. John M. Bradley, judge of said court, forbidding" the collector "from collecting any portion of said ten-mill tax." In obedience to this injunction, the collector stopped the collection of the "ten-mill tax," though he went on with all the rest.

Thereupon all the relators united in an application to the Circuit Court for a rule on the collector to show cause why a peremptory writ of mandamus should not issue commanding him to proceed with the collection of the ten-mill tax. The collector appeared in obedience to the rule, and for cause showed that he had been enjoined by the State court from making the collection. The parties went to a hearing on the application of the relators and the return of the collector to the rule. The Circuit Court, after hearing, awarded the writ, and for the reversal of an order to that effect this writ of error was brought by the collector. The relators then moved to dismiss the writ for the following reasons: "First.—Because the said writ of error is sued out upon an order of said Circuit Court for the enforcement of its peremptory writ of mandamus, theretofore duly and regularly issued in accordance with law and the practice of said court, which order is not a *final judgment* of said Circuit Court, and is, therefore, not such a judgment, order or proceeding as can legally be brought to this court by writ of error, and is not within the jurisdiction of this court. Second.—And because the amount in controversy does not exceed the sum of five thousand dollars, wherefore the same is not within the jurisdiction of this court."

Mr. B. C. Brown, *Mr. E. W. Kimball* and *Mr. C. P. Redmond* in support of the motion.—I. The judgment below was not a

final judgment to which a writ of error lies. *Boyle* v. *Zacharie*, 6 Pet. 648; *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144; *Evans* v. *Gee*, 14 Pet. 1; *Ames* v. *Smith*, 16 Pet. 303; *Brockett* v. *Brockett*, 2 How. 238; *Wylie* v. *Coxe*, 14 How. 1; *Connor* v. *Peugh's Lessee*, 18 How. 394; *Doswell* v. *De La Lanza*, 20 How. 29; *McCargo* v. *Chapman*, 20 How. 555; *Callan* v. *May*, 2 Black, 541; *Gregg* v. *Forsyth*, 2 Wall. 56; *Sparrow* v. *Strong*, 3 Wall. 97, 103; *Barton* v. *Forthsyth*, 5 Wall. 190; *Cooke* v. *Burnley*, 11 Wall. 659, 672.—II. The amount in controversy is not sufficient to give jurisdiction. No tax-payer will pay on the levy more than $1,500. If not the amount which each tax-payer has to pay, on this levy, then the amount which each creditor, separately, will receive from this levy, so far as value is concerned, fixes the jurisdiction of this court. *Clifton* v. *Sheldon*, 1 Black, 494; *Rich* v. *Lambert*, 12 How. 347; *Oliver* v. *Alexander*, 6 Pet. 143; *Stratton* v. *Jarvis*, 8 Pet. 4; *Seaver* v. *Bigelows*, 5 Wall. 208; *Paving Company* v. *Mulford*, 100 U. S. 147; *Terry* v. *Hatch*, 93 U. S. 44; *Chatfield* v. *Boyle*, 105 U. S. 231; *Russell* v. *Stansell*, 105 U. S. 303; *Parker* v. *Morrill*, 106 U. S. 1.

Mr. A. H. Garland for plaintiff in error, *contra.*

Mr. Chief Justice Waite delivered the opinion of the court. He stated the facts in the foregoing language, and continued: The relators moved to dismiss the writ, because, 1, an order awarding a peremptory writ of mandamus is not a "final judgment;" and, 2, the value of the matter in dispute does not exceed $5,000, inasmuch as no one of the relators will be "entitled to receive of the tax collected so much as five thousand dollars, and no single tax-payer will be required to pay that amount of tax." A motion to affirm, as allowed by Rule 6, § 5, has not been united, as it very properly might have been, with this motion to dismiss.

As to the first objection, it is sufficient to say that the practice of the court has always been the other way. Our reports are full of cases in which jurisdiction of this kind has been entertained, and from 1867, when *Riggs* v. *Johnson County*,

6 Wall. 166, was decided, until now, our power to review such orders as final judgments has passed substantially unchallenged. While the writ of mandamus, in cases like this, partakes of the nature of an execution to enforce the collection of a judgment, it can only be got by instituting an independent suit for that purpose. There must be, first, a showing by the relator in support of his right to the writ; and, second, process to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defence, the showings of the parties make up the pleadings in the cause, and any issue of law or fact that may be raised must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right, that is to say, process to enforce a judgment. The proceeding may be likened to a creditor's bill in equity, which is resorted to in aid of execution. The writ which is wanted cannot be had on application to a ministerial officer. It can only issue after a judgment of the court to that effect in an independent adversary proceeding instituted for that special purpose. Such a judgment is, in our opinion, a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this court.

The second objection is, to our minds, equally untenable. The writ which has been ordered in this case is not like that in *Hawley* v. *Fairbanks*, 108 U. S. 543, to compel the levy of taxes to pay separate and distinct judgments, in favor of several relators, who, for convenience and to save expense, united in one suit to enforce their respective rights, but to compel a tax collector to collect a single tax which has been levied for the joint benefit of all the relators, and in which they have a common and undivided interest. As in the cases of *Shields* v. *Thomas*, 17 How. 3, 5, and *The Connemara*, 103 U. S. 754, all the relators claim under one and the same title, to wit, the levy of a tax which has been made for their benefit. They have a common interest in the tax, and it is perfectly immaterial to the tax collector how it is divided among them. He has no controversy with them on that point; and if there is any difficulty

as to the proportions in which they are to share the proceeds of his collections, the dispute will be among themselves and not with him. He cannot act upon separate instructions from the several creditors. His duty is to collect the tax for the benefit of all alike. A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators, but to raise the whole tax of ten mills on the dollar. As the matter stands, each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors. It is apparent, therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole for division among them, after the collection is made, according to their several shares. The value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided when collected. It is conceded that the amount of the tax is more than $5,000.

The motion to dismiss is overruled.

MELLEN *v.* WALLACH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 24, 1884.—Decided November 3, 1884.

Under a deed of trust to secure M., covering land in the District of Columbia, owned by B. and W., as tenants in common, the land was sold to B., in 1873. The amount secured by the deed was $5,000 of principal and $2,429.02 interest, expenses and taxes. The sale was for enough to pay all this and leave a sum due to W. for her share of the surplus. The terms of sale were not carried out, but M. advanced to B. $3,200 more (out of which the $2,429.02 was paid), and took a deed of trust for $8,200, which was recorded as a first lien. A deed of trust to secure the amount going to W. was recorded as a second lien, but was never accepted by W. Litigation afterwards ensued, to which M. and B. and W. were parties, and in which a sale of the land was ordered and made in 1880, and M. bought it, for a sum not sufficient to pay the $7,429.02, with interest, and the subsequent

taxes on the land. W. claimed priority out of the purchase money for her share of the surplus on the sale of 1873, and M. claimed the right to set off against the purchase money enough of her claim for the $7,429.02, and interest, and the subsequent taxes, to absorb it: *Held*, that the parties had abandoned the sale of 1873, and that the sale of 1880 must be regarded as a sale to enforce the original deed of trust to secure M., and that W. had no right to any of the proceeds of the sale of 1880.

The facts which make the case are stated in the opinion of the court.

Mr. Sidney T. Thomas (*Mr. L. G. Hine* was with him), for appellant.

Mr. Luther H. Pike and *Mr. Jessup Miller* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

Mrs. Susan L. Wallach, the wife of Charles L. Wallach, and Mrs. Catharine Burche, the wife of Raymond W. Burche, sisters, and owners, as tenants in common, of land and buildings on the northwest corner of 6th street west and D street north, in the city of Washington, joined with their husbands, on January 15th, 1872, in the execution to Joseph C. G. Kennedy, of a deed of trust of that property to secure the payment to Mrs. Rebecca R. Mellen, of a joint and several promissory note for $5,000, made by the grantors, payable at the end of five years from that date, with interest, at the rate of 10 per cent. per annum, payable in quarterly instalments. The deed provided that the trustee might, on default, sell the property, at public sale, to the highest bidder, on such terms and conditions as he might deem most for the interest of all parties concerned in the sale, first giving at least ten days' notice of the time, place and terms of sale, by published advertisement. The deed provided that the proceeds of the sale, after paying its expenses, and other expenses of the trust, and a commission to the trustee, should be used to pay the debt, interest, costs and expenses, whether due and unpaid, or unpaid though not due, and the surplus to the grantors. There was also a provision that the expense of insurance, as well as of any taxes the payment whereof might become necessary, should thereupon be-

come a debt due and owing by the grantors, the payment of which should be secured by the deed.

There being default in the payment of interest, the trustee published a notice that he would sell the property at public auction, on December 8th, 1873, on the following terms: $5,000, with interest thereon at the rate of 10 per cent. per annum, from January 15th, 1873, "together with the expenses of sale, in cash, and the balance at one and two years, for which the purchaser is to give his notes, bearing interest at the rate of eight per cent. per annum, and secured by deed of trust on the property sold." The property was sold for $16,509.66. The purchaser was Mrs. Burche. The charges against the purchase money were stated by the trustee to be $7,692.45, made up of $5,093.74 for note and interest, and $2,598.71 for taxes, trustee's fee, auctioneer's commission and advertising. This left a net balance of $8,817.21, of which one-half, or $4,408.60, was stated to belong to Mrs. Wallach, and to be the sum to be secured for her benefit under the deed of trust to be given on the property sold, according to published terms of sale. Mr. Kennedy, as trustee, and Mrs. Mellen, on December 15th, 1873, made a deed to Mrs. Burche, conveying the property to her. This deed was acknowledged by the trustee on December 24th, 1873. On that day Mrs. Burche executed to Mrs. Mellen a deed of trust of the same property, to secure the payment of a promissory note bearing that date, made by Mrs. Burche, for $8,200, payable to the order of Mrs. Elizabeth Hain, five years after date, with interest at the rate of 10 per cent. per annum, payable quarterly. This deed was acknowledged and recorded on that day, so as to make it a first lien on the property. On the same day Mrs. Burche executed two promissory notes, payable to the order of Mr. Kennedy, each for $2,204.30, payable one in one year and the other in two years after date, with interest at the rate of 8 per cent. per annum, and, to secure them, executed to Anthony Hyde and Albert F. Fox a deed of trust on the same property. This deed was acknowledged December 31st, 1873, and recorded January 7th, 1874. Of course it was only a second lien on the property. Mrs. Mellen, Mrs. Burche and the trustee intended

that these notes to Mr. Kennedy and this second deed of trust should be the provision for the $4,408.60 for Mrs. Wallach.

What was done came about in this way: Mrs. Mellen made an arrangement with Mrs. Burche to let the $5,000 of principal stand, and to lend her $3,200 more, if she would secure the $8,200 by a first lien on the property. Mrs. Hain was the mother of Mrs. Mellen, and lent to her $1,000 of the $3,200. Mrs. Mellen furnished the rest, and had the note made to Mrs. Hain, and herself made trustee. Subsequently the notes were transferred to her. With some of the $3,200, the interest, taxes, expenses, &c., beyond the $5,000, were paid, and the remainder Mrs. Burche retained. Mrs. Wallach never accepted the two notes given to Mr. Kennedy, or the deed of trust securing them, and did not record that deed, or procure or authorize it to be recorded.

In September, 1873, there being a dispute between Mrs. Wallach and Mrs. Burche, as to the application of the rents of the property, which, under an agreement between them, Mrs. Wallach had been receiving for several years, and as to other matters concerning the property, they agreed, in writing, to submit the matter to three referees, who made an award November 8th, 1873. On January 29th, 1874, Mrs. Burche brought a suit in equity, in the Supreme Court of the District of Columbia, against Mrs. Wallach and Mr. Kennedy, praying for an accounting between herself and her sister respecting their interests in the property, and respecting the rents received and taxes paid and repairs made by Mrs. Wallach, and respecting the moneys Mrs. Burche had paid or secured on the property for taxes and expenses of the trustee's sale and interest on the debt to Mrs. Mellen, and respecting charges on the property at the time of the sale, and that the amount which should be found to be due to Mrs. Burche be deducted from the $4,408.60 going to Mrs. Wallach, and that Mrs. Wallach convey her interest in the property to Mrs. Burche in fee simple, and that Mr. Kennedy and Mrs. Wallach be enjoined from parting with the two notes or their proceeds till a final decree.

On December 1st, 1874, Mrs. Wallach filed an answer to Mrs. Burche's bill and also a cross-bill against Mr. Kennedy,

Mr. and Mrs. Burche, Mrs. Hain and Mrs. Mellen. In this bill she attacked the validity of the sale under the deed of trust, for various reasons, and prayed for an accounting between herself and Mrs. Burche, and for the setting aside of the award, and of the sale under the deed of trust, and for the cancelling of the deed from Mr. Kennedy to Mrs. Burche, and for a sale of the property. This cross-bill was not prosecuted, but on the 16th of January, 1875, Mrs. Wallach filed an original bill in the same court against the same defendants as in the cross-bill, and containing in substance the same allegations and praying the same relief, and, in addition, the cancelling of the trust deed from Mrs. Burche to Mrs. Mellen, and of that from Mrs. Burche to Hyde and Fox. This bill contains the averment that Mrs. Wallach never admitted that the sale to Mrs. Burche was a valid one, and that she had never received, or sought to receive, any benefit therefrom, or to claim anything thereunder, and that, shortly after the sale was made, she gave notice to Mr. Kennedy that she denied that the sale was valid.

Mr. and Mrs. Burche answered this bill. So did Mrs. Mellen. The two suits were brought to a hearing together, on proofs, before the court at special term, and on the 27th of June, 1877, a decree was made, entitled in both suits, adjudging the sale of December 8th, 1873, to have been a valid sale; and that Mrs. Burche and Mrs. Wallach agreed with Mrs. Mellen that the sale should be made, and that, if either of them should purchase at the sale, Mrs. Mellen should lend to the purchaser so much money as should be found necessary to pay off the liens on the property and the arrears of interest, with costs and expenses of sale, and add the same to the original debt of $5,000, and take a new deed of trust for the aggregate amount of those two sums, which deed was to be the first mortgage on the property. The decree referred the suit brought by Mrs. Burche to an auditor to state accounts between Mrs. Burche and Mrs. Wallach. A decree was made dismissing the bill filed by Mrs. Wallach. She appealed from both decrees to the court in general term, which, by a decree made June 5th, 1878, consolidated the two suits, reversed the decree in the suit brought by Mrs.

Wallach, modified the decree in the other suit, and directed the court in special term to enter a decree in the consolidated suits, confirming the sale by Mr. Kennedy, and referring it to an auditor to take various accounts between the parties. On the 5th of May, 1879, he reported eight accounts. Mrs. Mellen excepted to the report, and the auditor was directed to state a further account. He did so on October 30th, 1879. On the 3d of January, 1880, the court in special term made a decree in the consolidated suit, adjudging that the sum of $5,000 due to Mrs. Mellen, and the further sum of $2,429.02, afterwards advanced by her for the payment of interest in arrear, taxes and other encumbrances, constituted the only lien upon the estates of Mrs. Burche and Mrs. Wallach in the property on the day of sale, December 8th, 1873; that the further sum of $970.98 was due Mrs. Mellen from Mrs. Burche, and chargeable on her share in the property; that the sum of $3,975.49 became due on December 8th, 1873, to Mrs. Wallach, with interest, at the rate of 8 per cent. per annum, for her share of the net proceeds of the sale of the property on that day; and that the property be sold by trustees. An ineffectual attempt by them to sell at auction was made January 26th, 1880, $11,000 being bid, and the property being then withdrawn. On June 9th, 1880, they sold it, at auction, to Mrs. Mellen, for $9,900. On exceptions by Mrs. Wallach, the court, on November 8th, 1880, set aside the sale, and ordered another. It was made, at auction, on November 19th, 1880, to Mrs. Mellen, for $9,900. On December 29th, 1880, the court in special term made a decree confirming the sale, and allowing Mrs. Mellen to discount out of the purchase money her claim of $7,429,02, fixed by the decree of January 3d, 1880, with interest on $7,105.41 thereof from December 8th, 1873, and the taxes and assessments which had accrued against the property since that date. A statement agreed to between Mrs. Mellen and Mrs. Wallach showed that the net proceeds of sale were insufficient to pay the claims so allowed to Mrs. Mellen, by the sum of $3,580.81. Mrs. Wallach appealed to the court in general term, and on the 9th of July, 1881, it made a decree (1 Mackey, 236), which adjudged that the arrangement made between Mrs. Burche and Mrs.

Mellen to encumber the property for $8,200 was without the knowledge of Mrs. Wallach, and was never approved or ratified by her; that at the time of the execution of the trust deed for $8,200, Mrs. Wallach was entitled to have out of the property $3,975.49, with interest at the rate of 8 per cent. per annum from December 8th, 1873; that the rights of Mrs. Wallach had not been waived by her, and could not be affected by any arrangement between Mrs. Burche and Mrs. Mellen; that the decree of the court in special term, made December 29th, 1880, be reversed; that Mrs. Mellen comply with the terms of sale on her purchase within thirty days, or the property be resold at her risk and cost; that the proceeds of the property be applied in the first place to pay to Mrs. Wallach the $3,975.49, with interest thereon at the rate of 8 per cent. per annum from December 8th, 1873, and the residue be paid to Mrs. Mellen; and that Mrs. Mellen pay the costs of the suits. From this decree Mrs. Mellen has taken the present appeal.

The only question for consideration is, whether Mrs. Mellen or Mrs. Wallach is entitled to priority of payment out of the net proceeds of the sale of the property under the decree of January 3d, 1880. If Mrs. Mellen is entitled to priority, there is nothing for Mrs. Wallach; and she will have lost her interest in the property and her share of the net proceeds of its sale by Mr. Kennedy. Mr. Kennedy was authorized, by the deed of trust, to sell upon such terms and conditions as he might deem most for the interest of all parties concerned in the sale. He exercised his best judgment in prescribing the terms he did, which were $5,000, with interest at the rate 10 per cent. per annum from January 15th, 1873, and the expenses of the sale, in cash, and the balance at one and two years, with interest at 8 per cent. per annum, secured by deed of trust on the property sold. Although Mrs. Wallach attacked the validity of the sale by her suit, and prayed for the cancelling of the deed from Mr. Kennedy to Mrs. Burche, and of the trust deed from Mrs. Burche to Mrs. Mellen, the court, in special term, by its decree of June 27th, 1877, adjudged the sale to be valid, and, although Mrs. Wallach appealed, the court in general term confirmed the sale. If that sale had been carried

out according to its terms, Mrs. Mellen would have received in cash her $5,000 of principal, and what was due to her beyond that would have been secured in notes at one and two years, with a deed of trust, and the surplus going to Mrs. Wallach would have been secured by the same deed of trust. But in such event, Mrs. Mellen would have been entitled to receive first the whole amount going to her before Mrs. Wallach could receive anything, because Mrs. Wallach's claim was only to the surplus. But the sale by Mr. Kennedy was not carried out according to its terms. The court in general term, by its decree of June 5th, 1878, confirmed the sale, and provided for taking accounts, although it reversed the decree which had dismissed Mrs. Wallach's bill, and evidently contemplated then that the sale might be carried out, for the decree says, that inasmuch as the settlement for such sale, made by Mrs. Mellen and Mrs. Burche, was complained of, and it was alleged that the account on which the sale was settled was made up without the knowledge of Mrs. Wallach, and Mrs. Wallach alleged that a much larger amount had been charged to her than ought to have been, therefore, in order to settle the equities of the parties interested in the sale, between Mrs. Mellen and Mrs. Wallach and Mrs. Burche, and between Mrs. Mellen and Mrs. Burche, and between Mrs. Wallach and Mrs. Burche, growing out of the sale and otherwise, the reference is made. The reference embraced an ascertainment of the liens on the property at the date of its sale, and what share of them was chargeable to Mrs. Wallach, and what sum, if any, due from her to Mrs. Burche ought to be set off against Mrs. Wallach's interest in the proceeds of Mr. Kennedy's sale, and what were the expenses of such sale. The same decree reserved all the equities between the parties touching the matters in controversy until the report should be made and confirmed.

The $8,200 deed of trust was given by Mrs. Burche to Mrs. Mellen, and the parties got into litigation. As a result of that, the court in special term decreed, on January 3d, 1880, that the sum of $5,000 due to Mrs. Mellen, and the $2,429.02 which she had advanced to pay interest in arrear, taxes and other encumbrances, were liens on the property on the day of Mr.

Kennedy's sale. But the decree went on to direct a sale of the property and of all the interest and estate therein of all the parties to the suit, by trustees whom it appointed. The decree directed the trustees to bring into court the money and notes which they should receive, to be distributed under the further order of the court. This decree was not appealed from, but the sale took place under it. That sale was confirmed by the court in special term, by its decree of December 29th, 1880. Mrs. Mellen acquiesced in that decree by not appealing from it. On Mrs. Wallach's appeal from it, the court in general term decreed that the trustees who made the sale should require Mrs. Mellen to comply specifically with the terms of her purchase. Mrs. Wallach did not appeal from that, and so she acquiesced in it; and Mrs. Mellen, on her appeal to this court assigns for error only the action of the general term in giving to Mrs. Wallach priority of payment. Mrs. Burche, being a party to both suits, and not appealing, is bound by the decrees. In view of all this, it must be held that all parties have by their action abandoned the sale by Mr. Kennedy, and acquiesced in the subsequent sale to Mrs. Mellen. It follows from this that all claim of Mrs. Wallach to any surplus from the sale by Mr. Kennedy is gone. Mrs. Mellen, instead of exacting on the sale in cash her $5,000, was willing to leave it to be still a first lien on the property. Her priority of lien, as established by the decree of January 3d, 1880, which was not appealed from, extended to the sum of $2,429.02, beyond the $5,000, as money which she had paid to discharge interest, costs, expenses and taxes which were made a lien on the property by the trust deed to Mr. Kennedy. That amount was, with the $5,000 embraced in the $8,200, covered by the deed of trust made by Mrs. Burche. But, to the extent of $7,429.02, with the interest awarded by the decree of December 29th, 1880, Mrs. Mellen's claim stands and has never been satisfied. It is a first lien under the trust deed to Mr. Kennedy, which remains to be enforced for the benefit of Mrs. Mellen, the sale under that deed being, as shown, out of the way, by assent of all parties. Mrs. Mellen has never waived that claim and lien. She asserted them by taking the trust

deed from Mrs. Burche, to which we see no valid objection, so far, at least, as the amount for which she had a lien at the date of Mr. Kennedy's sale is concerned, and which is the amount allowed her by the court in special term as a lien. She has asserted the same claim and lien constantly ever since. She did not abandon them by assenting to the re-sale provided for by the decree of January 3d, 1880. In fact that decree, so far as the $7,429.02 adjudged by it to be due to Mrs. Mellen and to have been a lien on the property on the day of Mr. Kennedy's sale, and so far as Mrs. Mellen's claim to that extent is concerned, may properly be regarded as ordering a re-sale to enforce Mrs. Mellen's rights under the deed of trust to Mr. Kennedy. Such is its effect. *Astor* v. *Miller*, 2 Paige, 68; *Olcott* v. *Bynum*, 17 Wall. 63; *Mackey* v. *Langley*, 92 U. S. 142, 155.

The decree of the court in general term, made July 9th, 1881, is reversed, and the cause is remanded to that court, with direction to affirm, with costs, the decree of the court in special term made December 29th, 1880, and to take or direct such further proceedings as may be in conformity with law and not inconsistent with this opinion.

BUTTERWORTH, Commissioner of Patents, *v.* UNITED STATES *ex rel.* HOE & Others.

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

Argued October 15, 16, 1884.—Decided November 3, 1884.

The Secretary of the Interior has no power by law to revise the action of the Commissioner of Patents in awarding to an applicant priority of invention, and adjudging him entitled to a patent. The legislation on this subject examined and reviewed.

The executive supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do not extend to matters in which the subordinate is directed by statute to act judicially.

Opinion of the Court.

The action of the Commissioner of Patents in awarding or refusing a patent to an applicant, and in matters of that description, is quasi-judicial.

The Commissioner of Patents, after determining that a patent shall issue, acts ministerially in preparing the patent for the signature of the Secretary, and in countersigning it. And if he then refuses to perform those ministerial acts *mandamus* will be directed.

The remedy by bill in equity, under Rev. Stat. § 4915, applies only when the court decides to reject an application for a patent on the ground that the applicant is not, on the merits, entitled to it.

The case is stated in the opinion of the court.

Mr. Solicitor General as *Amicus Curiæ;* and for the Commissioner of Patents, plaintiff in error.

Mr. A. C. Bradley for Scott.

Mr. A. J. Willard for defendants in error.

Mr. Justice Matthews delivered the opinion of the court.

This is a writ of error prosecuted for the purpose of reviewing and reversing the judgment of the Supreme Court of the District of Columbia, awarding a peremptory mandamus commanding the plaintiff in error, the Commissioner of Patents, to receive the final fee of $20 tendered by the relators, and cause letters patent of the United States to R. Hoe & Co., as assignees of Gill, to be prepared and sealed, according to law, for a certain invention therein particularly described, and to be presented to the Secretary of the Interior for his signature.

The facts upon which the controversy arises are shown by the record to be as follows: On March 12th, 1881, Gill, one of the relators, made application in due form to the Commissioner of Patents for letters patent for certain new and useful improvements in printing machines, of which he claimed to be the original and first inventor. An interference was declared with an unexpired patent, No. 238,720, granted to Walter Scott, March 8th, 1881. A hearing was had before the examiner of interferences, who decided in favor of Scott, and, on appeal to the examiners-in-chief, that decision was affirmed. An appeal from that decision was taken by Gill to the Commissioner of Patents, who decided that Gill was the original and first in-

ventor of the improvements claimed, and was entitled to a patent therefor; and, on June 4th, 1883, adjudged that such patent should issue to the relators composing the partnership of R. Hoe & Co., as assignees of Gill, the inventor.

On June 14th, 1883, an appeal was taken by Scott from that decision of the Commissioner of Patents to the Secretary of the Interior, under rules prescribed by that officer, dated May 17th, 1883, who, on March 7th, 1884, reversed the decision of the Commissioner of Patents in favor of Gill, adjudged Scott to be the original and first inventor of the improvements claimed, and that Gill was not entitled to a patent therefor.

In his return to the alternative writ the Commissioner of Patents, admitting that he had refused, in compliance with the demand of the relators, to accept their tender of the final fee, and to prepare the patent for signature, and to take any further steps therein, declares: "That he so refused, not because he desired to make further inquiry, or to be further advised in that behalf, no motion or other proceeding for rehearing or review had been taken or was pending before him in that behalf, but that he based his refusal, and does so still, solely upon the ground that the honorable the Secretary of the Interior had entertained the appeal taken to him from said decision under the rules aforesaid, and had, in pursuance of said appeal, entered a decision reversing that of the Commissioner of Patents, and awarded priority of invention to Walter Scott."

The return proceeds as follows:

"Your respondent further says that for many years, and until 1881, it was held, in pursuance of decisions and opinions of the honorable Attorney-General made in that behalf, that the honorable Secretary of the Interior had, and therefore has, no legal authority to review on appeal a decision of the Commissioner of Patents, wherein the Commissioner has finally adjudged an applicant to be entitled to a patent as prayed for in his application; in other words, that the judgment of the Commissioner of Patents upon the right of an applicant to have and receive a patent is final and conclusive, subject only to review by the Supreme Court of the District of Columbia, and such other courts as have jurisdiction in that

behalf, and by the Commissioner; and the practice of the Patent Office and the honorable the Secretary of the Interior conformed thereto. This question, however, was again raised in the cases of *Nicholson* v. *Edison*, and *Le Roy* v. *Hopkins*, and the honorable the Attorney-General of the United States, to whom the question was again referred, in an opinion signed on the 20th day of August, 1881, held that the honorable the Secretary of the Interior had and could, on appeal to him, exercise the jurisdiction to review the decision of the Commissioner of Patents, and control his action in that behalf; and later on, to wit, the 26th day of February, 1884, the honorable Secretary, in an official letter (a copy of which is hereto attached, marked E), advised your respondent that he, the honorable Secretary, had, in pursuance of the opinion of the honorable Attorney-General, exercised jurisdiction on appeal from the judicial action of the Commissioner in determining questions devolved upon him by the statute.

"In deference to that opinion and the action of the honorable the Secretary of the Interior in the case under consideration, your respondent refused, and does refuse, to accede to the demand of the relator. That, in view of the decisions and the uniform practice of the Commissioners of Patents and the heads of the Department of the Interior prior to 1881, doubt and uncertainty have arisen touching the legal obligations devolving upon your respondent in the case under consideration, and those of like character.

"Your respondent further says that if the judgment of the Commissioner of Patents, which is, that the relator is entitled to receive his patent as prayed for, is final, and if upon such judgment it is the lawful duty of the respondent to accept said final fee and take the necessary and proper steps to prepare said patent for issue, as prayed, then your respondent has improperly refused, and does improperly refuse, to prepare said patent for issue; but if his decision is subject to review and reversal on appeal to the honorable the Secretary of the Interior, then such refusal on the part of your respondent to accept said fee and prepare said patent for issue is right and proper."

The return of the Commissioner also sets out as exhibits the

decision of his predecessor in office awarding priority of invention to Gill and adjudging him to be entitled to a patent; the appeal of Scott to the Secretary of the Interior; the rules governing such appeals as adopted and promulgated by that officer; the decision on that appeal by the Secretary communicated by letter to the Commissioner, reversing the decision of the Commissioner and awarding priority of invention to Scott, and a subsequent letter of the Secretary to the Commissioner, dated February 26th, 1884, in which he states that at the request of his predecessor, Mr. Kirkwood, in connection with the cases of *Nicholson* v. *Edison* and *Leroy* v. *Hopkins*, the Attorney-General considered the question as to the extent of the supervisory authority of the Secretary over the acts of the Commissioner, and, in an opinion dated August 20th, 1881, reached the conclusion that the final discretion in all matters relating to the granting of patents is lodged in the Secretary of the Interior; that Secretary Kirkwood concurred in that opinion, and from that time to the present, appeals from the judicial action of the Commissioner of Patents have been considered by the Secretary of the Interior; that the attention of Congress was particularly directed to this new practice in the annual report of the Secretary of the Interior for 1881, and that there has not since been any legislative expression of dissent from the interpretation the existing law had received; and that he does not feel justified in discontinuing a practice which he finds thus established.

It is clear enough that if the action of the Commissioner of Patents, in the matter of controversy, is subject to the order of the Secretary of the Interior, the judgment of the Supreme Court of the District of Columbia must be reversed; for *mandamus* evidently will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do.

The direct and immediate question, therefore, for our determination, is, whether the Secretary of the Interior had power by law to revise and reverse the action of the Commissioner of Patents in awarding to Gill priority of invention, and adjudging him entitled to a patent.

The authority and power claimed for the Secretary of the Interior are asserted and maintained upon these general grounds: that he is the head of the department of which the Patent Office is a bureau; that the Secretary is charged by § 441 Rev. Stat., with the supervision of public business relating to patents for inventions, in the same terms and in the same sense as in the cases of the various other subjects which in that section are classed together, to wit, the census, the public lands, the Indians, pensions, and bounty lands, the custody and distribution of publications, etc.; that, by § 4883, it is required that all patents shall be signed by the Secretary, as the responsible representative of the government, in whose name the grant is made, and countersigned by the Commissioner of Patents, only to attest the act of his superior; that, by § 481, while the Commissioner is required to superintend or perform all duties respecting the granting and issuing of patents directed by law, it is thereby also provided that it must be under the direction of the Secretary of the Interior—a clause to be read, it is argued, as if it were expressly inserted as a qualification of every statutory duty imposed upon the Commissioner; that, by § 483, the regulations which, from time to time, the Commissioner may establish for the conduct of proceedings in the Patent Office, are subject to the approval of the Secretary; that, by § 487, the reasons for the refusal of the Commissioner to recognize any person as a patent agent, either generally or in any particular case, are subject to the approval of the Secretary; that this general relation of official subordination, with the accompanying powers of supervision and direction, extends to all the official acts of the Commissioner, without regard to any distinction between those which are merely ministerial and those which are judicial in their nature; and that such supervision and direction may be exerted at any stage of a proceeding, in the discretion of the Secretary, whether in advance, or during its progress, or after its termination, and embraces, therefore, the mode of appeal, though no appeal, in express terms, is actually given.

And it is claimed that this conclusion is strengthened by the

analogy of the other bureaus, forming parts of the various executive departments of the government, like that, for example, of the General Land Office, the Commissioner of which is, by law, subject to the supervision of the Secretary of the Interior, in respect to which it was decided, in *Magwire* v. *Tyler*, 1 Black, 195, approved and affirmed in *Snyder* v. *Sickles*, 98 U. S. 203, that the power of supervision and appeal vested in the Secretary extends to all matters relating to the General Land Office, and is co-extensive with the authority of the Commissioner to adjudge.

In reference to this argument from the analogy of the general relation of the heads of executive departments to their bureau officers, it may as well be observed, in this connection, that, although not without force, it will be very apt to mislead, unless particular regard is had to the nature of the duties entrusted to the several bureaus, and critical attention is given to the language of the statutes defining the jurisdiction of the chief and his subordinates, and the special relation of subordination between them respectively; for it will be found, on a careful examination, too extensive and minute to be entered upon here, that the general relation between them, of superior and inferior, is varied by the most diverse provisions, so that in respect to some bureaus the connection with the department seems almost clerical, and one of mere obedience to direction, while in that of others the action of the officer, although a subordinate, is entirely independent, and, so far as executive control is concerned, conclusive and irreversible. And in respect to the particular illustration drawn from the relation of the General Land Office to the Department of the Interior, the language of the section of the Revised Statutes (§ 453) describes the duties of the Commissioner, to be performed under the direction of the Secretary, as executive duties, while those which relate to the decision of questions of private right under the pre-emption laws, being quasi-judicial, are made by § 2273 expressly subject to an appeal, first from the register and receiver to the Commissioner, and from him to the Secretary. *Lytle* v. *Arkansas*, 9 How. 314; *Barnard's Heirs* v. *Ashley's Heirs*, 18 How. 43. Each case must be governed by its own

text, upon a full view of all the statutory provisions intended to express the meaning of the legislature.

To determine that intention of the legislature, in reference to the principal question in the present case, it becomes important, in the first place, to obtain a clear idea of the nature and extent of the jurisdiction involved in the claim, that all the official acts of the Commissioner of Patents are subject to the direction and superintendence of the Secretary of the Interior.

If the Secretary is charged by law with the performance of such a duty, he is bound to fulfil it. It is imperative, not discretionary. He cannot discharge it, according to the intention of the statute, in a manner either arbitrary or perfunctory. While it may be admitted that, so far as the public alone have an interest in the proper performance by the Commissioner of his duties in the administration of his bureau, the Secretary might satisfy his duty of direction and superintendence by prescribing general rules of conducting the public business and securing, by general oversight, conformity to them; yet, on the other hand, it must also be admitted, that whenever a private person acquires by law a personal interest in the performance by the Commissioner of any act, he thereby also acquires an individual interest in the direction and supervision of the Secretary, to correct any error, or supply any omission or defect in its performance, tending to his injury. It is a maxim of the law, admitting few if any exceptions, that every duty laid upon a public officer, for the benefit of a private person, is enforceable by judicial process. So that the Secretary would be bound, upon proper application, in every such instance, to inquire into, and if necessary redress, the alleged grievance. And hence the official duty of direction and supervision on the part of the Secretary implies a correlative right of appeal from the Commissioner, in every case of complaint, although no such appeal is expressly given. Such, indeed, is the practical construction put by the Secretary himself upon his own powers and duties; for the rules governing appeals to the Secretary of the Interior in patent cases, made part of the return here, assume the equal right of all parties to the proceeding, whether *ex parte* or otherwise, to obtain his review of the action of the Commissioner.

not only in the final judgment, but upon all interlocutory questions material to the matter, to the decision of which exceptions have been duly taken during the progress of the inquiry.

It is further to be observed, in the same connection, that if the power and duty of the Secretary, in directing and superintending the performance by the Commissioner of his duties, and those of all other subordinates in the bureau, may be exercised in the form of appeal, it may also be exercised in any other mode, in the discretion of the Secretary, suitable to the end in view; for, if directing and superintending include review by appeal after a decision, they may as well embrace dictating, either in advance of action or from time to time, during its course and progress. So that it follows, in every case of an application for a patent, or for a reissue, or for an extension, or in cases of an interference, the Secretary may direct the matter to be heard before himself, and thereupon further direct what decision shall be rendered in each matter by the Commissioner, so as to meet his approval. This right of interposition, at any stage of the proceeding, is explicitly maintained in the opinion of the Attorney-General of August 20th, 1881, which was made the basis for the reversal of the previous practice of the department in this particular, as will appear by the following extract:

"From the right and power of the Secretary to withhold his signature from the patent, unless he is satisfied of the claimant's title thereto, plainly follows an equal right to direct the Commissioner, while the proceedings are pending, to receive an amendment which will open up a line of evidence that may throw light on that title."

We are led, therefore, immediately to inquire whether such a construction of phrases, employed in establishing the organization of the Patent Office as a bureau in the Department of the Interior, is justified by a view of the whole legislation *in pari materia*, and consistent with the integrity of the system of the statutes in relation to letters patent for new and useful inventions.

The general object of that system is to execute the intention of that clause of the Constitution, Art. I., sec. VIII., which

confers upon Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved, that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions.

Accordingly, it is provided in the statutes, Rev. Stat. § 4893, that on the filing of any application for a patent, the Commissioner shall cause an examination to be made of the alleged new invention or discovery, and if on examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner, not the Secretary, shall issue a patent therefor, although it must be signed by the Secretary. The claim is examined in the first instance by a primary examiner assigned to the class to which it belongs; if twice rejected by him, the applicant is entitled, Rev. Stat. § 4909, to appeal from his decision to that of the board of examiners-in-chief, constituted a tribunal for that purpose; and from their decision, if adverse, he may appeal to the Commissioner in person. Rev. Stat. § 4910. If dissatisfied with his decision, the party, except

in cases of interference, in respect to which another provision is made, hereafter to be considered, may appeal to the Supreme Court of the District of Columbia. Rev. Stat. § 4911. To that appeal the Commissioner is a formal party, the court acting only on the evidence adduced before him, and confining its revision to the points set forth in the reasons of appeal. A certificate of its proceedings and decision is to be returned to the Commissioner and entered of record in the Patent Office, and shall govern—so the statute says—the further proceedings in the case, but without precluding, it continues, any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

It is evident that the appeal thus given to the Supreme Court of the District of Columbia from the decision of the Commissioner, is not the exercise of ordinary jurisdiction at law or in equity on the part of that court, but is one step in the statutory proceeding under the patent laws whereby that tribunal is interposed in aid of the Patent Office, though not subject to it. Its adjudication, though not binding upon any who choose by litigation in courts of general jurisdiction to question the validity of any patent thus awarded, is, nevertheless, conclusive upon the Patent Office itself, for, as the statute declares, Rev. Stat. § 4914, it "shall govern the further proceedings in the case." The Commissioner cannot question it. He is bound to record and obey it. His failure or refusal to execute it by appropriate action would undoubtedly be corrected and supplied by suitable judicial process. The decree of the court is the final adjudication upon the question of right; everything after that dependent upon it is merely in execution of it; it is no longer matter of discretion, but has become imperative and enforceable. It binds the whole department, the Secretary as well as the Commissioner, for it has settled the question of title, so that a demand for the signatures necessary to authenticate the formal instrument and evidence of grant may be enforced. It binds the Secretary by acting directly upon the Commissioner, for it makes the action of the latter final by requiring it to conform to the decree.

Congress has thus provided four tribunals for hearing appli-

cations for patents, with three successive appeals, in which the Secretary of the Interior is not included, giving jurisdiction, in appeals from the Commissioner, to a judicial body, independent of the department, as though he were the highest authority on the subject within it. And to say that, under the name of direction and superintendence, the Secretary may annul the decision of the Supreme Court of the District, sitting on appeal from the Commissioner, by directing the latter to disregard it, is to construe a statute so as to make one part repeal another, when it is evident both were intended to co-exist without conflict.

The inference is that an appeal is allowed from the decision of the Commissioner refusing a patent, not for the purpose of withdrawing that decision from the review of the Secretary, under his power to direct and superintend, but because, without that appeal, it was intended that the decision of the Commissioner should stand as the final judgment of the Patent Office, and of the Executive Department, of which it is a part.

As already stated, the case of interferences is expressly excepted by § 4911 from the appeals allowed to the Supreme Court of the District. Further provision, covering such and also all other cases in which an application for a patent has been refused, either by the Commissioner of Patents or by the Supreme Court of the District, is found in Rev. Stat. § 4915. It is thereby provided that the applicant may have remedy by bill in equity. This means a proceeding in a court of the United States having original equity jurisdiction under the patent laws, according to the ordinary course of equity practice and procedure. It is not a technical appeal from the Patent Office, like that authorized in § 4911, confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits. Such has been the uniform and correct practice in the Circuit Courts. *Whipple* v. *Miner*, 15 Fed. Rep. 117; *Ex parte Squire*, 3 Ban. and A. 133; *Butler* v. *Shaw*, 21 Fed. Rep. 321. It is provided that the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to re-

ceive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing, in the Patent Office, a copy of such adjudication, and otherwise complying with the requirements of law. And in all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner, and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not.

It thus appears that, as, in cases of other applications for a patent refused by the Commissioner, the judgment, on a direct appeal, of the Supreme Court of the District is substituted for, and becomes the decision of, the Patent Office, so here, in cases of interference, where the Commissioner has rejected an application for a patent, the decree of the Circuit Court of the United States governs the action of the Commissioner, and requires him, in case the adjudication is in favor of the complainant, to issue the patent as decreed to him. It certainly cannot be successfully claimed that, to a writ of mandamus issued out of a court of competent jurisdiction, commanding the Commissioner of Patents to record and execute the judgment of the Supreme Court of the District, reversing on an appeal his decision refusing a patent in any case other than an interference, or the decree of a Circuit Court of the United States in any case under Rev. Stat. § 4915, requiring a patent to be issued to the claimant, it would be a sufficient answer that he had been directed by the Secretary of the Interior not to do so. If not, it must be, and is, because the decision of the Commissioner, as originally rendered, or that correction of it required by the judicial proceedings specified in the two sections of the statutes referred to, is final and conclusive upon the Department.

This conclusion is strengthened by the provisions of Rev. Stat. § 4918. It is there enacted that, in case a patent is actually, though erroneously, issued, interfering with another, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under

him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative or invalid, in any particular part of the United States, according to the interest of the parties in the patent or the invention patented; of course, without prejudice to the rights of any person, except the parties to the suit, and those deriving title under them subsequent to the rendition of the judgment.

Thus every case is fully provided for, both when the Commissioner wrongfully refuses to issue a patent, and when, in cases of interference, he erroneously issues one; and that, by means of judicial proceedings, through tribunals distinct from and independent of the Patent Office, the integrity and force of whose judgments would be annulled if not regarded as conclusive upon the Commissioner, notwithstanding any power of direction and superintendence on the part of the Secretary, which is therefore necessarily excluded.

The law gives express appeals from the decision of the Commissioner, or, in cases where technical appeals are not given, other modes of review by judicial process. It gives no such appeal from him to the Secretary. If it exists, it is admitted it is only by an implication, which discovers an appeal in the power of direction and superintendence. That power does not necessarily, *ex vi termini*, include a technical appeal; and the principle applies that where a special proceeding is expressly ordained for a particular purpose it is presumably exclusive. It is clear that when the appeal is expressly authorized from the Commissioner to the court, either directly or by means of an original suit in equity, another appeal to the Secretary on the same matter is excluded; and no reason can be assigned for allowing an appeal from the Commissioner to the Secretary in cases in which he is by law required to exercise his judgment on disputed questions of law and fact, and in which no appeal is allowed to the courts, that would not equally extend it to those in which such appeals are provided, for all are equally embraced in the general authority of direction and superin-

tendence. That includes all or does not extend to any. The true conclusion, therefore, is, that in matters of this description, in which the action of the Commissioner is quasi-judicial, the fact that no appeal is expressly given to the Secretary is conclusive that none is to be implied.

The conclusion is confirmed by a review of the history of legislation on the point.

The first statute on the subject of patents, act of 1790, ch. 7, 1 Stat. 109, authorized their issue by the Secretary of State, the Secretary for the Department of War, and the Attorney General, or any two of them, "if they shall deem the invention or discovery sufficiently useful and important."

The act of 1793, ch. 11, 1 Stat. 318, which next followed, authorized them to be issued by the Secretary of State, upon the certificate of the Attorney-General that they are conformable to the act. The 9th section of the statute provided for the case of interfering applications, which were to be submitted to the decision of arbitrators, chosen one by each of the parties and the third appointed by the Secretary of State, the decision or award of two of whom should be final as respects the granting of the patent.

This continued to be the law until the passage of the act of 1836, ch. 357, 5 Stat. 117, creating, in the Department of State, the Patent Office, "the chief officer of which shall be called," it says, "the Commissioner of Patents," and "whose duty it shall be, under the direction of the Secretary of State, to superintend, execute, and perform all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries, inventions, and improvements as are herein provided for or shall hereafter be by law directed to be done and performed," &c. By that act it was declared to be the duty of the Commissioner to issue a patent if he "shall deem it to be sufficiently useful and important," the very discretion previously vested in the three heads of Departments by the act of 1790; and, in case of his refusal, the applicant was (§ 7) secured an appeal from his decision to a board of examiners, to be composed of three disinterested persons, appointed for that purpose by the Secretary of State, one of whom, at least, to be

selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertained. The decision of this board being certified to the Commissioner, it was declared that "he shall be governed thereby in the further proceedings to be had on such application." A like proceeding, by way of appeal, was provided in cases of interferences. By § 16 of the act a remedy by bill in equity, as now given in §§ 4915, 4918 Rev. Stat., was given as between interfering patents or whenever an application shall have been refused on an adverse decision of a board of examiners. By § 11 of the act of 1839, ch. 88, 5 Stat. 354, as modified by the act of 1852, ch. 107, 10 Stat. 75, it was provided that in all cases where an appeal was thus allowed by law from the decision of the Commissioner of Patents to a board of examiners, the party, instead thereof, should have a right to appeal to the Chief Justice or to either of the assistant judges of the Circuit Court of the United States for the District of Columbia; and by § 10 the provisions of § 16 of the act of 1836 were extended to all cases where patents are refused for any reason whatever, either by the Commissioner or by the Chief Justice of the District of Columbia, upon appeals from the decision of the Commissioner, as well as where the same shall have been refused on account of or by reason of interference with a previously existing patent.

In this state of legislation, the Patent Office, by the act of 1849, ch. 108, 9 Stat. 395, was transferred to the Department of the Interior, the Secretary of which, it was enacted, "shall exercise and perform all the acts of supervision and appeal, in regard to the office of Commissioner of Patents, now exercised by the Secretary of State;" which language, so far at least as appeals, strictly so-called, are concerned, was without force, as no appeals had ever been given from any decision of the Commissioner to the Secretary of State, unless that can be called so, which, by § 7 of the act of 1836, 5 Stat. 120, was to be determined by a board of examiners, appointed, *pro re nata*, by the Secretary of State, and for which, as we have seen, an appeal to the Chief Justice of the Circuit Court of the District of Columbia had been substituted by the act of 1839, 5 Stat. 354.

The act of 1861, ch. 88, 12 Stat. 246, created the office of examiners-in-chief, "for the purpose of securing greater uniformity of action in the grant and refusal of letters patent," "to be composed of persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the applicant for that purpose being filed, to revise and determine upon the validity of decisions made by examiners when adverse to the grant of letters patent; and also to revise and determine, in like manner, upon the validity of the decisions of examiners in interference cases, and, when required by the Commissioner, in applications for the extension of patents, and to perform such other duties as may be assigned to them by the Commissioner; that from their decisions appeals may be taken to the Commissioner of Patents in person, upon payment of the fee hereinafter prescribed; that the said examiners-in-chief shall be governed in their action by the rules to be prescribed by the Commissioner of Patents."

The act of July 8, 1870, 16 Stat. 198, revised, consolidated and amended the statutes then in force on the subject, and the substance of its provisions, material to the present inquiry, have been carried into the existing revision.

It will be observed that the judgment and discretion vested by the original patent law of 1790, in a majority of the three executive officers, the Secretary of State, the Secretary for the Department of War, and the Attorney-General, who were authorized to cause letters patent to issue, "if they shall deem the invention or discovery sufficiently useful and important," was transferred by the act of 1836, § 7, to the Commissioner of Patents, it being made his duty to issue a patent for the invention, "if he shall deem it sufficiently useful and important;" and is continued in him by Rev. Stat. § 4893, the language being, that he shall cause an examination to be made of the alleged new invention, "and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor."

It thus appears, not only that the discretion and judgment of the Commissioner, as the head of the Patent Office, is sub-

stituted for that of the head of the department, but also, that that discretion and judgment are not arbitrary, but are governed by fixed rules of right, according to which the title of the claimant appears from an investigation, for the conduct of which ample and elaborate provision is made; and that his discretion and judgment, exercised upon the material thus provided, are subject to a review by judicial tribunals whose jurisdiction is defined by the same statute. In no event could the direction of the Secretary of the Interior extend beyond the terms in which it is vested, that is, to the duties to be performed under the law by the Commissioner. The supervision of the Secretary cannot change those duties nor require them to be performed by another, nor does it authorize him to substitute his discretion and judgment for that of the Commissioner, when, by law, the Commissioner is required to exercise his own, and when that judgment, unless reversed, in the special mode pointed out, by judicial process, is by law the condition on which the right of the claimant is declared to depend. The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the department may extend, in respect to matters purely administrative and executive, they do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act. That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed.

Such has been the uniform construction placed by the department itself upon the laws defining the relation of its executive head to the Commissioner of Patents. No instance has

been cited in which the right of the Secretary to reverse such action of the Commissioner in granting or withholding a patent has been claimed or exercised prior to that based upon the opinion of the Attorney-General in 1881. The jurisdiction had been previously expressly disclaimed, in 1876, by Secretary Chandler, 9 Off. Gaz. 403, and by his immediate successor, Mr. Schurz, in 1877, 1878, and 1879, 12 Off. Gaz. 475; 13 Off. Gaz. 771; 16 Off. Gaz. 220.

Some question is made as to the remedy. We think, however, that *mandamus* will lie, and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature, and to countersign it, were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators This we have held not to be a valid excuse. The case falls clearly within the principles acted upon in *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522.

The remedy by bill in equity under § 4915 is not appropriate, because it applies only when the Commissioner decides to reject an application for a patent, on the ground that the applicant is not, on the merits, entitled to it. So that, if, in such a case, a decree for a patent could be considered, *ex proprio vigore*, as equivalent to a patent, or could be enforced by direct process in execution of it, nevertheless, the present is not a case where such a bill would lie.

It is suggested that the writ was erroneously awarded by the court below, on the ground that the decision of the Commissioner of Patents, in favor of issuing the patent to the relators, was erroneous in law upon its face. But that question does not arise upon this record. We have adjudged that it belongs exclusively to the Commissioner to decide the question for himself, whether a patent ought to issue. The statute points out the remedy for a party aggrieved by his error, if he has decided erroneously. It is not by an appeal to the Secretary; nor

can the question be presented in such a proceeding as the present.

The judgment of the Supreme Court of the District of Columbia is consequently

Affirmed.

MORAN, Ex'r of COOPER *v.* NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

Submitted April 15, 1884.—Decided November 3, 1884.

A municipal ordinance of the city of New Orleans, to establish the rate of license for professions, callings and other business, which assesses and directs to be collected from persons owning and running towboats to and from the Gulf of Mexico and the city of New Orleans, is a regulation of commerce among the States, and is an infringement of the provisions of Article I., section 8, paragraph 3, of the Constitution of the United States.

This was an action to recover a license tax.

The city of New Orleans was authorized by a law of the State (Acts Extra Session, 1870, p. 37, § 12), for the purposes of the act, "to levy, impose and collect a license upon all persons pursuing any trade, profession or calling, and to provide for its collection; and said license shall not be construed to be a tax on property."

The same act, § 21, provides that "all licenses imposed by the city, not paid on the 31st day of July, shall be seizable, after thirty days' publication in the official journal," in certain courts of record in the city; "and upon the prayer of the city, through its proper representatives, any court of competent jurisdiction shall enjoin the said person or persons so liable to pay a license tax, and who shall refuse or neglect to pay the same, from continuing to carry on such business or profession until he shall have paid the same and all costs and charges for the recovery and enforcement of the claim therefor."

The council of the city of New Orleans passed an ordinance "to establish the rate of licenses for professions, callings and

other business for the year 1880," which assessed and directed to be collected the sums specially set forth, among others—

"Sec. 39. Every member of a firm or company, every agency, person, or corporation, owning and running towboats to and from the Gulf of Mexico, five hundred dollars.

"Every member of a firm or company, every agent, person or corporation, owning and running job-boats within the corporate limits, fifty dollars."

Joseph Cooper was the owner of two steam propellers, each measuring over 100 tons, duly enrolled and licensed at the port of New Orleans, under the laws of the United States, to be employed in the coasting trade, and employed them as towboats in taking vessels from the sea up the river to New Orleans and from that port to the sea.

The city of New Orleans brought its action against him in the Third District Court for the Parish of Orleans to recover the license tax under the ordinance, and obtained a judgment in its favor, which, on appeal, was affirmed by the Supreme Court of the State. The writ of error in this case was sued out by Cooper to reverse that judgment. After entry of the suit here Cooper died, and the plaintiff in error, as his widow in community and tutrix of his minor heirs, was admitted to prosecute it.

Mr. J. R. Beckwith for plaintiff in error.

Mr. S. P. Blanc, and *Mr. C. F. Buck* for defendant in error.—This writ of error brings before this court, for review, only the question—whether the imposition of a license tax on the calling, trade or occupation of running and operating towboats within municipal limits, and to the Gulf of Mexico, is a restraint or regulation imposed on commerce, and as such, violative of the laws and Constitution of the United States.—I. The license tax sued for is not a regulation of commerce and as such inhibited by the Constitution. Steamboats, ships, ferryboats, etc., are liable to taxation, as property, at their home ports. *St. Joseph* v. *Saville*, 39 Missouri, 460; *Minturn* v. *Hays*, 2 Cal. 590; *New Albany* v. *Meekin*, 3 Ind. 481;

Morgan v. *Parham*, 16 Wall. 471; *Wilkey* v. *Pekin*, 19 Ill. 160; *Hays* v. *The Pacific Mail Steamship Co.*, 17 How. 596; *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224; *People* v. *Commissioners of Taxes*, 48 Barb. 157; *Battle* v. *Mobile*, 9 Ala. 234; *Perry* v. *Torrence*, 8 Ohio, 521. A State tax which remotely affects the efficient exercise of a Federal power is not for that reason alone prohibited. *Railroad Co.* v. *Perriston*, 18 Wall. 5. So a State tax on telegraph companies is valid. *Western Union Telegraph Co.* v. *Richmond*, 26 Gratt. 1. See also *License Cases*, 5 How. 504; *Wallcott* v. *People*, 17 Mich. 68; *State Freight Tax*, 15 Wall. 232; *Nathan* v. *Louisiana*, 8 How. 73; 8 Wall. 123, 148; *Osborne* v. *Mobile*, 16 Wall. 479.—II. The enrollment or licensing a vessel confers upon it no immunity from the valid laws of a State. *Baker* v. *Wise*, 16 Gratt. 139; *Smith* v. *Maryland*, 18 How. 71; *Newport* v. *Taylor*, 16 B. Mon. 699; *Conway* v. *Taylor*, 1 Black, 603. The Federal license is authority to use the vessel, but confers no exemption from State taxation. A State may even prohibit a business which is taxed by Congress. *Pervear* v. *Commonwealth*, 5 Wall. 475.

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

The defence relied on at the trial and overruled was that the ordinance imposing the license tax was a regulation of commerce among the States, and therefore contrary to Art. I. § 8, par. 3 of the Constitution of the United States and void.

Whether the Supreme Court of Louisiana erred in overruling that defence is the single question presented for our consideration.

In the case of *Sinnot* v. *Davenport*, 22 How. 227, it was decided that a law of Alabama requiring owners of steamboats navigating the waters of the State, before such boat shall leave the port of Mobile, to file a statement in writing in the office of the probate judge of the county, setting forth the name of the vessel, the name, place of residence, and the interest of each owner in the vessel, under a penalty for non-compliance, as applied to a vessel which had taken out a license and was

duly enrolled under the act of Congress for carrying on the coasting trade and plied between New Orleans and the cities of Montgomery and Wetumpka, in Alabama, was in conflict with the act of Congress, and was therefore unconstitutional and void.

Mr. Justice Nelson, delivering the opinion of the court said:

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body, in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State legislature derived its enactment." (Page 243.)

And, repeating what was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, on pages 210–214, as to the force and effect of the act of Congress providing for the enrollment and license of vessels engaged in the coasting trade, and of the license itself when issued, Mr. Justice Nelson said:

"These are the guards and restraints, and the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring."

The act of the Legislature of Alabama in that case was declared void on the single and distinct ground that it imposed another and an additional condition to the privilege of carrying on this trade within her waters.

Immediately following that case, argued and decided at the same time, was that of *Foster* v. *Davenport*, 22 How. 244. It differed from the former in this respect only, that the vessel seized for non-compliance with the law of Alabama was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile and the wharves of the city, and in towing vessels anchored there to and from the city, and, in some

instances, towing the same beyond the outer bar of the bay and into the Gulf to the distance of several miles, but was duly enrolled and licensed to carry on the coasting trade while engaged in this business. Mr. Justice Nelson, delivering the opinion of the court, said:

"It is quite apparent, from the facts admitted in the case, that the steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination."

The present case would seem to fall directly within the rule of these decisions, unless the fact that the ordinance of the city of New Orleans is the exercise of the taxing power of the State, can be supposed to make a material difference.

But since the case of *Brown* v. *Maryland*, 12 Wheat. 419, it has been repeatedly decided by this court, that when a law of a State imposes a tax, under such circumstances and with such effect as to constitute it a regulation of commerce, either foreign or inter-state, it is void on that account. *Telegraph Co.* v. *Texas*, 105 U. S. 460, and cases there cited. In the *State Freight Tax Cases*, 15 Wall. 232–276, it was said that it could not make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation; that it was not the purpose of the law, but its effect, which was to be considered. The fundamental proposition on the subject was expressed by Mr. Justice Miller, delivering the opinion of the court in *Crandall* v. *Nevada*, 6 Wall. 35–45, in this comprehensive language: "The question of the taxing power of the States, as its exercise has affected the functions of the Federal Government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional

operations of that government, or the rights which its citizens hold under it, has been uniformly denied."

Otherwise unrestrained by the authority of the Federal Constitution, the taxing power of the States extends to and embraces the persons, property and pursuits of their people; although it is not always easy, in particular cases, to draw the line which separates the two jurisdictions; as may be seen by comparing the cases of *The State Freight Tax*, 15 Wall. 232, and of the *State Tax on Railway Gross Receipts*, 15 Wall. 284, and as was said in *Osborne* v. *Mobile*, 16 Wall. 479.

And it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or inter-state commerce, and duly enrolled and licensed under the acts of Congress, may be taxed by State authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry, and is valued as other property in the State, without unfavorable discrimination on account of its employment. *Transportation Co.* v. *Wheeling*, 99 U. S. 273; *Morgan* v. *Parham*, 16 Wall. 471; *Hays* v. *Pacific Mail Steamship Co.*, 17 Howard, 596; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365.

But the license fee in the present case is not a tax upon the boats as property, according to any valuation. The very law authorizing its imposition declares that it shall not be construed to be a tax on property.

It is said, however, to be a tax on an occupation, and for that reason not a regulation of commerce. If it were a tax upon the income derived from the business, it might be justified by the principle of the decision in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 284, which shows the distinction between a tax on transportation and a tax upon its fruits, realized and reduced to possession, so as to have become part of the general capital and property of the tax-payer.

But here it is not a tax on the profits and income after they have been realized from the business. It is a charge explicitly made as the price of the privilege of navigating the Mississippi River between New Orleans and the Gulf, in the coastwise trade; as the condition on which the State of Louisiana con-

sents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under, and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer.

The judgment of the Supreme Court of Louisiana is accordingly reversed, and the cause remanded, with directions to render a judgment reversing that of the Third District Court for the Parish of Orleans, and directing that court to render a judgment dismissing the petition of the city of New Orleans.

By stipulation of counsel on file, the same judgment is to be entered in the case of *E. N. Yorke* v. *The City of New Orleans*, No. 34, and *The Eclipse Towboat Company* v. *The City of New Orleans*, No. 35.

UNITED STATES *v.* WADDELL & Others.

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

Submitted October 14, 1884.—Decided November 3, 1884.

§ 5508 Rev. Stat. is a constitutional and valid law. *Ex parte Yarbrough*, 110 U. S. 651, affirmed.

The exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands which is conferred by § 2289 Rev. Stat. is the exercise of a right secured by the Constitution and laws of the United States within the meaning of § 5508 Rev. Stat.

An information which charges in substance that a citizen of the United States, made, on a given day at a land office of the United States a homestead entry on a quarter section of land subject to entry at that place, and that afterwards, while residing on that land for the purpose of perfecting his right to the same under specified laws of the United States on that subject, the defendants conspired to injure and oppress him and to intimidate and threaten him in the free exercise and enjoyment of that right, and because of his having exercised it, and to prevent his compliance with those laws; and in the second count that, in pursuance of the conspiracy they did upon said homestead tract, with force and arms, fire off loaded guns and pistols in his cabin, and did then and there drive him from his home on said homestead entry; and in the third count that the defendants went in disguise on the premises when occupied by him, with intent to prevent and hinder the free exercise of and enjoyment by him of the right and privilege to make said homestead entry on lands of the United States secured to him by the Constitution and laws of the United States, and the right to cultivate and improve said lands and mature his title as provided by the statute, states the facts with precision so as to bring the case within § 5508 Rev. Stat.

The certificate of division contained two questions which this court decided, and a third whether the demurrer below was well taken. No ground of demurrer was assigned which raised any question except the two decided, but the record disclosed a grave constitutional question which was not argued or suggested by counsel. *Held*, That the case should be remanded, with answers to the two questions, and for further proceedings.

Information charging a conspiracy to violate a law of the United States. The proceedings, and the facts which make the case, are fully stated in the opinion of the court.

Mr. Solicitor-General for plaintiff in error.

Mr. Joseph W. Martin for defendants in error.

Opinion of the Court.

Mr. Justice Miller delivered the opinion of the court.

This case arises on a criminal information filed by the District Attorney of the United States for the Eastern District of Arkansas in the Circuit Court for that District.

The defendants demurred to the information, and, on consideration of the demurrer, the judges of that court were divided in opinion on three questions, which they have certified to this court, as follows:

"1. Whether § 5508 of the Revised Statutes is a constitutional and valid law.

"2. Whether the information in said cause charged any offence under said § 5508 of the Revised Statutes of the United States or against any statute of the United States.

"3. Whether the demurrer to said information was well taken and should be sustained."

The first and second counts of the information undertake to set out a conspiracy of the defendants, under § 5508, to deprive or hinder Burrell Lindsey, a citizen of the United States, of the right to establish his claim to certain lands of the United States under the homestead acts, namely, §§ 2289, 2290, and 2291 of the Revised Statutes.

And the third count, without charging a conspiracy, states that defendants went upon the land of the United States, occupied by said Lindsey as a homestead, with intent to prevent and hinder him from residing upon and improving said land and maturing the title to himself to said homestead entry, a right secured to him by the sections of the Revised Statutes aforesaid.

The first question certified to us, as to the constitutional validity of § 5508 of the Revised Statutes, was answered in the affirmative by the unanimous opinion of this court in *Yarbrough's Case*, 110 U. S. 651. It is not deemed necessary or appropriate to add to what was there so recently said on that subject. The first question must therefore be answered affirmatively.

Does the information charge any offence under that section? The section reads thus:

"If two or more persons conspire to injure or oppress,

threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The substance of the first two counts of the information is, that Burrell Lindsey, a citizen of the United States, made, on the 30th day of December, 1882, at the United States land office at Little Rock, a homestead entry on a quarter-section of land subject to entry at that place. That afterwards, to wit, on the 10th day of January, 1883, while residing on and cultivating said land for the purpose of perfecting his right to the same, under the laws of the United States on that subject, namely, §§ 2289, 2290, and 2291 of the Revised Statutes, the defendant conspired to injure and oppress him, and to intimidate and threaten him in the free exercise and enjoyment of that right and because of his having exercised it, and to prevent his compliance with those laws; and in the second count, that, in pursuance of this conspiracy, they did, upon said homestead tract, with force and arms, fire off loaded guns and pistols in the cabin of said Lindsey, and did then and there drive him from his home on said homestead entry.

The third count charges that the defendants went in disguise on said premises, while occupied by said Lindsey, with intent to prevent and hinder the free exercise of and enjoyment by him of the right and privilege to make said homestead entry on lands of the United States secured to him by the Constitution and laws of the United States, and the right to cultivate and improve said land and to mature his title, as provided by the statute already referred to.

It seems clear enough that the allegation of a conspiracy to prevent Lindsey from exercising the right to make effectual

his homestead entry, and the acts done in pursuance of that conspiracy, and the going in disguise to his house for the same purpose, are stated with reasonable precision so as to bring the case within section 5508, if the right which he was exercising was one within the meaning of that section and within the constitutional power of Congress to protect by this legislation. In reference to this latter qualification, the statute itself is careful to limit its operation to an obstruction or oppression in "the free exercise of a right or privilege secured by the Constitution or laws of the United States, or because of his having exercised such rights."

The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties as well as statutes, and it does not, in this section at least, design to protect any other rights.

The right assailed, obstructed, and its exercise prevented or intended to be prevented, as set out in this petition, is very clearly a right wholly dependent upon the act of Congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an act of Congress. The Constitution of the United States, by Article IV., section 3, in express terms vests in Congress "the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States." One of its regulations—the one under consideration—authorizes a class of persons, of whom Lindsey is one, to settle upon its land, and, on payment of an inconsiderable sum of money and the written declaration of intent to make it a homestead, he is authorized to reside there. By building a house and making other improvements on it and residing there for five years consecutively, which, under the statute and under that alone, he has a right to do, and paying the fees to the officer necessary to its issue, he acquires a patent or title in fee to the land.

But his title is dependent on continued residence of himself

or family. By the original entry he acquires the inchoate but well-defined right to the land and its possession, which can only be perfected by continued residence, possession, and cultivation for five years. His right to continue this residence for five years for that purpose, is dependent upon the act of Congress. His right to the patent, after this is done, rests exclusively on the same foundation.

The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the State and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title.

Whenever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute. In the language of the court in *Ex parte Yarbrough:* "The power arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both of these cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing."

This language is as applicable to the present case as it is to that.

It would indeed be strange if the United States, under the constitutional provisions we have cited, being the owner of unsettled lands larger in area than the most powerful kingdoms of Europe, and having the power "to dispose of and make all needful rules and regulations respecting this territory," cannot make a law which protects a party in the performance of his existing contract for the purchase of such land, without which

the contract fails, and the rights, both of the United States and the purchaser, are defeated.

This view requires the second question also to be answered affirmatively.

With regard to the third question, we have some difficulty in deciding what precise point of law the judges of the Circuit Court differed upon, and what they referred to us for decision.

Did they mean to ask, is there any reason whatever why this information shall be held bad? Or did they mean to inquire whether it was bad for either of the two other matters we have discussed? Or did they refer it to this court to decide whether it was bad for any of the reasons found in the demurrer to it filed in the case?

It has been repeatedly held in this court that the object of the statute authorizing such certificates is to present some one or more well-defined, clear-cut questions of law which arise in the progress of the case in the Circuit Court, and on which the opinions of the judges holding it or them are opposed. The first two questions suggest, in each of them, such a point very clearly. The third does not. It leaves us to wander over the whole field of conjecture for any possible objection to the information, without pointing to any distinct proposition of law on which the judges divided. *De Wolf* v. *Usher*, 3 Pet. 269; *Sadler* v. *Hoover*, 7 How. 646; *Wilson* v. *Barnum*, 8 How. 258; *Daniels* v. *Railroad Co.*, 3 Wall. 250; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Ward* v. *Chamberlain*, 2 Black, 430.

If we look beyond the certificate of the judges to the demurrer itself, we find no ground of demurrer assigned which raises any other question than the two we have discussed. The demurrer is in the following language:

"*United States* v. *David Waddell* et als. } No. 959.

"Come the defendants, by their attorney, and demur to the information herein filed against them, and for cause thereof say:

"1st. The matters and things alleged therein do not consti-

tute any offence against the laws or sovereignty of the United States.

"2d. Said information does not allege any offence of which this court has jurisdiction.

"3d. Because said section 5508, so far as it may attempt to impose penalties and inflict punishment for the lawlessness and violence set forth in said information, is in violation of the Constitution of the United States and void.

"4th. And because said information is in other respects informal, is insufficient and defective.

"Wherefore said defendants pray judgment of said information, and that the same may be quashed, &c.

"JOSEPH W. MARTIN, *Att'y for def'ts.*"

Nor has the counsel for the United States, or for the defendants, suggested in their briefs or otherwise any other question or proposition of law besides the two we have already decided.

The pertinency of these remarks will be seen when we observe that § 5508, after defining the punishment of those convicted under it, by fine and imprisonment, adds: "And (they) shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States." When we bring this language, which is not the sentence of the court, but an indelible disgrace affixed to the party convicted, by the declaration of the law itself, into direct connection with the language of the fifth article of amendment of the Constitution, namely, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," there does arise a very serious question whether *this* crime is not made an infamous one by the language of the statute, and cannot, therefore, be prosecuted by information.

The question is a very important one. It has not been argued before us or even suggested by counsel. We see no reason to believe that it was in the minds of the judges, nor any evidence that they would have been opposed in opinion on it if it had been suggested to them.

Statement of Facts.

Under these circumstances we think it the true course to remit the case to the Circuit Court with the answers to the two other questions, that the question whether the case can be prosecuted by information may be there raised in an appropriate manner; and for such action, as to counsel and the court may appear best.

The first and second questions are answered affirmatively, and the case

Remanded to the Circuit Court for further proceedings.

WILSON, Adm'r, *v.* ARRICK, Adm'x.

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

Argued October 16, 1884.—Decided October 27, 1884.

In the District of Columbia, a debt due the estate of an intestate, collected by an agent of the administrator, is an administered asset, and cannot be recovered of the agent by an administrator *de bonis non* of the estate, appointed by the court after removal of the administrator.

Horatio Ames, whose administrator *de bonis non* brought this suit, died in January, 1871. On some day not shown by the record, but prior to April, 1873, his widow, Charlotte L. Ames was appointed administratrix, with the will annexed, of his estate. There was claimed to be due the estate, from the United States, a large sum of money for cannon furnished, which was satisfied by payments made in April, 1871, and in January, 1873. In May, 1873, Mrs. Ames filed her account, in which she charged herself with the sum of $39,955 as received by her from the United States on account of the claim of the estate, and took credit for three payments, amounting to $33,574.36, made to Clifford Arrick, the intestate of the defendant, for which vouchers were filed, signed by him. Exceptions were filed to the account by Oliver Ames, a brother of Horatio Ames. Before the exceptions were heard, the court, on January 9th, 1875, removed Mrs. Ames for having failed to comply with an order of the court requiring her to give an additional bond, and

appointed the present plaintiff, Nathaniel Wilson, administrator *de bonis non* in her place. On January 22, 1876, the exceptions were heard, and the credit of $33,574.36, which the administratrix claimed on account of payments made to Arrick, was reduced by the court to the sum of $2,955.56, and the commission she claimed was also reduced. The account, as filed, showed a balance in her hands of $2,260.64; as corrected by the court, this balance was increased to $34,876.75.

Disregarding this settlement of the account, this suit was brought by Wilson, the administrator *de bonis non*, against Arrick, to recover the sum of $39,955, the whole amount with which the administratrix had charged herself in her account; the allegation of the declaration being that he had collected that sum for the estate of Horatio Ames, and refused to pay it over. Arrick having died pending this suit, it was revived against the administrator of his estate.

It appears from the bill of exceptions that warrants were issued by the Secretary of the Navy to the administratrix for the amounts due from the United States to the estate she represented; that on their delivery to her she was required to indorse upon them her receipt for the money, which she did; and, having the warrants in her possession, she indorsed and delivered them to Arrick, who drew the money.

The court, at the request of the defendant, charged the jury that "the legal effect of the receipts, given in evidence and signed by Charlotte L. Ames, as administratrix, was to invest her with the control of the moneys mentioned in said receipts; and, if the administratrix parted with said control by the indorsement of said receipts, then the plaintiff is not entitled to recover." And the court, of its own motion added: "If you find, from the testimony in this case, that Mrs. Ames, administratrix of the estate of Horatio Ames, deceased, received this fund from the government for the purpose of administration, and that after receiving it she wasted it upon Arrick, or anybody else, the plaintiff in this case would not be entitled to recover; it would be the case of administration of assets, and it does not survive to the administrator *de bonis non* to prosecute." Verdict for the defendant, and judgment on the verdict. To

reverse this judgment this writ of error was sued out, and this charge of the court was assigned for error.

Mr. A. S. Worthington for plaintiff in error.—I. *Wilson* v. *Walker*, 109 U. S. 258, is distinguishable from this case. There it was held that a debt due to a deceased person, when collected, becomes the property of the administrator. In this case we seek to recover money so collected from a third person to whom it was paid as agent. This can be done under the common law, which was held in *Wilson* v. *Walker* to be in force in the District. 1. If the action be brought by the first administrator while his authority as administrator continues, he may treat the fund in the hands of such third person either as a debt due him individually, or as one due the estate which he represents, and so sue, either in his own name or as administrator, as he may elect. 2 Williams on Executors (7th Ed.) 952; *Clarke* v. *Hougham*, 2 B. & C. 149; *Sasscer* v. *Walker's Ex'r*, 5 G. & J. 102; *Chapman* v. *Davis*, 4 Gill, 166. 2. If the first administrator die (or be removed) before the agent who has collected the fund has paid it over, the administrator *de bonis non* may also treat the fund as property belonging to the estate, and sue for and recover it accordingly. Maryland Stat. 1785, ch. 80, § 1; Stat. 1798, ch. 101, sub-chapter 14, § 4; *Gist, Adm'r*, v. *Cockey*, 7 Harr. & Johns. 134; *Crane* v. *Alling*, 2 Green, N. J. (14 N. J. L.), 593; *Catherwood* v. *Chabaud*, 1 B. & C. 150; *Blydenburg* v. *Lowry*, 4 Cranch C. C. 368; *Cole* v. *Hebb*, 7 G. & J. 20. If it is claimed that Mrs. Ames authorized Arrick to retain this money, the authority was obtained by fraud, and the money may be recovered. *Catts* v. *Phalen*, 2 How. 376.—II. The other error assigned is the ruling of the court excluding the deposition of Oliver Ames as to transactions between him and Arrick. This ruling was based upon section 585 of the Revised Statutes of the United States, which provides, among other things, that in actions against administrators *neither party* shall be allowed to testify as to any transaction with or statement by the intestate, unless called by the opposite party or required to testify by the court. Here Oliver Ames was not a party. He was interested in the

result, no doubt; but the statute does not cover such a case. Whether because the reason for excluding the testimony of one who is interested in the result is the same as that for excluding the parties themselves, the courts shall strain the words of the law to cover all such cases, is a question that frequently arises, but no reported decision of it has been found. It is submitted that to make the words "either party" include all who may have an interest in the litigation, would be carrying construction to the point of legislation.

Mr. Henry E. Davis for defendant in error.

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

We think the charge was right. In the case of *United States* v. *Walker*, 109 U. S. 258, which, as appears by an inspection of the record, was a suit brought by the United States for the use of Nathaniel Wilson, as administrator *de bonis non* of the estate of Horatio Ames, upon the bond of Charlotte L. Ames, as administratrix of the same estate, to recover the identical money sued for in this case, it was held that an administrator *de bonis non* derives his title from the deceased, and not from the former administrator, and to him is committed only the administration of goods, chattels, and credits of the deceased which have not been administered; and that, both at common law and under the act of Congress in force in the District of Columbia, an administrator *de bonis non* has title only to the goods and personal property which remain in specie and have not been administered. Upon this ground the judgment of the court was based.

The plaintiff in error, conceding that since the decision in *United States* v. *Walker*, *ubi supra*, he could not maintain his action against the administratrix or the sureties upon her bond, to recover money the proceeds of administered assets, still insists that the action will lie against an agent of the administratrix, to whom the money has been paid. This contention cannot be sustained. If the money sued for in this case is the proceeds of a debt due the estate of Horatio Ames, which has

been administered by Mrs. Ames, the administratrix, the case of the *United States* v. *Walker* must be decisive of this. For if the present plaintiff has no title to the money, his action will no more lie against the agent of the administratrix than against the administratrix herself.

We are of opinion that the facts stated in the bill of exceptions, as already recited, show that the claims of the estate of Ames against the United States had been administered by Mrs. Ames, the administratrix. The demand of the estate against the United States had been settled and paid and the liability of the United States discharged. This was an administration of these assets of the estate. The mere acceptance even of the warrants was such an alteration of the property as vested the title in the administratrix, and was tantamount to their administration. Bacon's Abr., Title Executors and Administrators, B. 2, 2. The warrants and the money received on them became the property of the administratrix, and she was responsible therefor to the creditors, legatees, and distributees of the estate, and they only were entitled to sue therefor. *United States* v. *Walker*, *ubi supra*; *Beall* v. *New Mexico*, 16 Wall. 535; *Ennis* v. *Smith*, 14 How. 416. If the cases cited by counsel for appellant, *Catherwood* v. *Chabaud*, 1 B. & C. 150, and *Blydenburg* v. *Lowry*, 4 Cranch C. C. 368, sustain his contention, they are inconsistent with the law as heretofore laid down by this court, and cannot avail him.

The fact that the administratrix has improperly paid out money of the estate, the proceeds of assets administered by her, or that they have been paid to her agent, does not invest the administrator *de bonis non* with title, and authorize him to sue therefor. If, as held in the case of the *United States* v. *Walker*, *ubi supra*, the administratrix was not herself liable for the proceeds of those assets to the administrator *de bonis non*, it follows that the person who has received them as her agent cannot be liable. We think there was no error in the charge.

It further appears by the bill of exceptions that "the plaintiff offered to prove, by the deposition of Oliver Ames, taken in this case, transactions on the part of the intestate of the defendant with, and statements by, him to the said Oliver

Ames, tending to show that the said charges," on which the money sued for was paid to him by the administratrix, "were unconscionable." This evidence was excluded by the court, and its exclusion is now assigned for error. But it is clear that, if the plaintiff had no title to the money received by Arrick, the evidence offered was immaterial and was properly excluded.

We find no error in the record.

The judgment of the Supreme Court of the District of Columbia is therefore affirmed.

UNITED STATES *v.* FLANDERS & Others.

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

Argued October 20, 1884.—Decided November 3, 1884.

A person appointed and commissioned as a collector of internal revenue, under the act of July 1, 1862, 12 Stat. 432, is entitled to the compensation, provided for by § 34 of that act, of a percentage commission to be computed on the moneys accounted for and paid over by him, from the time he enters on the duties of his office and his services are accepted, and not merely from the time he takes the oath of office and files his official bond.

A collector of internal revenue appointed under that act is entitled, in a suit against him on such bond, brought to recover public money collected by him and not paid over, to have allowed, as a set-off, money paid by him for publishing advertisements required to be made by § 19 of that act, if the amount is found to be reasonable and proper, although the item was not formally allowed or certified by the accounting officers in the Treasury Department or otherwise.

Action against principal and sureties on an internal revenue bond. The facts appear fully in the opinion of the court.

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

Mr. J. Q. A. Fellows submitted for defendants in error on his brief.

Mr. Justice Blatchford delivered the opinion of the court.

Opinion of the Court.

This is a suit brought by the United States, in the Circuit Court of the United States for the Eastern District of Louisiana, against George S. Denison and the sureties on his bond, as collector of internal revenue for the first collection district of Louisiana, to recover $4,346.84, as public money which he collected and did not pay over. Three of the sureties defended the suit, and, on a trial before a jury, there was a verdict in their favor, and a judgment accordingly. The United States have sued out a writ of error.

The answer sets up that Denison, or his estate, is entitled to further credits than those allowed to him, which claims for credits he presented to the accounting officers of the Treasury, but they disallowed them, to the amount of $4,199.74, on account of his compensation as collector, and to the amount of $777, on account of money paid by him for necessary and legal advertising.

The bill of exceptions sets forth, that there was evidence tending to show that Denison was appointed collector by a commission dated March 4, 1863; that he took the oath of office, and executed his bond as such collector, on the 15th of May, 1863, and remained in office until the 11th of December, 1863; that his accounts were adjusted by the accounting officers of the Treasury at various dates subsequent to June 3, 1864, but in these adjustments he had not concurred, and the proper notice had been given to lay the foundation for the introduction of evidence as to the additional credits claimed; that he entered upon the discharge of his official duty as collector on the 11th of March, 1863, and continued so to act until December 11th, 1863; and that his accounts were regularly transmitted monthly, during his whole term of office, and at the end thereof, and all prior to June 30, 1864. The counsel for the plaintiffs asked the court to instruct the jury that Denison was not entitled to any compensation as collector prior to May 15, 1863, the date on which he gave the bond and took the oath of office. The court refused to give that instruction, but, instead thereof, gave the following: that the government could have properly refused to allow Denison to assume the office of collector until he had taken the oath of office and given the

requisite bond; that for certain purposes he could not be an officer until he had taken the oath and given the bond; but, if the jury found, that, after he had received his commission, the government permitted him to discharge the duties of the office, and accepted of his services therein, prior to the time of his taking the oath and giving the bond, he was entitled to compensation from the time when he commenced to discharge his official duties and his services in the office were accepted by the government; and, that, it being admitted that he had collected the sum of $577,791.28, he was entitled to compensation at the rate of $833,33⅓ per month during the time he held the office of collector, counting from the time when, after receiving his commission, he was permitted by the government to discharge the duties of the office and his services were accepted therein, although, during a portion of such time, he had not taken his official oath, nor given his official bond. To this refusal and instruction there was an exception by the plaintiffs.

It is contended that there was error in the instruction that the collector was entitled to compensation for the time before he took the oath and gave the bond. His commission was dated March 4, 1863, and the government permitted him to discharge the duties of the office, and accepted of his services, from March 11, 1863. At that time the act of July 2, 1862, 12 Stat. 502, was in force, which provided that every person appointed to any office of profit under the government, in any civil department of the public service, except the President, should, "before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe" an oath or affirmation, the form of which is given. Section 4 of the act of July 1, 1862, 12 Stat. 433, provided that, before any collector of internal revenue should "enter upon the duties of his office," he should give a specified bond, with sureties.

The compensation to which Denison was entitled was at the rate of $10,000 a year, under section 34 of the act of July 1, 1862, 12 Stat. 445. That section allows the compensation to the collector "appointed," in full compensation for his services and those of his deputies. The compensation is by a specified

percentage commission, to be computed on the moneys "paid over and accounted for under the instructions of the Treasury Department," the commissions not to exceed $10,000 a year, in any case. The compensation is given by the statute to the collector, when appointed, and is based wholly on the amount of moneys paid over and accounted for. If he is appointed, and acts, and collects the moneys, and pays them over and accounts for them, and the government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath "before being entitled to any of the salary or other emoluments" of the office. But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commissions as compensation, does not arise until he takes and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys. This was, in substance, the charge given, and it was correct.

The counsel for the plaintiffs requested the court to instruct the jury, that, during the time Denison was collector, the law did not provide for the reimbursement to collectors of internal revenue of any amount expended by them for advertisements; and that, there being no proof that the Secretary of the Treasury had ever made any allowance to Denison for amounts expended by him for advertisements, nothing could be allowed to the defendants for advertising. The court refused to give that instruction, but gave the following: that "if, in accordance with the terms of the statute, defendant Denison was required, as collector of internal revenue, to make, and did make, in certain newspapers, certain advertisements, for which he was required to pay, and did pay, and if, also, the jury found that the amounts so paid were reasonable and proper amounts, he was entitled to a credit for the amounts so paid by him, although the Secretary of the Treasury had made no allowance

to him therefor." To this refusal and instruction the plaintiffs excepted.

The 19th section of the act of July 1, 1862, 12 Stat. 439, required the collector to give notices, by advertisement, that duties were due and payable, and to advertise notices of the sale of articles distrained. The item of $777 for bills for advertising was disallowed by the accounting officers, because section 34 of the act of July 1, 1862, before cited, after providing for compensation, went on to say that there should also be allowed to the collector his necessary and reasonable expenses for stationery and blank books used in the performance of his official duties, to be paid out of the treasury, after being duly examined and certified by the Commissioner of Internal Revenue, and did not include expenses for advertising, and they were not included until provided for, by amendment, by the act of March 3, 1865, 13 Stat. 469, which took effect April 1, 1865. But we are of opinion, that, as the statute required the advertisements to be made, the collector was entitled to a credit for the reasonable and proper amounts paid therefor, although such amounts were not formally allowed or certified. It was submitted to the jury to say whether the collector made and paid for the advertisements, and whether they were such as fell within those named in the statute, and whether the amounts paid for them were reasonable and proper. The instruction given is not open to the criticism made, that it submitted to the jury a question of law. It was not left to the jury to determine whether the advertising for which credit was claimed was such as the collector was required to make, in the sense that it was left to the jury to determine what advertisements the law required to be made. But it must be inferred, that the court explained the statute as to the advertisements, and the fair meaning of the instruction is, that it was left to the jury to say whether, in view of the advertisements which the statute, as explained by the court, required, those made by the collector were such advertisements, and were made, and were paid for, and were reasonable and proper in amount.

In *Andrews* v. *United States*, 2 Story, 202, which was a suit

on the bond of a collector of customs, Mr. Justice Story held, that expenditures, by a collector of customs, for office rent, fuel, clerk hire, and stationery were properly to be deemed incidents to the office, and ought, therefore, to be allowed as proper charges against the United States, and as a set-off in the suit. In that case, the statute required the collector to keep and transmit accounts of those particular expenditures. The Treasury Department disallowed them, but the court held, that the statute contemplated their allowance, and that the collector had a right to be reimbursed their amount, even though he did not keep or transmit the accounts of them. The view taken was, that, if a claim, though not strictly of a legal nature, was *ex æquo et bono* due to the defendant, for moneys expended on account of, and for the benefit of, the United States, he was entitled to an allowance and compensation therefor, upon the footing of a *quantum meruit*, under § 3 of the act of March 3, 1797, 1 Stat. 514. That statute is now embodied in § 957 of the Revised Statutes, which provides that, in all suits against a person accountable for public moneys, he may show that he is equitably entitled to credits which have been rejected. In *United States* v. *Wilkins*, 6 Wheat., 135, 144, this court said, of § 3 of the act of 1797, that it supposed that "not merely legal but equitable credits ought to be allowed to debtors of the United States, by the proper officers of the Treasury;" that all such credits could be allowed at the trial of the suit; and that a judgment was required for such sum only as the defendant, in equity and justice, should be proved to owe to the United States. This view was affirmed in *Gratiot* v. *United States*, 15 Pet. 336, 370, and in *Watkins* v. *United States*, 9 Wall. 759, 765.

In the present case, the statute required the advertisements to be made, and there is nothing in it which implies that they are to be paid for out of the compensation to be allowed, or that they are not to be reimbursed because they are not named with stationery and blank books, or because "advertising" was first inserted in the act of 1865. In section 115 of the same act of July 1, 1862, 12 Stat. 488, it was provided, that the pay of collectors should be paid out of the accruing inter-

nal duties or taxes, before they were paid into the Treasury, and $500,000 was appropriated "for the purpose of paying" various specified expenses, including "advertising and any other expenses of carrying this act into effect." This advertising was an expense of carrying the act into effect, and was aside from the pay of the collector, and was to be paid out of the Treasury, as an expense. The allowance of it by the accounting officers or otherwise was not a prerequisite to the right of Denison to have it credited to him in this suit. *Campbell* v. *United States*, 107 U. S., 407.

The judgment of the Circuit Court is affirmed.

ELK *v.* WILKINS.

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

Argued April 28, 1884.—Decided November 3, 1884.

An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized, or taxed, or recognized as a citizen, either by the United States or by the State, is not a citizen of the United States, within the meaning of the first section of the Fourteenth Article of Amendment of the Constitution.

A petition alleging that the plaintiff is an Indian, and was born within the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States, and is a *bona fide* resident of the State of Nebraska and city of Omaha, does not show that he is a citizen of the United States under the Fourteenth Article of Amendment of the Constitution.

This is an action brought by an Indian, in the Circuit Court of the United States for the District of Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a qualified voter therein. The petition was as follows:

Statement of Facts.

"John Elk, plaintiff, complains of Charles Wilkins, defendant, and avers that the matter in dispute herein exceeds the sum of five hundred dollars, to wit, the sum of six thousand dollars, and that the matter in dispute herein arises under the Constitution and laws of the United States; and, for cause of action against the defendant, avers that he, the plaintiff, is an Indian, and was born within the United States; that more than one year prior to the grievances hereinafter complained of he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States; and avers that, under and by virtue of the Fourteenth Amendment to the Constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States.

"That on the sixth day of April, 1880, there was held in the city of Omaha, (a city of the first class, incorporated under the general laws of the State of Nebraska providing for the incorporation of cities of the first class,) a general election for the election of members of the city council and other officers for said city.

"That the defendant, Charles Wilkins, held the office of and acted as registrar in the fifth ward of said city, and that as said registrar it was the duty of such defendant to register the names of all persons entitled to exercise the elective franchise in said ward of said city at said general election.

"That this plaintiff was a citizen of and had been a *bona fide* resident of the State of Nebraska for more than six months prior to said sixth day of April, 1880, and had been a *bona fide* resident of Douglas County, wherein the city of Omaha is situate, for more than forty days, and in the fifth ward of said city more than ten days prior to the said sixth day of April, and was such citizen and resident at the time of said election, and at the time of his attempted registration, as hereinafter set forth, and was in every way qualified, under the laws of the State of Nebraska and of the city of Omaha, to be registered as a voter and to cast a vote at said election, and complied with the laws of the city and State in that behalf.

Statement of Facts.

"That on or about the fifth day of April, 1880, and prior to said election, this plaintiff presented himself to said Charles Wilkins, as such registrar, at his office, for the purpose of having his name registered as a qualified voter, as provided by law, and complied with all the provisions of the statutes in that regard, and claimed that, under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, he was a citizen of the United States, and was entitled to exercise the elective franchise, regardless of his race and color; and that said Wilkins, designedly, corruptly, wilfully and maliciously, did then and there refuse to register this plaintiff, for the sole reason that the plaintiff was an Indian, and therefore not a citizen of the United States, and not, therefore, entitled to vote, and on account of his race and color, and with the wilful, malicious, corrupt and unlawful design to deprive this plaintiff of his right to vote at said election, and of his rights, and all other Indians of their rights, under said Fourteenth and Fifteenth Amendments to the Constitution of the United States, on account of his and their race and color.

"That on the sixth day of April this plaintiff presented himself at the place of voting in said ward, and presented a ballot and requested the right to vote, where said Wilkins, who was then acting as one of the judges of said election in said ward, in further carrying out his wilful and malicious designs aforesaid, declared to the plaintiff and to the other election officers that the plaintiff was an Indian and not a citizen and not entitled to vote, and said judges and clerks of election refused to receive the vote of the plaintiff, for that he was not registered as required by law.

"Plaintiff avers the fact to be that by reason of said wilful, unlawful, corrupt and malicious refusal of said defendant to register this plaintiff, as provided by law, he was deprived of his right to vote at said election, to his damage in the sum of $6,000.

"Wherefore plaintiff prays judgment against defendant for $6,000, his damages, with costs of suit."

The defendant filed a general demurrer for the following causes: 1st. That the petition did not state facts sufficient to

constitute a cause of action. 2d. That the court had no jurisdiction of the person of the defendant. 3d. That the court had no jurisdiction of the subject of the action.

The demurrer was argued before Judge McCrary and Judge Dundy, and sustained; and the plaintiff electing to stand by his petition, judgment was rendered for the defendant, dismissing the petition with costs. The plaintiff sued out this writ of error.

By the Constitution of the State of Nebraska, article 7, section 1, "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State six months, and in the county, precinct or ward for the term provided by law, shall be an elector. First. Citizens of the United States. Second. Persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election."

By the statutes of Nebraska, every male person of the age of twenty-one years or upwards, belonging to either of the two classes so defined in the Constitution of the State, who shall have resided in the State six months, in the county forty days, and in the precinct, township or ward ten days, shall be an elector; the qualification of electors in the several wards of cities of the first class (of which Omaha is one) shall be the same as in precincts; it is the duty of the registrar to enter in the register of qualified voters the name of every person who applies to him to be registered, and satisfies him that he is qualified to vote under the provisions of the election laws of the State; and at all municipal, as well as county or State elections, the judges of election are required to check the name, and receive and deposit the ballot, of any person whose name appears on the register. Compiled Statutes of Nebraska of 1881, ch. 26, § 3; ch. 13, § 14; ch. 76, §§ 6, 13, 19.

Mr. A. J. Poppleton and *Mr. John L. Webster* for plaintiff in error.

Mr. G. M. Lambertson for defendant in error.

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

The plaintiff, in support of his action, relies on the first clause of the first section of the Fourteenth Article of Amendment of the Constitution of the United States, by which "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;" and on the Fifteenth Article of Amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

This being a suit at common law, in which the matter in dispute exceeds $500, arising under the Constitution of the United States, the Circuit Court had jurisdiction of it under the act of March 3, 1875, ch. 137, § 1, even if the parties were citizens of the same State. 18 Stat. 470; *Ames* v. *Kansas*, 111 U. S. 449. The judgment of that court, dismissing the action with costs, must have proceeded upon the merits, for, if the dismissal had been for want of jurisdiction, no costs could have been awarded. *The Mayor* v. *Cooper*, 6 Wall. 247; *Mansfield & Coldwater Railway* v. *Swan*, 111 U. S. 379. And the only point argued by the defendant in this court is whether the petition sets forth facts enough to constitute a cause of action.

The decision of this point, as both parties assume in their briefs, depends upon the question whether the legal conclusion, that under and by virtue of the Fourteenth Amendment of the Constitution the plaintiff is a citizen of the United States, is supported by the facts alleged in the petition and admitted by the demurrer, to wit: The plaintiff is an Indian, and was born in the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a *bona fide* resident of the State of Nebraska and city of Omaha.

The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he "is

an Indian, and was born within the United States," and that "he had severed his tribal relation to the Indian tribes," clearly implies that he was born a member of one of the Indian tribes within the limits of the United States, which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen, by the State or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution.

Under the Constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed

by any State. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Constitution, art. 1, sects. 2, 8; art. 2, sect. 2; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515; *United States* v. *Rogers*, 4 How. 567; *United States* v. *Holliday*, 3 Wall. 407; *Case of the Kansas Indians*, 5 Wall. 737; *Case of the New York Indians*, 5 Wall. 761; *Case of the Cherokee Tobacco*, 11 Wall. 616; *United States* v. *Whiskey*, 93 U. S. 188; *Pennock* v. *Commissioners*, 103 U. S. 44; *Crow Dog's Case*, 109 U. S. 556; *Goodell* v. *Jackson*, 20 Johns. 693; *Hastings* v. *Farmer*, 4 N. Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825 and 1830 with the Choctaws, 7 Stat. 159, 211, 236, 335, 483, 488; *Wilson* v. *Wall*, 6 Wall. 83; Opinion of Attorney-General Taney, 2 Opinions of Attorneys General, 462; in 1855 with the Wyandotts, 10 Stat. 1159; *Karrahoo* v. *Adams*, 1 Dillon, 344, 346; *Gray* v. *Coffman*, 3 Dillon, 393; *Hicks* v. *Butrick*, 3 Dillon, 413; in 1861 and in March, 1866, with the Pottawatomies, 12 Stat. 1192; 14 Stat. 763; in 1862 with the Ottawas, 12 Stat. 1237; and the Kickapoos, 13 Stat. 624; and acts of Congress of March 3, 1839, ch. 83, § 7, concerning the Brothertown Indians, and of March 3, 1843, ch. 101, § 7, August 6, 1846, ch. 88, and March 3, 1865, ch. 127, § 4, concerning the Stockbridge Indians, 5 Stat. 351, 647; 9 Stat. 55; 13 Stat. 562. See also treaties with the Stockbridge Indians in 1848 and 1856, 9 Stat. 955; 11 Stat. 667; 7 Opinions of Attorneys General, 746.

Chief Justice Taney, in the passage cited for the plaintiff

from his opinion in *Scott* v. *Sandford*, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: "They" (the Indian tribes) "may, without doubt, like the subjects of any foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." But an emigrant from any foreign State cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which "no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;" and "the Congress shall have power to establish an uniform rule of naturalization." Constitution, art. 2, sect. 1; art. 1, sect. 8.

By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott* v. *Sandford*, 19 How. 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. *Slaughter-House Cases*, 16 Wall. 36, 73; *Strauder* v. *West Virginia*, 102 U. S. 303, 306.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared

to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

This view is confirmed by the second section of the Fourteenth Amendment, which provides that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.

So the further provision of the second section for a propor-

tionate reduction of the basis of the representation of any State in which the right to vote for presidential electors, representatives in Congress, or executive or judicial officers or members of the legislature of a State, is denied, except for participation in rebellion or other crime, to "any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States," cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation.

It is also worthy of remark, that the language used, about the same time, by the very Congress which framed the Fourteenth Amendment, in the first section of the Civil Rights Act of April 9, 1866, declaring who shall be citizens of the United States, is "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 14 Stat. 27; Rev. Stat. § 1992.

Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being "naturalized in the United States," by or under some treaty or statute.

The action of the political departments of the government, not only after the proposal of the Amendment by Congress to the States in June, 1866, but since the proclamation in July, 1868, of its ratification by the requisite number of States, accords with this construction.

While the Amendment was pending before the legislatures of the several States, treaties containing provisions for the naturalization of members of Indian tribes as citizens of the United States were made on July 4, 1866, with the Delawares, in 1867 with various tribes in Kansas, and with the Pottawatomies, and in April, 1868, with the Sioux. 14 Stat. 794, 796; 15 Stat. 513, 532, 533, 637.

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe.

That treaty not only provided for the naturalization of mem-

bers of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the District Court of the United States, of their intention to become citizens; 15 Stat. 517, 520, 521; but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were "unfitted for the responsibilities of citizenship;" and enacting that a register of the whole people of this tribe, resident in Kansas or elsewhere, should be taken, under the direction of the Secretary of the Interior, showing the names of "all who declare their desire to be and remain Indians and in a tribal condition," and of incompetents and orphans as described in the treaty of 1855, and that such persons, and those only, should thereafter constitute the tribe; it provided that "no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization, and unless the agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge." 15 Stat. 514, 516.

Since the ratification of the Fourteenth Amendment, Congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States.

By the act of July 15, 1870, ch. 296, § 10, for instance, it was provided that if at any time thereafter any of the Winnebago Indians in the State of Minnesota should desire to become citizens of the United States, they should make application to the District Court of the United States for the District of Minnesota, and in open court make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and should also make proof to the satisfaction of the court that they were sufficiently intelligent and prudent to control their affairs and interests, that they had adopted the habits of civilized life, and had for at least five years before been able to support themselves and their families; and there-

upon they should be declared by the court to be citizens of the United States, the declaration entered of record, and a certificate thereof given to the applicant; and the Secretary of the Interior, upon presentation of that certificate, might issue to them patents in fee simple, with power of alienation, of the lands already held by them in severalty, and might cause to be paid to them their proportion of the money and effects of the tribe held in trust under any treaty or law of the United States; and thereupon such persons should cease to be members of the tribe, and the lands so patented to them should be subject to levy, taxation, and sale, in like manner with the property of other citizens. 16 Stat. 361. By the act of March 3, 1873, ch. 332, § 3, similar provision was made for the naturalization of any adult members of the Miami tribe in Kansas, and of their minor children. 17 Stat. 632. And the act of March 3, 1865, ch. 127, before referred to, making corresponding provision for the naturalization of any of the chiefs, warriors, or heads of families of the Stockbridge Indians, is re-enacted in section 2312 of the Revised Statutes.

The act of January 25, 1871, ch. 38, for the relief of the Stockbridge and Munsee Indians in the State of Wisconsin, provided that "for the purpose of determining the persons who are members of said tribes and the future relation of each to the government of the United States," two rolls should be prepared under the direction of the Commissioner of Indian Affairs, signed by the sachem and councillors of the tribe, certified by the person selected by the Commissioner to superintend the same, and returned to the Commissioner; the one, to be denominated the citizen roll, of the names of all such persons of full age, and their families, "as signify their desire to separate their relations with said tribe, and to become citizens of the United States," and the other, to be denominated the Indian roll, of the names of all such "as desire to retain their tribal character and continue under the care and guardianship of the United States;" and that those rolls, so made and returned, should be held as a full surrender and relinquishment, on the part of all those of the first class, of all claims to be known or considered as members of the tribe, or to be interested

in any provision made or to be made by the United States for its benefit, "and they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States." 16 Stat. 406.

The Pension Act exempts Indian claimants of pensions for service in the army or navy from the obligation to take the oath to support the Constitution of the United States. Act of March 3, 1873, ch. 234, § 28; 17 Stat. 574; Rev. Stat. § 4721.

The recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribe. The act of March 3, 1875, ch. 131, § 15, allowed to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations," the benefit of the homestead acts, but only upon condition of his "making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior;" and further provided that his title in the homestead should be absolutely inalienable for five years from the date of the patent, and that he should be entitled to share in all annuities, tribal funds, lands and other property, as if had maintained his tribal relations. 18 Stat. 420. And the act of March 3, 1884, ch. 180, § 1, while it allows Indians "located on public lands" to "avail themselves of the homestead laws as fully and to the same extent as may now be done by citizens of the United States," provides that the form and the legal effect of the patent shall be that the United States does and will hold the land for twenty-five years in trust for the Indian making the entry, and his widow and heirs, and will then convey it in fee to him or them. 23 Stat. 96.

The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are

and whose citizens they seek to become, and not by each Indian for himself.

There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the Fourteenth Amendment, and of the condition of the Indians at the time of its proposal and ratification.

The act of July 27, 1868, ch. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that "in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship," while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority. 15 Stat 223; Rev. Stat. § 1999.

The provision of the act of Congress of March 3, 1871, ch. 120, that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty," is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 Stat. 566; Rev. Stat. § 2079.

In the case of *United States* v. *Elm*, 23 Int. Rev. Rec. 419, decided by Judge Wallace in the District Court of the United States for the Northern District of New York, the Indian who was held to have a right to vote in 1876 was born in the State of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that State; and by a statute of the State it had been enacted that any native Indian might purchase, take, hold and convey lands, and, whenever he should have become a freeholder to the value of one hundred dollars, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. Stat. 1843, ch. 87. The condition of the tribe from which he

derived his origin, so far as any fragments of it remained within the State of New York, resembled the condition of those Indian nations of which Mr. Justice Johnson said in *Fletcher* v. *Peck*, 6 Cranch, 87, 146, that they "have totally extinguished their national fire, and submitted themselves to the laws of the States;" and which Mr. Justice McLean had in view, when he observed in *Worcester* v. *Georgia*, 6 Pet. 515, 580, that in some of the old States, "where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the State have been extended over them, for the protection of their persons and property." See also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities, *Danzell* v. *Webquish*, 108 Mass. 133; *Pells* v. *Webquish*, 129 Mass. 469; Mass. Stat. 1862, ch. 184; 1869, ch. 463.

The passages cited as favorable to the plaintiff from the opinions delivered in *Ex parte Kenyon*, 5 Dillon, 385, 390, in *Ex parte Reynolds*, 5 Dillon, 394, 397, and in *United States* v. *Crook*, 5 Dillon, 453, 464, were *obiter dicta*. The *Case of Reynolds* was an indictment in the Circuit Court of the United States for the Western District of Arkansas for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge Parker in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dillon, 397, 404. Each of the other two cases was a writ of habeas corpus; and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. *Case of the Hottentot Venus*, 13 East, 195; *Case of Dos Santos*, 2 Brock. 493; *In re Kaine*, 14 How. 103. In *Kenyon's Case*, Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, "this alone would be conclusive of this case." 5 Dillon,

390. In *United States* v. *Crook*, the Ponca Indians were discharged by Judge Dundy because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority; 5 Dillon, 468; and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

The law upon the question before us has been well stated by Judge Deady in the District Court of the United States for the District of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: "Being born a member of 'an independent political community'—the Chinook—he was not born subject to the jurisdiction of the United States—not born in its allegiance." *McKay* v. *Campbell*, 2 Sawyer, 118, 134. And in a later case he said: "But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since." *United States* v. *Osborne*, 6 Sawyer, 406, 409.

Upon the question whether any action of a State can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the State of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See *Chirac* v. *Chirac*, 2 Wheat. 259; *Fellows* v. *Blacksmith*, 19 How. 366; *United States* v. *Holliday*, 3 Wall. 407, 420; *United States* v. *Joseph*, 94 U. S. 614, 618.

The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action. *Judgment affirmed.*

Mr. Justice Harlan, with whom concurred Mr. Justice Woods, dissenting.

Mr. Justice Woods and myself feel constrained to express our dissent from the interpretation which our brethren give to that clause of the Fourteenth Amendment which provides 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."

The case, as presented by the record, is this: John Elk, the plaintiff in error, is a person of the Indian race. He was born within the territorial limits of the United States. His parents were, at the time of his birth, members of one of the Indian tribes in this country. More than a year, however, prior to his application to be registered as a voter in the city of Omaha, he had severed all relations with his tribe, and, as he alleges, fully and completely surrendered himself to the jurisdiction of the United States. Such surrender was, of course, involved in his act of becoming, as the demurrer to the petition admits that he did become, a *bona fide* resident of the State of Nebraska. When he applied in 1880 to be registered as a voter, he possessed, as is also admitted, the qualifications of age and residence in State, county, and ward, required for electors by the Constitution and laws of that State. It is likewise conceded that he was entitled to be so registered, if, at the time of his application, he was a citizen of the United States; for, by the Constitution and laws of Nebraska every citizen of the United States, having the necessary qualifications of age and residence in State, county, and ward, is entitled to vote. Whether he was such citizen is the single question presented by this writ of error.

It is said that the petition contains no averment that Elk was taxed in the State in which he resides, or had ever been treated by her as a citizen. It is evident that the court would not have held him to be a citizen of the United States, even if the petition had contained a direct averment that he was taxed; because its judgment, in legal effect, is, that, although born within the territorial limits of the United States, he could not, if at his birth a member of an Indian tribe, acquire national citizenship

by force of the Fourteenth Amendment, but only in pursuance of some statute or treaty providing for his naturalization. It would, therefore, seem unnecessary to inquire whether he was taxed at the time of his application to be registered as a voter; for, if the words "all persons born . . . in the United States and subject to the jurisdiction thereof," were not intended to embrace Indians born in tribal relations, but who subsequently became *bona fide* residents of the several States, then, manifestly, the legal status of such Indians is not altered by the fact that they are taxed in those States.

While denying that national citizenship, as conferred by that amendment, necessarily depends upon the inquiry whether the person claiming it is taxed in the State of his residence, or has property therein from which taxes may be derived, we submit that the petition does sufficiently show that the plaintiff is taxed, that is, belongs to the class which, by the laws of Nebraska, are subject to taxation. By the Constitution and laws of Nebraska all real and personal property, in that State, are subject to assessment and taxation. Every person of full age and sound mind, being a resident thereof, is required to list all of his personal property for taxation. Const. Neb., art. 9, § 1; Compiled Stat. of Neb., ch. 77, pp. 400–1. Of these provisions upon the subject of taxation this court will take judicial notice. Good pleading did not require that they should be set forth, at large, in the petition. Consequently, an averment that the plaintiff is a citizen and *bona fide* resident of Nebraska implies, in law, that he is subject to taxation, and is taxed, in that State. Further: The plaintiff has become so far incorporated with the mass of the people of Nebraska that, being, as the petition avers, a citizen and resident thereof, he constitutes a part of her militia. Comp. Stat. Neb., ch. 56. He may, being no longer a member of an Indian tribe, sue and be sued in her courts. And he is counted in every apportionment of representation in the legislature; the requirement of her Constitution being, that "the legislature shall apportion the Senators and Representatives according to the number of inhabitants, excluding Indians not taxed and soldiers and officers of the United States army." Const. Neb., art. 3, § 1.

At the adoption of the Constitution there were, in many of the States, Indians, not members of any tribe, who constituted a part of the people for whose benefit the State governments were established. This is apparent from that clause of article 1, section 3, which requires, in the apportionment of representatives and direct taxes among the several States "according to their respective numbers," the exclusion of "Indians not taxed." This implies that there were, at that time, in the United States, Indians who were taxed, that is, were subject to taxation, by the laws of the State of which they were residents. Indians not taxed were those who held tribal relations, and, therefore, were not subject to the authority of any State, and were subject only to the authority of the United States under the power conferred upon Congress in reference to Indian tribes in this country. The same provision is preserved in the Fourteenth Amendment; for, now, as at the adoption of the Constitution, Indians in the several States, who are taxed by their laws, are counted in establishing the basis of representation in Congress.

By the act of April 9, 1866, entitled "An Act to protect all persons in the United States in their civil rights, and furnish means for their vindication" (14 Stat. 27), it is provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." This, so far as we are aware, is the first general enactment making persons of the Indian race citizens of the United States. Numerous statutes and treaties previously provided for all the individual members of particular Indian tribes becoming, in certain contingencies, citizens of the United States. But the act of 1866 reached Indians not in tribal relations. Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race (excluding only "Indians not taxed"), who were born within the territorial limits of the United States, and were not subject to any foreign power. Surely every one must admit that an Indian, residing in one of the States, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, al-

though he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the State of their residence. Language could not express that purpose with more distinctness than does the act of 1866. Any doubt upon the subject, in respect to persons of the Indian race residing in the United States or Territories, and not members of a tribe, will be removed by an examination of the debates, in which many distinguished statesmen and lawyers participated in the Senate of the United States when the act of 1866 was under consideration.

In the bill as originally reported from the Judiciary Committee there were no words excluding "Indians not taxed" from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations with governments of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States, Mr. Trumbull, who reported the bill, modified it by inserting the words "excluding Indians not taxed." What was intended by that modification appears from the following language used by him in debate:

"Of course we cannot declare the wild Indians who do not recognize the government of the United States, who are not subject to our laws, with whom we make treaties, who have their own laws, who have their own regulations, whom we do not intend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States when it says that Indians not taxed are to be excluded. It has occurred to me that, perhaps, the amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding

Indians not taxed, and not subject to any foreign power, shall be deemed citizens of the United States." Cong. Globe, 1st Sess., 39th Congress, p. 527.

In replying to the objections urged by Mr. Hendricks to the bill even as amended, Senator Trumbull said:

"Does the Senator from Indiana want the wild roaming Indians, not taxed, not subject to our authority, to be citizens of the United States—persons that are not to be counted in our government? If he does not, let him not object to this amendment that brings in *even* [only] *the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen.*" Ibid. 528.

The entire debate shows, with singular clearness, indeed, with absolute certainty, that no Senator who participated in it, whether in favor of or in opposition to the measure, doubted that the bill, as passed, admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations, and became residents of one of the States or Territories, within the full jurisdiction of the United States. It was so interpreted by President Johnson, who, in his veto message, said:

"By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, *Indians subject to taxation*, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States."

It would seem manifest, from this brief review of the history of the act of 1866, that one purpose of that legislation was to confer national citizenship upon a part of the Indian race in this country—such of them, at least, as resided in one of the States or Territories, and were subject to taxation and other public burdens. And it is to be observed that, whoever was included within the terms of the grant, contained in that act, became citizens of the United States, without any record of

their names being made. The citizenship so conferred was made to depend wholly upon the existence of the facts which the statute declared to be a condition precedent to the grant taking effect.

At the same session of the Congress which passed the act of 1866, the Fourteenth Amendment was approved and submitted to the States for adoption. Those who sustained the former urged the adoption of the latter. An examination of the debates in Congress, pending the consideration of that amendment, will show that there was no purpose, on the part of those who framed it or of those who sustained it by their votes, to abandon the policy inaugurated by the act of 1866, of admitting to national citizenship such Indians as were separated from their tribes, and were residents of one of the States or of one of the Territories, outside of any reservation or territory set apart for the exclusive use and occupancy of Indian tribes.

Prior to the adoption of the Fourteenth Amendment numerous statutes were passed with reference to particular bodies of Indians, under which all the individual members of such bodies, upon the dissolution of their tribal relations or upon the division of their lands derived from the government, became or were entitled to become, citizens of the United States by force alone of the statute, without observing any of the forms required by the naturalization laws in the case of a foreigner becoming a citizen of the United States. Such was the statute of March 3, 1839, 5 Stat. 349, relating to the Brothertown Indians, in the then Territory of Wisconsin. Congress consented that the lands reserved for their use might be partitioned among the individuals composing that tribe. The act required the partition to be evidenced by a report and map to be filed with the Secretary of the Interior, by whom it should be transmitted to the President; whereupon, the act proceeded, "the said Brothertown Indians, and each and every of them, shall then be deemed to be, and, from that time forth, are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens," &c. Similar legislation was enacted with

reference to the Stockbridge Indians. 5 Stat. 646–7. Legislation of this character has an important bearing upon the present question, for it shows that, prior to the adoption of the Fourteenth Amendment it had often been the policy of Congress to admit persons of the Indian race to citizenship upon their ceasing to have tribal relations, and without the slightest reference to the fact that they were born in tribal relations. It shows also that the citizenship thus granted was not, in every instance, required to be evidenced by the record of a court. If it be said that the statutes, prior to 1866, providing for the admission of Indians to citizenship, required, in their execution, that a record be made of the names of those who thus acquired citizenship, our answer is, that it was entirely competent for Congress to dispense, as it did in the act of 1866, with any such record being made in a court or in any department of the government. And certainly it must be conceded that, except in cases of persons "naturalized in the United States" (which phrase refers only to those who are embraced by the naturalization laws and not to Indians), the Fourteenth Amendment does not require the citizenship granted by it to be evidenced by the record of any court, or of any department of the government. Such citizenship passes to the person, of whatever race, who is embraced by its provisions, leaving the fact of citizenship to be determined, when it shall become necessary to do so in the course of legal inquiry, in the same way that questions as to one's nativity, domicile, or residence are determined.

If it be also said that, since the adoption of the Fourteenth Amendment, Congress has enacted statutes providing for the citizenship of Indians, our answer is, that those statutes had reference to tribes, the members of which could not, while they continued in tribal relations, acquire the citizenship granted by the Amendment. Those statutes did not deal with individual Indians who had severed their tribal connections and were residents within the States of the Union, under the complete jurisdiction of the United States.

There is nothing in the history of the adoption of the Fourteenth Amendment which, in our opinion, justifies the conclu-

sion that only those Indians are included in its grant of national citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States. As already stated, according to the doctrines of the court, in this case—if we do not wholly misapprehend the effect of its decision—the plaintiff, if born while his parents were members of an Indian tribe, would not be embraced by the amendment, even had he been, *at the time it was adopted*, a permanent resident of one of the States, subject to taxation, and, in fact, paying property and personal taxes, to the full extent required of the white race in the same State.

When the Fourteenth Amendment was pending in the Senate of the United States, Mr. Doolittle moved to insert after the words "subject to the jurisdiction thereof," the words "excluding Indians not taxed." His avowed object in so amending the measure was to exclude, beyond all question, from the proposed grant of citizenship, tribal Indians who—since they were, in a sense, subject to the jurisdiction of the United States—might be regarded as embraced in the grant. The proposition was opposed by Mr. Trumbull and other friends of the proposed constitutional amendment, upon the ground that the words "Indians not taxed" might be misconstrued, and, also, because those words were unnecessary, in that the phrase "subject to the jurisdiction thereof" embraced only those who were subject to the complete jurisdiction of the United States, which could not be properly said of Indians in tribal relations. But it was distinctly announced by the friends of the measure that they intended to include in the grant of national citizenship Indians who were within the jurisdiction of the States, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States. Said Mr. Trumbull: "It is only those who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens." Congress. Globe, Pt. 4, 1st. Sess., 39th Cong., pp. 2890 to 2893. Alluding to the phrase "Indians not taxed," he remarked that the language of the proposed constitutional amendment was

better than that of the act of 1866 passed at the same session. He observed:

"There is a difficulty about the words 'Indians not taxed.' Perhaps one of the reasons why I think so is because of the persistency with which the Senator from Indiana himself insisted that the phrase 'Indians not taxed,' the very words which the Senator from Wisconsin wishes to insert here, would exclude everybody that did not pay a tax; that that was the meaning of it; we must take it literally. The Senator from Maryland did not agree to that nor did I, but, if the Senator from Indiana was right, it would receive a construction which, I am sure, the Senator from Wisconsin would not be for, for if these Indians come within our limits and within our jurisdiction and are civilized, he would just as soon make a citizen of a poor Indian as of the rich Indian." Ibid. 2894.

A careful examination of all that was said by Senators and Representatives, pending the consideration by Congress of the Fourteenth Amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that in the form in which it was approved by Congress it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the States or Territories of the Union. This fact is, we think, entitled to great weight in determining the meaning and scope of the amendment. *Lithographic Co.* v. *Sarony*, 111 U. S. 57.

In this connection we refer to an elaborate report made by Mr. Carpenter, to the Senate of the United States, in behalf of its judiciary committee, on the 14th of December, 1870. The report was made in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country. The report says: "For these reasons your committee do not hesitate to say that the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the

Fourteenth Amendment, 'subject to the jurisdiction' of the United States; and, therefore, that *such* Indians have not become citizens of the United States by virtue of that amendment; and, if your committee are correct in this conclusion, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment." The report closes with this significant language: "It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or nations only, and that, *when the members of any Indian tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States.*"

The question before us has been examined by a writer upon constitutional law whose views are entitled to great respect. Judge Cooley, referring to the definition of national citizenship as contained in the Fourteenth Amendment, says:

"By the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in this country, more or less permanent, for business, instruction, or pleasure, are not citizens. Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either State or Territorial, are extended, they are protected by, and, at the same time, held amenable to, those laws in all their intercourse with the body politic, and with the individuals composing it; but they are also, as a quasi-foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are 'subject to the jurisdiction' of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights, or, on the other

hand, subjected to the full responsibilities of American citizens. It would not, for a moment, be contended that such was the effect of this amendment.

"When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and as his case is then within the terms of this amendment, it would seem that his right to protection, in person, property and privilege, must be as complete as the allegiance to the government to which he must then be held; as complete, in short, as that of any other native born inhabitant." 2 Story's Const., Cooley's Edi., § 1933, p. 654.

To the same effect are *Ex parte Kenyon*, 5 Dillon, 390; *Ex parte Reynolds*, Ib. 307; *United States* v. *Crook*, Ib. 454; *United States* v. *Elm*, Dist. Ct. U. S., Northern District of New York, 23 Int. Rev. Rec. 419.

It seems to us that the Fourteenth Amendment, in so far as it was intended to confer national citizenship upon persons of the Indian race, is robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States. There were, in some of our States and Territories at the time the amendment was submitted by Congress, many Indians who had finally left their tribes and come within the complete jurisdiction of the United States. They were as fully prepared for citizenship as were or are vast numbers of the white and colored races in the same localities. Is it conceivable that the statesmen who framed, the Congress which submitted, and the people who adopted that amendment, intended to confer citizenship, national and State, upon the entire population in this country of African descent (the larger part of which was shortly before held in slavery), and by the same constitutional provision to exclude from such citizenship Indians

who had never been in slavery, and who, by becoming *bona fide* residents of States and Territories within the complete jurisdiction of the United States, had evinced a purpose to abandon their former mode of life and become a part of the People of the United States? If this question be answered in the negative, as we think it must be, then we are justified in withholding our assent to the doctrine which excludes the plaintiff from the body of citizens of the United States, upon the ground that his parents were, when he was born, members of an Indian tribe. For, if he can be excluded upon any such ground, it must necessarily follow that the Fourteenth Amendment did not grant citizenship even to Indians who, although born in tribal relations, were, at its adoption, severed from their tribes, and subject to the complete jurisdiction, as well of the United States as of the State or Territory in which they resided.

Our brethren, it seems to us, construe the Fourteenth Amendment as if it read: "All persons *born subject* to the jurisdiction of, or naturalized in, the United States, are citizens of the United States and of the State in which they reside;" whereas the amendment, as it is, implies in respect of persons born in this country, that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States. This would not include the children, born in this country, of a foreign minister, for the reason that, under the fiction of extra-territoriality as recognized by international law, such minister, "though actually in a foreign country, is considered still to remain within the territory of his own State," and, consequently, he continues "subject to the laws of his own country, both with respect to his personal status, and his rights of property; and his children, though born in a foreign country, are considered as natives." Halleck's International Law, ch. 10, § 12. Nor was plaintiff born without the jurisdiction of the United States in the same sense that the subject of a foreign State, born within the territory of that State, may be said to have been born without the jurisdiction of our government. For according to the decision in *Cherokee*

Nation v. *Georgia*, 5 Pet. 17, the tribe, of which the parents of plaintiff were members, was not "a foreign State, in the sense of the Constitution," but a domestic dependent people, 'in a state of pupilage," and "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered an invasion of our territory, and an act of hostility." They occupied territory, which the court in that case said, composed "a part of the United States," the title to which this nation asserted independent of their will. "In all our intercourse with foreign nations," said Chief Justice Marshall, in the same case, "in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our citizens. . . . They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their Great Father." And again, in *United States* v. *Rogers*, 4 How. 572, this court, speaking by Chief Justice Taney, said that it was "too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority." *The Cherokee Tobacco*, 11 Wall. 616.

Born, therefore, in the territory under the dominion, and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the States, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race. If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of govern-

ment, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

ADAMS COUNTY *v.* BURLINGTON & MISSOURI RAILROAD CO.

IN ERROR TO THE SUPREME COURT OF IOWA.

Argued October 22, 1884.—Decided November 3, 1884.

When a record shows that two questions are presented by the pleadings, one Federal and one non-Federal, and that the judgment below rested upon a decision of the non-Federal question, this court has no jurisdiction to review that judgment.

Suit in equity. The facts which make the case are stated in the opinion of the court.

Mr. George G. Wright and *Mr. F. M. Davis* argued for plaintiff in error.

Mr. T. M. Stuart, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson*, for defendants in error, submitted on their briefs.

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

This is a suit in equity brought by Adams County, Iowa, the plaintiff in error, on the 23d of December, 1869, against the Burlington and Missouri River Railroad Company, in a State court of Iowa, to quiet its title to sixty-six forty-acre lots of land. The county asserts title under the swamp-land act of September 28, 1850, 9 Stat. 519, ch. 84, and the railroad company under the Iowa land-grant act of May 15, 1856, 11 Stat. 9, ch. 28. The company, in its answer, denied the title of the county, on the ground that the lands were not swamp lands within the meaning of the swamp-land act, and took issue on every material averment of fact in the bill to support a title under that act. It then set up its own title under the land-grant act.

The petition averred a selection of the lands in dispute, as

swamp lands, by Walter Trippett, county surveyor of the county, under the authority of the Secretary of the Interior and Commissioner of the General Land Office, as well as the Governor and Legislature of Iowa, and the report thereof, in due form, to the Commissioner of the General Land Office, on the 30th of September, 1854. On account of this selection and report, it was claimed that the right of the State to a patent for the lands selected was perfected by the act of March 3, 1857, ch. 117, 11 Stat. 251. The railroad company filed an answer in the nature of a cross-bill asking for affirmative relief on the following facts:

"Petitioner further states that on the 25th day of October, 1861, the claim or right of said plaintiff to said lands under and by virtue of said pretended selection of said Trippett was submitted to the Commissioner of the General Land Office for final adjudication, and defendant appeared before said Commissioner and resisted the claims of said plaintiff to said lands, and asserted its rights thereto as lands granted to the State of Iowa for railroad purposes, and said Commissioner, after full and careful examination of plaintiff's claim, rejected the same as fraudulent and unfounded, and afterwards, on the 25th of October, 1862, said Commissioner certified and conveyed said lands to the State of Iowa for railroad purposes, under and in pursuance of act of Congress of date of May 15th, 1856, . . . and that on the —— day of ———— the said State certified and conveyed the same to defendant in pursuance of the said act of the Legislature of the said State of date of ————, 1856. . . . Defendant here avers the fact to be that the said plaintiff, well knowing that her claims to said lands were fraudulent and unfounded, did, upon the said decision of the said Commissioner against her, voluntarily abandon all claim, right, or interest in said lands, and has, since the date of such decision and up to the time of the commencement of this suit, recognized and treated defendant as the owner of said lands; that the said County of Adams, since the 25th day of October, 1861, has, by numerous and repeated acts, not only abandoned all claims to said lands, but has recognized, treated, and acknowledged the same to belong to defendant; that since the

date of said decision said county has regularly each year (up to and including the year 1871) listed and assessed said lands as the land of the defendant, and has, since the date aforesaid, regularly levied and collected taxes thereon from defendant.

"That the taxes thus levied and collected on said lands from defendant since the 25th day of October, 1861, would, with the legal interest thereon, amount to about ten thousand dollars. That prior to the 25th of October, 1861, the county had assumed to contract portions of said land to certain individuals under the pre-emption laws, and some of said pre-emptors had taken possession of said land and made valuable improvements thereon, but that plaintiff, after that date, ceased to take any further notice or control of said land, or attempt in any manner to fulfil their said agreement with said pre-emptors; and relying upon their title to said lands, and having every reason to believe, from the acts and conduct of the plaintiff, that she had acquiesced in the decision of said Commissioner, and abandoned all claim to said lands, defendant contracted with said pre-emptors, and with the knowledge of the plaintiff, and without any objections being made by said plaintiff, defendant sold and conveyed by warranty deed parcels of said land aforesaid, and defendant afterwards, and before the commencement of this suit, sold and conveyed by warranty deed these portions of said land to different persons, many of whom are now, and for the last six years have been, in the actual possession of the same, and have made valuable improvements thereon.

"That on the 17th day of June, 1869, the said plaintiff, for the purpose of inducing defendant to bring said lands into market, made and entered into a written contract, whereby she expressly recognized defendant's ownership of said lands, and agreed, in consideration of defendant's bringing said lands into market and selling the same to settlers, to remit a portion of the taxes that she had levied thereon, and defendant then and there paid to said county the sum of ten thousand dollars as taxes on certain lands, including the land in controversy."

The prayer was "that plaintiff's bill may be dismissed, and that defendant have and obtain a decree and judgment quieting their title to said lands, and for costs of this case;" and, if the

title of the defendant was not sustained, that there might be a judgment in favor of the defendant and against the county for the taxes that have been paid on the land.

Under these pleadings testimony was taken, and the cause heard in the court of original jurisdiction, where, on the 8th of May, 1878, a decree was rendered dismissing the plaintiff's bill, and "finding that the allegations of defendant's cross-bill are true, and that the defendant is entitled to the relief prayed for; that the lands in controversy . . . were duly certified to the defendant as land inuring to it, as alleged in the cross-bill; that the defendant became thereby the legal owner of said lands, as alleged in the cross-bill; and that plaintiff has, since 1862, recognized and treated said defendant as the owner of said land, as alleged in said cross-bill; and plaintiff is now, by such acts and conduct, estopped from claiming the same or denying the defendant's title thereto." Upon this finding the decree established the title of the company and quieted it as against the claim of the county.

From this decree an appeal was taken to the Supreme Court of the State, where, on the 24th of October, 1879, it was affirmed. Thereupon the county presented to the Chief Justice of the Supreme Court a petition for the allowance of a writ of error to this court. In this petition it was stated that "in the pleadings, record, judgment and decree . . . there was drawn in question the rights" of the county under the swamp-land act, and the act of March 3, 1857, as well as the construction of the acts making the railroad grant, and that the decision was against the right claimed by the county. In his certificate of the allowance of the writ the Chief Justice stated that he found from the record that the "facts stated in the petition are true."

The case was several times considered by the Supreme Court before the final judgment of affirmance was rendered, and the record contains four opinions, filed at different times in the course of the proceeding, from which it appears, in the most positive manner, that the decision of the cause in favor of the company was placed entirely on the ground of estoppel, as set up in the cross-bill. The original title of the county is nowhere, in any of the opinions, disputed or denied.

A motion is made to dismiss the writ to this court for want of jurisdiction, on the ground that no federal question is involved.

To give us jurisdiction of a writ of error for the review of the judgment of a State court, it must appear affirmatively, not only that a federal question was raised and presented for decision to the highest court of the State having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Chouteau* v. *Gibson*, 111 U. S. 200. This record shows that there were two questions presented by the pleadings, to wit:

1. Whether the county acquired a title in equity to the lands in dispute under the operation of the swamp-land act, supplemented as it was by the act of March 3, 1857; and,

2. Whether, if it did, it was estopped by its subsequent acts from setting up that title as against the railroad company.

It may be conceded that the first of these questions was federal in its character, but we are clearly of opinion the second was not. A consideration of no act of Congress was involved in its decision. There was nothing in the swamp-land grant to prevent the county from surrendering the property to the railroad company, if that was thought best. Under this defence the validity of the original title was not disputed. The claim was that, in legal effect, that title had been ceded to the railroad company, and that the county was in no condition to demand it back. There was no dispute about the federal right itself, but about the consequences of what had been done by the parties in respect to it, after the title had passed in equity from the United States to the county.

To our minds, for the purposes of the present question, the case is, in all respects, the same as it would be if the dispute had been about the effect of an instrument intended as a conveyance of the property from the county to the company. The controversy is not as to the right to convey, but as to the effect of what has been done to make a conveyance. That depends not on federal, but on State law.

It is contended, however, that inasmuch as the alleged com-

promise between the county and the company included, among other things, the claim of the county for taxes levied on the lands, the right to tax the lands before a patent was issued for them by the United States, must have been passed upon by the court below in the decision which was rendered. Clearly this is not necessarily so. The company claims nothing under the taxation. Its rights against the county do not depend on the validity of the taxes. The right to tax was one of the matters in dispute between the county and the company, and that was compromised with the rest. The effect of the compromise upon the title of the county would be the same whether the tax was properly levied or not. It follows, therefore, that the decision of the court below on this branch of the case did not involve the question of the validity of the title set up by the county under laws of the United States.

This brings us to the inquiry whether it appears sufficiently that the case was disposed of below on this defence. If it does, the motion to dismiss must be granted, and, having no jurisdiction, we cannot pass on the correctness of that decision.

The record discloses that this separate and distinct defence was made, and that it in no way depended on the validity or invalidity of the original title of the county. In our opinion it is clearly to be inferred from the decree of the court of original jurisdiction, which was affirmed in the Supreme Court, that the decision in favor of the company was placed entirely on that ground. So far as the original bill of the county is concerned, the decree finds in favor of the company and dismisses the bill. Then, as to the cross-bill, it finds the legal title to be in the company, and that the county is estopped from claiming the lands or denying the company's title thereto. This, of itself, implies that there was, in fact, no decision against any right, title, privilege or immunity claimed under the Constitution or laws of the United States, and that the decree rested alone on the defence of estoppel, which was broad enough to control the rights of the parties without disposing of the federal question which it was attempted to raise. In other words, it was adjudged by the State court that the title of the company must prevail in this suit because the county was precluded by its

conduct from insisting to the contrary. But if we look to the opinions, which, under the laws of Iowa, must be filed before a judgment is rendered, and which, when such is the law, may certainly be looked at to aid in construing doubtful expressions in a decree, it is shown unmistakably that the decision was put on that ground alone. *Gross* v. *U. S. Mortgage Co.*, 108 U. S. 486–7.

In the petition which was presented to the chief justice of the court for the allowance of a writ of error, it was stated "that in the pleadings, record, and judgment and decree there were drawn in question" the rights of the county under the swamp-land acts, as well as the construction of the land-grant acts, and that the judgment was against these rights. The chief justice, in his allowance of the writ, certified that he found the statements in the petition to be true, but, if this certificate is to have any effect at all upon this question, it certainly cannot be taken as conclusive when the same chief justice in an opinion on file in the case places the decision entirely on the ground of estoppel.

It follows that we have no jurisdiction, and

The motion to dismiss is granted.

NIX *v.* ALLEN.

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

Submitted October 17, 1884.—Decided November 3, 1884.

The exercise of a pre-emption right under the act of September 4, 1841, 5 Stat. 453, by an entry of one-quarter of a quarter section of land, was an abandonment of the right to enter under that act for the remaining three-quarters of that quarter section.

A person who, on the 8th March, 1870, had a title by patent to a quarter of a quarter section of land and lived in a house erected upon it, and cultivated the remaining three-quarters of the quarter section without title, did not reside upon the three-quarters so cultivated, within the meaning of ch. 289, Acts of Arkansas, 1871, which gave persons then residing upon lands belonging to or claimed by the Cairo and Fulton Railroad Company, or its branches, the right to purchase them not to exceed 160 acres.

Opinion of the Court.

The facts which make the case are stated in the opinion of the court.

Mr. A. H. Garland for appellant.

Mr. J. H. McGowan (*Mr. John F. Dillon* was with him) for appellees.

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

This is a suit in equity, brought by the appellant, in the Circuit Court of the United States for the Eastern District of Arkansas on the 2d day of May, 1879, to enjoin the execution of a judgment in ejectment recovered against him by the appellee at the then last April term of that court, for the possession of the west half and the southeast quarter of the northeast quarter of sec. 30, T. 15 S., R. 28 E., in Arkansas, and to obtain a conveyance of the legal title to the property on the ground that Allen holds it in trust for him. The case shows that in 1846 Sarah Nix, the mother of John B. Nix, then a minor residing with her, took possession of the whole of the northeast quarter of the section. Mrs. Nix had all the legal qualifications of a pre-emptor, and while in possession built a house on the northeast quarter of the quarter section, and cleared and cultivated a portion of the land on that and on each of the other quarters of the quarter. The principal part of the clearing and cultivation, however, was on the quarter where the house stood.

On the 9th of February, 1853, Congress passed an act granting lands to the State of Arkansas to aid in building a railroad from a point on the Mississippi opposite the mouth of the Ohio to the Texas boundary line near Fulton, in Arkansas. 10 Stat. 155. The lands now in question lie within the limits of that grant, and were withdrawn from entry on the 19th of May, 1853, but the granting act contained the usual reservation in favor of pre-emption settlers.

On the 22d of April, 1853, Mrs. Nix made and filed her declaratory statement and proof for the pre-emption of the whole of the northeast quarter of the section. In her statement she fixed the first of April, 1853, as the date of her settlement on

the lands. At the time of filing the statement and proof she made no payment.

On the 27th of March, 1854, Congress passed the following "act for the relief of settlers on lands reserved for railroad purposes." 10 Stat. 269.

"That every settler on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them: *Provided*, They shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day that may be fixed by the President's proclamation for the restoration of said lands to market."

On the 31st of March, 1854, Mrs. Nix made a pre-emption cash entry of the N. E. ¼ of the N. E. ¼ of the section, and a patent for this tract was issued in her name under that entry on the 10th of December, 1874. In her affidavit to support the entry she fixed the first of April, 1853, as the date of her settlement, the same as in her original declaratory statement. It is now claimed that this entry was not her own act, but the testimony shows unmistakably that it was. She was feeble at the time and unable to go to the land office herself, but the business was done for her by Benjamin Nix, her nephew and the guardian of John B. Nix, who furnished the money to make the payment from funds in his hands as guardian. Mrs. Nix had no means of her own, and the fifty dollars which was required to pay for the forty acres was all that John B. had. Neither the mother nor the son were able to buy more than was then entered. On the 28th of September, 1858, Mrs. Nix conveyed the land she entered to John B., who arrived at full age during the year 1857.

Mrs. Nix and John B. Nix lived together in the house on the N. E. ¼ of the quarter section until her death in 1863, and John B. remained there down to the time he filed the bill in this case. While occupying the northeast quarter of the quarter they have used and cultivated some part of the other quarters,

but the actual residence, both of the mother and son, has always been on the part that was entered by and patented to the mother. Mrs. Nix left other heirs besides John B. Nix, some of whom were living when this suit was begun.

On the 16th of January, 1855, the State of Arkansas transferred the grant of Congress, so far as it related to the lands in dispute, to the Cairo & Fulton Railroad Company, "subject to all the conditions, limitations and restrictions contained in the act of Congress aforesaid, and in the act of Congress entitled 'An Act for the relief of settlers on lands reserved for railroad purposes,' approved March 27th, 1854." The act by which this transfer was made contained the following provision:

"That citizens or heads of families, being settlers or occupants previous to the passage of this act, on the land herein transferred to the said Cairo & Fulton Railroad Company, shall each be entitled to a preference right of entry of any legal subdivision of land not exceeding one hundred and sixty acres, which shall be upon such legal subdivision as will include the residence of the said settler, which preference right shall be at the price of two dollars and fifty cents per acre, which preference right of entry shall exist from the passage of this act, and for three months after notice has been given for three successive weeks in a newspaper published in the city of Little Rock, that the said land is in market." Laws of Ark. 1854–5, 150, § 1.

This provision of the act of 1855 was repealed on the 26th of November, 1856, and the following enacted in its place:

"SEC. 2. Every person who, on the 9th day of February, 1853, occupied, by residence and cultivation thereon, any tract of land comprised in the grant made by virtue of, and under the provisions of such act of Congress of February 9th, 1853, may purchase from said Cairo & Fulton Railroad Company, at two dollars and fifty cents per acre, the legal subdivision of such land as shall include his residence and actual improvements, not to exceed one quarter section, by complying with the following conditions:

"SEC. 3. Such claimant shall, within three months after said lands are selected and confirmed to said company, and a list or

plat thereof filed in the recorder's office in the county in which such lands may lie, file with the Auditor of State his own affidavit, accompanied by the affidavits of two disinterested freeholders of his county, describing the land claimed by legal subdivisions, proving the fact of such occupancy, residence and cultivation upon such legal subdivision with the view to actual cultivation and settlement, before the day above specified, said company may, by giving reasonable notice to such claimant, appear before the auditor and controvert the facts set forth in such affidavits, and the auditor may swear witnesses, hear proof, and, for cause shown, set aside any such claims: *Provided*, That no such claim shall be set aside for misdescription, or error in form only, founded on mistake; but on affidavit showing such mistake, reasonable time may be given for the filing of corrected proof.

"SEC. 4. Said claimant shall after three months, or as soon thereafter as said company shall be in a condition to make title, pay to said company the consideration for said land as hereinbefore provided, whereupon he shall be entitled to receive from said company a deed for the same, but in case of failure to file said proof or pay said consideration money within the respective time specified, the right to make such purchase shall cease." Laws of Arkansas, 1856, 4.

On the 1st of February, 1859, another act was passed on the same subject, which contained this provision:

"SEC. 3. *Be it further enacted*, That every person who, on the 1st day of November, 1858, resided on or cultivated any improvement on any of the land comprised in the grant made by virtue of the act of Congress approved February 9th, 1853, may purchase from the said Cairo & Fulton Railroad Company, at two dollars and fifty cents per acre, one hundred and sixty acres, which may include the actual residence or the farm of such person, as he or she chooses to elect, by complying with the conditions prescribed by an act passed by the last General Assembly of this State, entitled 'An Act to amend an act to aid in the construction of the Cairo and Fulton Railroad,' approved January 16th, 1855, which act was approved November 26th, 1856: *And provided further*, That until such default

mentioned in said act, the owners of such improvements shall be entitled to use and occupy the same free of rent or charges." Laws of Arkansas, 1858–9, 62.

And, finally, on the 28th of March, 1871, the following was enacted:

SECTION 1. "That where any settler, who, on or before the eighth (8th) day of March, 1870, was residing and made improvements on the lands belonging or claimed by the Cairo and Fulton Railroad Company, or its branches, shall have the right to purchase the same, not to exceed one hundred and sixty acres, under the legal subdivision of said lands, and including the homestead and improvements of such settler, at not exceeding the rate of two dollars and fifty cents ($2.50) per acre, in preference to any and all other persons, from and after the passage of this act, and for three (3) months after said land has been advertised according to law."

SEC. 2. "That any person authorized to purchase land under the provisions of section one (1) of this act, tender to the authorized agent of said Cairo and Fulton Railroad Company, at the principal office of said company, or at the principal office of the branches of said Cairo and Fulton Railroad Company, and to the authorized agent thereof, the amount of the purchase money of said land and demand a title therefor or his preference right thereto shall be barred." Laws of Arkansas, 1871, 289, ch. 59.

On the 13th of July, 1857, the Commissioner of the General Land Office certified these lands with others to the Cairo & Fulton Railroad Company under its grant, and on the 18th of February, 1858, the company filed in the recorder's office of Lafayette County, which then embraced the lands in dispute, a list of all lands in that county "selected and confirmed to that company."

On the 15th of April, 1874, the land commissioner of the railroad company published in the Arkansas Daily Gazette a notice that the lands of the company between Little Rock and the Texas line would be sold at the office of the company on and after June 16, 1874, reserving, however, mineral lands and lands through which the road ran. The road went through

the northeast quarter of this section. The Gazette was a newspaper published at Little Rock, and designated by the governor of the State for the publication of official notices, and the advertisement was continued from the 15th of April to the 15th of June, 1874. The notice also called on all actual settlers who had not made application to purchase to do so before the day of sale. On the 28th of July, 1874, John B. Nix went to the land commissioner of the company and claimed the right to purchase the northeast quarter of the section at two dollars and a half an acre. He, at the same time, tendered four hundred dollars in payment of the purchase money, and demanded a conveyance. The commissioner would not admit his right to buy, and refused his tender.

On the 14th of May, 1875, the company sold and conveyed the lands in dispute, being the one hundred and twenty acres, to Thomas Allen, the appellee, and on the 23d of the same month he began a suit against Nix to recover possession.

On the 19th of June, 1878, while this suit was pending, John B. Nix made application to the land officers of the United States as heir-at-law of Sarah Nix, to purchase the whole northeast quarter under the pre-emption claim of his mother. At the same time he deposited with the register of the land office three hundred dollars "to pay out his mother's pre-emption." This application was refused.

Upon these facts the court below dismissed the bill, and this appeal was taken from a decree to that effect.

The claim of the appellant is, 1, that he has a complete equitable title to the lands under the acts of Congress as a pre-emptor; and, 2, that if this fails, the laws of the State gave him the right to purchase in preference to all others, and that he fully complied with all the requirements of those laws to complete and perfect his right of purchase before Allen, the appellee, got title. These will be considered in their order.

1. All the rights of pre-emption which the appellant sets up originated with his mother. In his application to enter the lands, made in 1878, he expressly bases his claim on her original settlement and his inheritance from her. He does not pretend that he made a settlement himself before the rights of

the railroad company accrued. In fact, he could not have made such a settlement, because he remained a minor until 1857, and the lands were withdrawn from market in 1853, on account of the railroad grant. Only persons over the age of twenty-one years could become pre-emption settlers. Such is the express provision of the pre-emption act. If, then, his mother, had she been alive, could not have made a pre-emption entry in 1878, he could not.

The settlement and claim of Mrs. Nix were made under the act of September 4, 1841, 5 Stat. 453, and in that statute it was expressly provided (sec. 10) that "no person shall be entitled to more than one pre-emptive right by virtue of this act." When, therefore, Mrs. Nix, on the 31st of March, 1854, made her pre-emption entry of the northeast quarter of the quarter section on which she settled, and as to which she filed her declaratory statement in 1853, she, in law, abandoned her settlement on the other three-quarters of the quarter section for the purposes of pre-emption, and surrendered all the pre-emption rights she ever had in them. This is clearly shown by the provision in sec. 13, "that before any person claiming the benefit of this act shall be allowed to enter such lands," he shall make oath "that he has never had the benefit of any right of pre-emption under this act." The right of pre-emption is the right to enter lands at the minimum price in preference to any other person, if all the requirements of the law are complied with. The prior settlement, declaratory statement and proof are not the pre-emption, but only the means of securing the right of pre-emption. By *entering* the forty acres in 1854, Mrs. Nix exhausted the one right of that kind which the law secured to her, and she could not claim another. She could have entered the whole one hundred and sixty acres at that time if she wished to, and had the money, but such an entry would have required two hundred dollars, and she had but fifty. The fifty would pay for forty acres, and so she bought that and gave up the rest. The law made no provision for entering a part of the quarter section at one time and saving a right to enter the remainder at another. The averment in the bill, therefore, that the payment of the fifty dollars at the time of the entry of the

forty acres was "intended as a part payment of the whole," cannot be true. The law permitted nothing of the kind.

The evident purpose of the act of March 27, 1854, was to aid pre-emptors. It gave the designated settlers the right of pre-emption, that is to say a preferred right to buy the lands on which they had settled under the pre-emption laws at the ordinary minimum price. If a settler had once had the benefit of those laws, this statute gave him no new right. He could not be a pre-emptor, because he could not take the necessary oath. Consequently, when Mrs. Nix, on the 31st of March, four days after the act of March 27 was approved, made her pre-emption entry of the forty acres, she exhausted all her rights under the act of 1854, as well as those under the act of 1841. It follows that the appellant has no right under the various acts of Congress which are relied on.

2. The Arkansas act of 1855, giving settlers and occupants a preference right of purchasing the lands thereby granted to the railroad company at two dollars and fifty cents an acre, was repealed by the act of November 26, 1856, before eitheir the appellant or his mother attempted to avail themselves of its provisions. The act of 1856 required claimants to file with the Auditor of State certain affidavits within three months after the lands were selected and confirmed to the company, and a list and plat thereof filed in the recorder's office of the county in which the lands were situate. The list and plat of these lands were filed in the proper recorder's office on the 13th of July, 1857. No affidavits, such as the act required, were ever filed by the appellant or his mother in the office of the Auditor of State, and, for this reason, in accordance with the express provisions of § 4, "the right to make such purchase" ceased as long ago as the year 1857. The act of 1859 did not inure to the benefit of the appellant or his mother for the same reason. The privileges of that act could only be secured "by complying with the conditions prescribed" in the act of 1856.

This reduces the claims of the appellant to such as he has under the act of 1871. That act grants the privilege of a preference purchaser only to a "settler who, on or before the 8th of March, 1870, was residing and made improvement on the lands

belonging to or claimed by the . . . railroad company," which he desired to buy. This appellant on the 8th of March, 1870, *resided* on the northeast quarter of the quarter section. That land the company neither owned nor claimed. It was entered and paid for by Mrs. Nix in 1854, and she deeded it to the appellant in 1858. His title to that part of the quarter section is not disputed, and his *residence* has always been there. He *cultivated* parts of the other quarters of the quarter on the 8th of March, 1870, but he did not *reside* upon them or either of them. Under the circumstances, his residence was, in law, confined to the land he owned. Seeing this difficulty, he applied for the purchase of the whole quarter section, basing his claim apparently on the original settlement and declaratory statement of his mother for the pre-emption of that tract. In this way he sought to connect his residence upon the N. E. $\frac{1}{4}$ with his occupation of the other quarters. That he cannot do, as by the entry of the N. E. $\frac{1}{4}$ his mother separated her residence from the rest of the quarter section, and he has done nothing since to change that condition of things. It follows that the appellant is not entitled to the privileges of the act of 1871, and his claim, both under the acts of Congress and those of the State, has failed. This makes it unnecessary to consider whether the act of 1871 is constitutional. Good or bad it is of no use to him. The same is true of the claim that the company has no title because at the time the grant was made the land in question was occupied by Mrs. Nix as a pre-emptor. The appellant can recover only on the strength of his own title. If he has no title, it is a matter of no importance how weak that of his adversary may be.

Decree affirmed.

MERSMAN *v.* WERGES & Another.

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

Argued October 17, 1884.—Decided November 3, 1884.

The addition of the signature of a surety to a promissory note, without the consent of the maker, does not discharge him.

A mortgage executed by husband and wife of her land, for the accommodation of a partnership of which the husband is a member, and as security for the payment of a negotiable promissory note made by the husband to his partner and indorsed by the partner for the same purpose, and to which note the partner, before negotiating it, adds the wife's name as a maker, without the consent or knowledge of herself or her husband, is not thereby avoided as against one who, in ignorance of the note having been so altered, lends money to the partnership upon the security of the note and mortgage.

Under the act of March 3, 1875, ch. 137, the Circuit Court has jurisdiction of a suit between citizens of different States to foreclose a mortgage made to secure the payment of a negotiable promissory note of which the plaintiff is indorsee, although the payee and mortgagee is a citizen of the same State with the defendant.

This is a bill in equity, filed in the Circuit Court of the United States for the District of Iowa by Joseph J. Mersman, a citizen of Missouri, against Caspar A. Werges and wife, citizens of Iowa, to foreclose a mortgage of her land in Iowa, executed on September 1, 1870, by the husband and wife to E. H. Krueger, likewise a citizen of Iowa, "to be void upon condition that the said Caspar A. Werges shall pay to the said E. H. Krueger the sum of six thousand dollars as follows, viz., one year from date, with ten per cent. interest thereon, according to the tenor and effect of his promissory note of even date herewith."

The bill originally set forth the note as signed by both husband and wife, but, after the coming in of the answer, was amended by leave of court so as to allege it to be the note of the husband only. The case was heard upon pleadings and proofs, by which it appeared to be as follows:

The husband and Krueger were members of a partnership engaged in carrying on a mill, Krueger being the active partner, and Werges and his wife living on a farm which belonged

to her. The plaintiff agreed with Krueger to lend to the husband, for the benefit of the partnership, $6,000 on the security of the farm; and the wife agreed, for the accommodation of the partnership, to execute a mortgage of the farm. The husband signed a note, payable to Krueger or order, and corresponding in terms with the mortgage; and the husband and wife executed the mortgage, and delivered the note and mortgage to Krueger. While they were in Krueger's hands, the name of the wife was subscribed to the note, under that of the husband, by Krueger or by his procurement, without the knowledge or consent of either husband or wife. Krueger indorsed the note, and delivered the note and mortgage to the plaintiff, who thereupon, not knowing that the wife had not herself signed the note, advanced the money to him for the partnership.

The Circuit Court held that the addition of the wife's name to the husband's note was a material alteration of the note, and made void the mortgage; and dismissed the bill. See 1 McCrary, 528. The plaintiff appealed.

Mr. C. H. Gatch for appellant.

Mr. Galusha Parsons for appellees.—The alteration in the note discharged both Werges and his wife from liability both on the note and on the mortgage. It changed the liability of Mrs. Werges from that of surety to original debtor. Any alteration of a written instrument will discharge a surety. *McMicken* v. *Webb*, 6 How. 292, 298; *Smith* v. *United States*, 2 Wall. 219; *Martin* v. *Thomas*, 24 How. 315; *Wood* v. *Steele*, 6 Wall. 80; *Adams* v. *Frye*, 3 Met. (Mass.) 103; *Laub* v. *Payne*, 46 Iowa, 550. The liability of a surety cannot be extended by implication beyond the terms of the contract. *Miller* v. *Stewart*, 9 Wheat. 680; *United States* v. *Boecker*, 21 Wall. 652, 657. Any alteration in a contract which destroys its identity and changes the evidence in respect to the transaction to which it relates will avoid it. *Davidson* v. *Cooper*, 13 M. & W. 343, 352; *Hall* v. *McHenry*, 19 Iowa, 521; *Wallace* v. *Jewell*, 21 Ohio St. 163; *Murray* v. *Graham*, 29 Iowa, 520;

Dickerman v. *Miner*, 43 Iowa, 508; *Hamilton* v. *Hooper*, 46 Iowa, 515; *Fay* v. *Smith*, 1 Allen, 477; *Draper* v. *Wood*, 112 Mass. 315. The note and mortgage are to be considered together in a suit for the foreclosure of the mortgage. *Kennedy* v. *Ross*, 25 Penn. St. 256. The jurisdiction of the Circuit Court attached only because of the negotiability of the note. That failing, the bill should have been dismissed.

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 decree of the Circuit Court cannot be sustained. The difference of opinion is not upon the facts of the case, but upon their legal effect.

A material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract, and substitutes a different agreement for that into which he entered. In the application of this rule, it is not only well settled that a material alteration of a promissory note by the payee or holder discharges the maker, even as against a subsequent innocent indorsee for value; but it has been adjudged by this court that a material alteration of a note, before its delivery to the payee, by one of two joint makers, without the consent of the other, makes it void as to him; and that any change which alters the defendant's contract, whether increasing or diminishing his liability, is material, and therefore the substitution of a later date, delaying the time of payment, is a material alteration. *Wood* v. *Steele*, 6 Wall. 80. See also *Angle* v. *Northwestern Insurance Co.* 92 U. S. 330; *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196, and cases there cited.

The present case is not one of a change in the terms of the contract, as to amount or time of payment, but simply of the effect of adding another signature, without otherwise altering or defacing the note. An erasure of the name of one of several obligors is a material alteration of the contract of the others, because it increases the amount which each of them may be held to contribute. *Martin* v. *Thomas*, 24 How. 315; *Smith* v. *United States*, 2 Wall. 219. And the addition of a new person

as a principal maker of a promissory note, rendering all the promisors apparently jointly and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker or makers, has been held in the courts of some of the States to be a material alteration. *Shipp* v. *Suggett*, 9 B. Monroe, 5; *Henry* v. *Coats*, 17 Indiana, 161; *Wallace* v. *Jewell*, 21 Ohio St. 163; *Hamilton* v. *Hooper*, 46 Iowa, 515. However that may be, yet where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker. *Montgomery Railroad* v. *Hurst*, 9 Alabama, 513, 518; *Stone* v. *White*, 8 Gray, 589; *McCaughey* v. *Smith*, 27 N. Y. 39; *Brownell* v. *Winnie*, 29 N. Y. 400; *Wallace* v. *Jewell*, 21 Ohio St. 163, 172; *Miller* v. *Finley*, 26 Michigan, 248.

The English cases afford no sufficient ground for a different conclusion. In the latest decision at law, indeed, Lord Campbell and Justices Erle, Wightman and Crompton held that the signing of a note by an additional surety, without the consent of the original makers, prevented the maintenance of an action on the note against them. *Gardner* v. *Walsh*, 5 El. & Bl. 83. But in an earlier decision, of perhaps equal weight, Lord Denman and Justices Littledale, Patteson and Coleridge held that in such a case the addition did not avoid the note, or prevent the original surety, on paying the note, from recovering of the principal maker the amount paid. *Catton* v. *Simpson*, 8 Ad. & El. 136; *S. C.* 3 Nev. & Per. 248. See also Gilbert on Evidence, 109. And in a later case, in the Court of Chancery, upon an appeal in bankruptcy, Lords Justices Knight Bruce and Turner held that the addition of a surety was not a material alteration of the original contract. *Ex parte Yates*, 2 DeG. & Jon. 191; *S. C.* 27 Law Journal, (N. S.), Bankr. 9.

The case at bar, being on the equity side of the court, is to

be dealt with according to the actual relation of the parties to the transaction, which was as follows: The note, though in form made by the husband to his partner, Krueger, and indorsed by Krueger, was without consideration as between them, and was in fact signed by both of them for the benefit of the partnership. The mortgage of the wife's land was executed and delivered by her and her husband to Krueger for the same purpose. The name of the wife was signed to the note by Krueger, or by his procurement, before it was negotiated for value. The plaintiff received the note and mortgage from Krueger, and advanced his money upon the security thereof, in good faith and in ignorance that the note had been altered. If the wife had herself signed the note, she would have been an accommodation maker, and, in equity at least, a surety for the other signers; and neither the liability of the husband as maker of the note, nor the effect of the mortgage executed by the wife, as well as by the husband, to secure the payment of that note, would have been materially altered by the addition of her signature. There appears to us, therefore, to be no reason why the plaintiff, as indorsee of the note, seeking no decree against the wife personally, should not enforce the note against the husband, and the mortgage against the land of the wife.

This suit, being between citizens of different States, and founded on a negotiable promissory note, the indorsement of which to the plaintiff carried with it as an incident, in equity, the mortgage made to secure its payment, was within the jurisdiction of the Circuit Court, under the act of March 3, 1875, ch. 137, although Krueger, the payee and mortgagee, could not have maintained a suit in that court. 18 Stat. 470; *Sheldon* v. *Sill*, 8 How. 441, 450; *Treadway* v. *Sanger*, 107 U. S. 323.

Decree reversed.

Statement of Facts.

HORBACH *v.* HILL.

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

Argued October 23, 1884.—Decided November 3, 1884.

Whether an agreement for a reconveyance of real estate, conveyed by deed in fee simple, on the repayment of the purchase money and the performance of other conditions, is a mortgage, is to be determined by the accompanying circumstances which explain the object of the agreement.

A creditor of a grantor of real estate, attacking the conveyance as made to defraud creditors, should show affirmatively that he was a creditor of the grantor when the alleged fraudulent conveyance was made.

This is a suit to set aside a sale of certain real property in Omaha, Nebraska, to John A. Horbach, the defendant in the court below, the appellant here, by one John A. Parker, Senior, on the ground that it was made to hinder, delay, and defraud the latter's creditors, of whom the complainant claims to be one. The material facts, briefly stated, are as follows: In March, 1871, one John A. Parker, Jr., died at Omaha, intestate, possessed of certain unimproved real property in that city. He also held a deed of seventeen other lots there, which he had purchased of his father in September, 1870. At the time of the purchase he executed to his father an agreement stating that on a final accounting of all business between them, including the purchase of the seventeen lots, he found himself indebted to his father in $8,734, to be paid to him, or to certain creditors to be named, within one year, and agreeing, in case he should be relieved from two certain bonds of $3,000 and upwards, to reconvey the lots to his father for a like consideration, and the expenses incurred on them, the amount to be credited on his indebtedness. He left, at his death, no personal estate of any value, and his debts were considerable, among others one of over $1,000 to Horbach. His father, who was his sole heir-at-law and his largest creditor, resided in Virginia, and upon his son's death went to Omaha to attend his funeral. Whilst there, on the 20th of March, 1871, he sold his interest in the estate of his son, and his interest under the

agreement to reconvey the seventeen lots, to Horbach for $6,000, and executed to him a deed of the lots standing in the name of the deceased, and assigned to him the agreement. He also sold and assigned to him the claim against the estate mentioned in the agreement, Horbach agreeing for the claim to pay the debts in Omaha due to himself and others, amounting to a sum not exceeding $2,200.

In May, 1871, Horbach, as a creditor of the estate of the deceased, was appointed its administrator and qualified. There being no personal effects with which to pay the debts, the real property of the deceased, including the seventeen lots, was sold at auction under orders of the proper court, and was purchased by different parties, one of whom named Kennedy bought the seventeen lots. The sales were reported to the court and confirmed. The proceeds were applied in due course of administration; and in November, 1874, the administrator was exonerated by the court from liability and his bond cancelled. Subsequently Horbach purchased at advanced prices portions of the property thus sold, among others fifteen of the seventeen lots.

In December, 1877, Edward B. Hill, the complainant in this suit, recovered in the District Court of Nebraska a judgment by default against John A. Parker, Sr., for $3,244 and costs, purporting to be owing upon the promissory note described in the petition of the plaintiff. This petition is not in the record, and therefore it does not appear whether Parker was liable as maker or as indorser, or when the note was made or when it matured. There was no personal service of process upon him, nor did he enter his appearance in the case; the service was by publication. The judgment, reciting that it appearing to the court that the attachment proceedings therein were regular and in conformity to law, ordered the sheriff to sell the real estate attached. What that real estate was does not appear, and that it included the seventeen lots, can only be inferred from the fact that under the judgment and order they were sold with other real property and conveyed to the complainant. In August, 1878, this suit was brought by him, claiming title to the premises thus purchased, and alleging that the conveyance to Hor-

bach by John A. Parker, Sr., in March, 1871, was made to hinder, delay, and defraud the latter's creditors; that the administration was taken under an agreement to manage and manipulate the estate for his benefit, and that the sales by the administrator were without consideration and fictitious, being in fact made for himself. It therefore prayed that the conveyance by Parker, Sr., to Horbach be adjudged void, and that the complainant be decreed to be the owner in fee of the property. The averments were traversed by the answer, which also set up the agreement to reconvey the seventeen lots. A replication being filed, testimony was taken. The case was then referred to a master "to report on the law and facts as shown by the pleadings and proofs." He held and reported that, except as to the seventeen lots, the purchases at the administrator's sale were valid; that, as to them, the complainant acquired title under his attachment proceedings; that the deceased, as to them, was mortgagee; that the deed of Parker, Sr., to Horbach was made when he was largely in debt to the complainant and others, and for the purpose of hindering, delaying, and defrauding his creditors, and that Horbach knew this; that the purchase of those lots by Kennedy at the administrator's sale was in good faith, but with notice that the title of the deceased was that of mortgagee only, and that hence no title was acquired; and that no title passed through Kennedy to Horbach because of like notice, and therefore the complainant was entitled to a decree to quiet his title. Exceptions were taken to the report, but they were overruled, and it was confirmed and a decree entered adjudging that the seventeen lots were, at the commencement of the suit, the property of the complainant, and directing the defendant to convey the same to him, and, in default thereof, that the decree should stand in lieu of such conveyance, and that the defendant should be barred of all interest in the property, and deliver possession thereof to the complainant. From this decree this appeal is brought.

Mr. Walter D. Davidge for appellant.—I. This is a bill to quiet title, not a creditor's bill. The decree is for conveyance and possession, not for sale. And though the remedy by bill

Argument for Appellant.

to quiet title has been enlarged by statute in Nebraska, *Holland* v. *Challen*, 110 U. S. 16, yet it is there held that complainant must show title, and a party not in possession must possess the legal title in order to maintain the action. *State* v. *Sioux City & Pacific Railroad*, 7 Neb. 357.—II. The bill being for actual fraud, the complainant was not entitled to a decree, even if he had averred and proved facts which, independently of actual fraud, might have entitled him to relief under some other head of equity. *Eyre* v. *Potter*, 15 How. 42, 56; *Moore* v. *Green*, 19 How. 69; *Price* v. *Barrington*, 3 Macn. & Gord. 486. And the bill could not be amended. *Shields* v. *Barrow*, 17 How. 130.—III. The record discloses nothing to show that appellee was an existing creditor, nor what was the financial condition of the grantor. It should have done so. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Mattingly* v. *Nye*, 8 Wall. 370; *Smith* v. *Vodges*, 92 U. S. 183.—IV. The conveyance to the decedent was absolute. The agreement to reconvey was not necessarily a mortgage. *Conway* v. *Alexander*, 7 Cranch, 218, 236; *Russell* v. *Southard*, 12 How. 139. A sale under a judgment in attachment in Nebraska would not pass a mere personal contract relating to lands. General Stat. Neb. 1873, §§ 198, 228. Such a sale would not even convey a trust by operation of law. *Trask* v. *Green*, 9 Mich. 358.—V. Assuming the seventeen lots were attached and sold as alleged, yet as the only jurisdiction acquired by the State court was by publication, the purchaser only succeeded to the legal or equitable title of the debtor. The purchaser, in such case, could only claim through the debtor, and not adversely or by paramount title; and the necessary predicate of overreaching and annulling the previous conveyance would not exist. Such conveyance, binding upon parties and privies, would be equally binding upon such a purchaser. If he could move at all to set aside the conveyance, he could only move as a creditor, and the judgment in attachment would be no evidence of debt. The judgment and sale in attachment would not enable the purchaser to maintain the present suit. *Pennoyer* v. *Neff*, 95 U. S. 714, and cases reviewed; *Hart* v. *Sansom*, 110 U. S. 151.

No appearance for appellee.

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

There are several fatal objections to the decree in this case. In the first place, there is no evidence affecting the good faith of the sale and conveyance from Parker, Senior, to the defendant, in March, 1871. It was known that the deceased owed several debts, and as there were no personal effects, that the real property was liable to be sold for their payment. Under these circumstances, the price paid by the defendant is not shown to be inadequate. And there is no evidence that he had any knowledge of the debt of Parker, Senior, to the complainant. So, whatever may be suggested or surmised as to possible fraudulent intentions of Parker, Senior, in the conveyance, its validity cannot be questioned in the absence of any evidence of participation in them by the defendant. The fraud which will vitiate a sale must be mutual, that is, must be intended by both parties, or by one with knowledge of the other's purpose, and thus acquiesced in and furthered. Here all such participation was wanting on the part of the purchaser.

In the second place, if the conveyance by the father to the defendant be treated as invalid, the title to the lots passed by the administrator's sale, and the subsequent deed in pursuance of it. The master found that the purchase by Kennedy at that sale was in good faith, but was void because of his knowledge that the property was held by the deceased as mortgagee, and that the defendant acquired no title from Kennedy because of like notice. But the conclusion that the conveyance by the father to the son was a mortgage was a mere assumption, not warranted by the accompanying agreement. There was no obligation resting on the father to make the payments mentioned in that agreement and claim a reconveyance. He had an option to do so, and then he was not merely to repay the consideration given by the son, but in addition thereto he was to obtain a release of two bonds by him exceeding $3,000 in amount. Upon such release the vendee agreed to reconvey the lots for the original consideration and the expenses incurred on them. There were no extraneous facts shown to explain the object of executing the papers, such as a previous indebtedness

of the father, or a liability on his part to secure the son against the bonds mentioned. Nor did it appear to whom the bonds were issued, nor for what consideration. Nor was it averred that the transaction was in any respect different from what the instruments imported—a sale to the son. The agreement can therefore be considered only as an independent contract to reconvey the lots on certain conditions. The assumption that the conveyance of the father to the son was a mortgage being unfounded, the objection to the purchase by Kennedy falls. That being valid, the deed received by him passed a good title, which he transferred to the defendant.

In the third place, there is no evidence that the complainant was a creditor of Parker, Senior, in March, 1871, when the conveyance was made to the defendant. The attachment suit was commenced by publication in August, 1877, and in December following judgment by default was rendered. This was more than six years after the conveyance. It does not appear when the alleged debt, upon which the attachment proceedings were founded, accrued. The allegation of the bill that Parker, Senior, was largely indebted to the complainant and others, and was insolvent when he conveyed to the defendant, is not sustained by the evidence. Indeed, there is no evidence in relation to his financial condition and means at that time. The testimony that he brought a summons in another suit against him to the office of the party who was then drawing the deed is contradicted; and even had this been so, the fact would not militate against the validity of the transaction. He had a right to dispose of his property in the ordinary course of business for a valuable consideration, and the defendant had a right to purchase it. The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud.

So, in any way in which this case can be considered, the bill cannot be sustained.

The decree must therefore be reversed, and the case remanded, with directions to dismiss the bill. And it is so ordered.

Statement of Facts.

FORT SCOTT *v.* HICKMAN.

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

Submitted October 17, 1884.—Decided November 3, 1884.

The statute of the State of Kansas (Gen. Stat. of Kansas, ch. 80, art. 3, sec. 24, p. 634), providing that, in a case founded on contract, when "an acknowledgment of an existing liability, debt or claim" shall have been made, an action may be brought within the period prescribed for the same, after such acknowledgment, if such acknowledgment was in writing, signed by the party to be charged thereby, requires, as interpreted by the Supreme Court of Kansas, that the acknowledgment, to be effective, be made, not to a stranger, but to the creditor, or to some one acting for or representing him.

An acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference or to leave it in doubt whether the party intended to prolong the time of legal limitation.

A committee of a city council, appointed to consider the city indebtedness, made a report containing a statement of the assets and liabilities of the city, and including among the latter a certain issue of bonds called M. bonds. The report further proposed a plan of compromise to be made with the holders of city bonds, the proposal being made in the form of a circular which the committee recommended "to be sent to each person holding city bonds, except M. bonds, as to which we make no report." The circular, by its terms, purported to be addressed "to each person holding bonds of the city," and requested "each bondholder to express his views fully." The city council adopted the report of the committee, and ordered the circular to be sent to the holders of the city bonds; and it was so sent to holders of bonds other than M. bonds, but not to holders of the latter: *Held*, That neither the note nor the circular was an acknowledgment of the M. bonds as a debt of the city, so as to take them out of the statute of limitations.

Where a Circuit Court of the United States, on the trial of an action at law before it, on the waiver of a jury, makes a special finding of facts, on all the issues raised by the pleadings, and gives an erroneous judgment thereon, which this court reverses, it is proper for this court to direct such judgment to be entered by the Circuit Court as the special finding requires.

This was an action brought by the defendant in error, in the Circuit Court of the United States for the District of Kansas, against the city of Fort Scott, in the State of Kansas, to recover the amount of principal and interest due on 27 bonds, for $500 each, issued by that city, 12 of which became due on July 1, 1873, and 15 on July 1, 1874. The bonds were coupon

bonds, with interest payable annually, on the 1st of July, at the rate of 10 per cent. per annum, and were dated July 1, 1871. Each bond contained the heading, "Special Improvement Bond of the City of Fort Scott, Kansas," and this statement: "Issued in accordance with sections 16 and 17 of an act of the Legislature of the State of Kansas, entitled 'An Act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868, approved March 8th, 1871,' and in pursuance of an ordinance of the city of Fort Scott, entitled 'An ordinance ordering the grading and macadamizing, &c., of certain streets and parts of streets, approved May 19th, 1871.' Countersigned by the city treasurer, this twentieth day of September, 1871."

The suit was commenced July 1, 1880, and was tried by the Circuit Court without a jury. As to 11 of the 12 bonds, that court found that all the coupons on them had been paid on and before July 1, 1873, but no payment of principal or interest had been made upon any of them since that date, except as stated in its fourth finding. As to the 15 bonds, it found that all the coupons on them were paid on and before May 16, 1875, but no payment of principal or interest had been made upon any of them since that date, except as stated in its fourth finding. The remaining findings were as follows:

"4th. The court further finds that, as to the remaining bond sued on herein, being bond number 78, it became due by its terms July 1st, 1873, and on and prior to that date all the interest coupons thereon had been paid; that, on November 8th, 1875, a payment was made on said bond number 78, of the sum of $290, and the balance of said bond remained due and unpaid at the time of the commencement of this action; that said payment upon bond 78 was made by Donnell, Lawson & Co., fiscal agents of the State of Kansas, upon the authority of certain letters sent them by J. H. Randolph, city treasurer of the defendant, written by him in the usual routine of his official duties, but without any special instruction or knowledge on the part of the city council of said city; which said letters are as follows, to wit:

'FORT SCOTT, KS., *June* 10, 1875.

MESS. DONNELL, LAWSON & CO., *New York.*

DEAR SIRS: Yours of the 2d inst. at hand. The coupons of our special improvement bonds are all retired except bonds Nos. 97 and 107 to 113; the last coupon on these Nos. (all past due) is not yet in; will give you statement of am't and Nos. of these bonds due and unpaid by next mail. You may redeem any one of these bonds whenever this fund in your hands is sufficient to do so. My remittance of May 26th, of $245, was all to apply on coupons of bonds issued to the M., K & T. R. R. Co., and not $70 of it for special im. fund, as you state you have credited, in your letter of June 1st. The Nos. of the bonds to which these coupons belong are 1 to 7, inclusive. You will please make the transfer of the $70 to your Fort Scott City coupon acc't. About what would our city funding bonds bring in your market, bonds running 10 years, int. payable s. a. at 10 per cent. p'r. annum?

Resp'y, yours, J. H. RANDOLPH, *City Treasurer.*'

'FORT SCOTT, KS., *Aug. 6th*, 1875.

MESS. DONNELL, LAWSON & CO., *New York.*

GENTLEMEN: I give you below the Nos. of our special improvement bonds now unpaid. Nos. 6 to 15, 17 to 22, 24, 30 to 39, 53 to 58, 60 to 80, 83 to 85, 97, 98, 99, and 104 to 115, in all 70 bonds of $500 each, all past due. I will be in New York last of this month, and will call and explain to you the situation in regard to these bonds, so you may understand the reason why they are not paid, and that owners of the same may govern themselves accordingly.

Very resp'y yours, J. H. RANDOLPH, *City Treasurer.*'

'FORT SCOTT, KS., *Aug. 11th*, 1875.

MESS. DONNELL, LAWSON & CO., *New York.*

GENTLEMEN: I enclose you herewith d'ft for $500 to apply on interest due on Fort Scott City special improvement bonds. If not convenient to apply on interest use to pay on bonds.

Resp'y yours, J. H. RANDOLPH.'

On November 8, 1875, said fiscal agents paid bond 77 of

this series, and said $290 on said bond 78, they being the only bonds presented to that date, which payments exhausted the funds in the hands of said fiscal agents. That the official accounts of the treasurer of said city contain the following entry of credit to himself: 'August 11th, 1875. By Donnell, Lawson & Co., to pay interest on special improvement bonds, $500,' which was the moneys remitted by said treasurer in the letter of August 11th, 1875. Said payments were reported by the city treasurer in his annual report and approved by the city council.

5th. The court further finds, that, in July, 1878, the defendant, the city of Fort Scott, Kansas, by its city council, referred the matter of its financial condition to the finance committee of said council, which committee made a report in writing to said council, on the 21st day of August, 1878, which report was duly adopted and spread in full on the records of the minutes of said council, and is as follows, to wit:

'*Council Proceedings, August 21st*, 1878.

Adjourned regular meeting.

Mayor Cohen in the chair.

The report of the finance committee on the matter of the city indebtedness was read, and on motion adopted and ordered placed on file. It is as follows:

To the Hon. Mayor and Councilmen of the City of Fort Scott, Kansas:

We, your committee on city indebtedness, met with and consulted B. P. McDonald, D. P. Lowe, J. S. McCord, J. D. McCleverty, and also J. D. Hill, W. J. Bowden, W. A. Cormany, members of the board of education of this city, whom the committee thought should be invited, and, after careful consideration, the joint committee unanimously agreed on the plan of compromise set forth in the following circular letter, which we recommend be sent to each person holding city and school district bonds, except Macadam bonds, about which latter we make no report:

CITY CLERK'S OFFICE, FORT SCOTT, KANSAS, *Sept. 3d*, 1878.

DEAR SIR: The city council of Fort Scott address this to each person holding bonds of the city of Fort Scott, Kansas, with a view to bring about such an amicable adjustment of the indebtedness of our city, if possible, as will be fair to the bondholders in view of our circumstances, and at the same time be such an one as the city can reasonably expect to be able to meet.

Nearly all of our county, city, and school district indebtedness was incurred at or about the year 1870, which was what would be called our times flush, when money was plenty and property of ready sale at good figures. In 1870 the assessed valuation of all kinds of property in the city was $1,445,730, as shown by the tax roll, while our assessed valuation for the year 1878 is only $814,457, being a decline in valuation of $631,273, or nearly one-half, a decline which cannot be accounted for upon the basis of the general decline in values, but is doubtless largely attributable to the excessive burden of our debt and taxation. For the year just past our levy for all funds in the city was 5.25 per cent., while this year, had an adequate levy been made, it would have been nearly 7 per cent., and this, too, without making any levy for sinking fund purposes to meet our railroad bonded indebtedness. A careful examination of our financial condition convinced us that to meet our indebtedness in its present form, including our share of the county and school district indebtedness, would, within two or three years, require a levy of 10 per cent., and should the extreme decline in our assessed valuation continue, the rate would exceed that figure.

Our assessed valuation of all kinds of property in the city, beginning with the year 1870, as shown by the tax roll, is as follows:

1870	$1,445,730
1871	1,421,682
1872	1,382,950
1873	1,233,624
1874	1,386,294

Statement of Facts.

1875	$1,071,834
1876	958,896
1877	904,368
1878	814,457

The increase in valuation in 1874 is explained by the fact that nearly 250 acres of outlying additions were that year annexed to the city. In the face of this great decline in value, our indebtedness is rapidly maturing and is yet to be provided for.

The indebtedness of our county in railroad bonds is $300,000, of which $150,000 are in litigation, and upon which there is nearly $40,000 of an accumulation of unpaid interest, and all may yet be adjudged a valid indebtedness. The assessed valuation of the county, including the city, this year, is $3,509,164; the valuation of the city being about one-fourth of that, places one-fourth of the county's burden upon the city. A statement of our indebtedness, then, upon that basis, is as follows:

One-fourth co. debt	$85,000
City railroad debt	100,000
City school district bonds	37,500
City bridge and funding bonds	41,500
City special improvement bonds and accrued interest	45,000
Other sundry indebtedness, about	6,000
Total	$315,000

From this statement it will be seen, that the ratio of our total indebtedness to our assessed valuation is about 40 per cent.

Of our indebtedness, our school district, bridge, and funding bonds bear ten per cent. interest, and for these the city has had something in the shape of value received. In the matter of our railroad 7 per cent. bonds, however, both county and city, the universal sentiment of our people is that we have not been rightly treated. Each of the railroad companies promised that their machine shops should be built and located in Fort Scott, the M., K. & T. made a written contract to that effect, and the

city railroad debt of $100,000, and a county railroad debt of $150,000, was created. The bonds were delivered, but the railroad companies have built their shops elsewhere. The M., K. & T. Railroad, after receiving $100,000 of city and $150,000 of county bonds, not only failed to comply with its contract, but started a new town, built its machine shops there, and has since lent every effort of its great power to foster a rival town within fifty miles of this place.

Had the railroad companies fulfilled their pledges, Fort Scott nor Bourbon County would not now be asking leniency at the hands of their creditors, our debts would not have been out of proportion to our valuation, our people would have been satisfied, our town and county prosperous.

We have incurred the debt, we have failed to receive the benefits. Both of the railroad companies are bankrupt, and we are without remedy or hope of redress.

A strong sentiment has always existed in favor of utterly repudiating our railroad debt, and now that the time approaches for levying a sinking fund tax to pay that debt, this sentiment increases. The present bondholders may be blameless as to the bad faith of the railroad companies, but the result to us is all the same, and our debt burden in no wise relieved by that fact.

Our inability to pay such a debt seems apparent, and sooner or later we know that we must fail. An increase in taxation means a decrease in value, the refusal of the tax-payer to pay, the driving out of capital already invested, and the turning away of those who would otherwise settle here. Realizing this, we have this year omitted to make a levy for debt purposes, either principal or interest, and hope, by a statement of the facts and of our circumstances, together with the safeguards which we propose for the future, to effect a compromise, which, while burdensome still to us, yet we know we can meet, and at the same time give to the bondholder as high a marketable value as he now has in the paper he now holds. We feel, however, that a difference ought to be made in the two classes of bonds, and hence we propose to refund the city and school district debt upon the following terms: The city railroad and ma-

chine shop 7 per cent. bonds to be refunded at 50 cts. on the dollar, into a 30-year 5 per cent. bond, payable at any time after 10 years, and the school district funding and bridge 10 per cent. bonds to be refunded into a like bond, at the rate of 75 cts. on the dollar of the present amount of bonds outstanding. This would make the amount of our city and school district debt about 20 per cent. of our valuation, leaving out of consideration our proportion of the county indebtedness, which, if considered, would still leave our debt about 30 per cent. of the valuation.

To effect this compromise we will need new legislation, and, in obtaining this, we propose and suggest the following provisions of law, as a protection to the holders of the compromise bonds against a subsequent over-issue, which might compel a new compromise, to wit:

A tax levy for interest to be made annually, sufficient to pay the interest then due. At the end of ten years, one-twentieth, or 5 per cent., of the principal to be collected, and for each year thereafter, until the whole refunded debt is paid or liquidated.

Making any officer who shall prevent such levy, personally liable to any bondholder for the amount then due, to be recovered in a civil action; making it a misdemeanor, punishable by fine and imprisonment, for any officer to divert any portion of the funds so collected to any other purpose than the payment of these bonds and interest, the fine to be not less than the sum so diverted.

Making a provision that the aggregate amount of our bonded indebtedness, when the now proposed compromise is effected, shall never be exceeded, until the entire amount of the compromise bonds shall be fully paid, and making any bonds that might be issued in excess of that amount absolutely null and void.

The bonds issued under such a law as this would be absolutely protected against an over-issue in the future, and, with this safeguard, would sell, in the aggregate, for more dollars and cents than the entire amount of our present bonded indebtedness.

In response to this, we ask each bondholder to express his views fully, stating the amount and kind of bonds he holds; and we sincerely hope that a compromise can be fully agreed upon by the time our legislature meets in January next, so that the proper legislation may be obtained, and the refunding bonds issued in time for the making of a levy in 1879.

By order of the city council of the city of Fort Scott, September 3d, 1878. ——— ———, *City Clerk.*'

At said meeting of August 21st, 1878, said city council also adopted the following motion, as appears by said records:

'On motion, the city clerk was instructed to have one hundred copies printed of the circular letter, with the report of the finance committee on our indebtedness, as the city attorney may direct, to be sent to the holders of our city bonds.'

6th. That, under date of September 3d, 1878, the city clerk of said city caused to be printed one hundred copies of said circular letter, each being printed with a dotted head-line in which to write the name of the person addressed, and sent a copy of the same to each of the holders of the bonds of said city except to the holders of said special improvement or Macadam bonds, but did not send said circular to this plaintiff, nor to any agent or representative of his, nor to any other holder of said special improvement or Macadam bonds.

The reason why said city clerk did not send any of said circulars to any of the holders of said special improvement or Macadam bonds was because of the directions to that effect made in the adopted report of the finance committee of said city council, as set forth in finding No. 5 herein. Each of the circulars so sent out by said city clerk were signed by him in writing, and had the name of the person to whom sent written in the dotted head-line thereof. Some persons holding bonds of said city, other than said special improvement or Macadam bonds, did receive copies of said circular in which no name was written in said dotted head-line, but were signed by said city clerk.

7th. That, in 1878, and after September 3d, one Thomas W. Marshall, of Westchester, Pa., where plaintiff resided, who held some of the bonds of said city other than said special improve-

ment or Macadam bonds, received one of said circulars, which he showed to plaintiff, which was signed by said city clerk in writing, over the words 'city clerk' at the end, and one H. Burkhalter, at Westchester, Pa., who also held some of the bonds of said city other than said special improvement or Macadam bonds, received one of said circulars in 1878, which he gave to plaintiff. Said circular was also received by other persons residing at Westchester, Pa., who held bonds of said city other than said special improvement or Macadam bonds.

8th. That the class of bonds sued on herein are described on their face as 'special improvement bonds,' but were commonly called 'Macadam bonds' by the holders thereof, and by the officers of said city, and were issued by said city in payment for macadamizing certain streets in said city."

On the foregoing findings of fact, the court held, as matter of law, that the plaintiff was entitled to recover on the bonds $26,385.23, and to have judgment accordingly, and judgment was entered for that amount, to bear interest at the rate of 10 per cent. per annum. The defendant brought this writ of error.

Mr. J. D. McCleverty for plaintiff in error.

Mr. S. E. Brown and *Mr. Wayne McVeagh* for defendant in error.—I. The acknowledgment was sufficient. *Elder* v. *Dyer*, 26 Kan. 604, overruling *Hanson* v. *Towle*, 19 Kan. 273, relied upon by counsel for plaintiff. If the bonds referred to in the circular were other than the bonds sued upon, the burden of proof was on plaintiff in error to show it. *Whitney* v. *Bigelow*, 4 Pick. 507. See also *Argus Company* v. *Mayor of Albany*, 55 N. Y. 495, Folger, J.—II. The acknowledgment was so made as to revive the cause of action. The circular, though mailed to certain individuals, was addressed to all bondholders. Under these circumstances the ownership of the bond is the criterion by which to ascertain the person to whom the notice applies. See the New York case above cited.—III. The question of the sufficiency of an acknowledgment is one of general jurisprudence. In determining it Federal courts are independent

of the constructions by State courts. *Delmar* v. *Insurance Co.*, 14 Wall. 665; *Swift* v. *Tyson*, 16 Pet. 1; *Watson* v. *Tarpley*, 18 How. 520; *Venice* v. *Murdock*, 92 U. S. 494.

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

The declaration of the plaintiff avers the adoption by the city council of the motion of August 21, 1878, and sets forth a copy thereof and of the circular letter, and alleges that one of the circulars was sent to the plaintiff, and one to each of the other holders of the defendant's bonds; that thus the defendant fully acknowledged and recognized the plaintiff's bonds as valid and subsisting obligations of the defendant; and that, on the 8th of November, 1875, the defendant recognized the existence and validity of the plaintiff's bonds by paying to him that day $290 on account thereof. The answer avers that the $290 was paid and credited wholly on bond No. 78; that there is due on that bond $434, which sum the defendant offers to pay and brings into court; that more than five years elapsed after the maturity of the other bonds before this suit was brought, and it is barred by the statutes of limitation of Kansas; that the defendant never acknowledged or recognized the plaintiff's bonds as subsisting obligations, as alleged in the declaration; and that the circular was never sent to the plaintiff by the city, or by its clerk, or by any of its officers, and the plaintiff never received it from the city, or from any party on behalf of the city. To this answer there is a reply containing a general denial.

The statute of Kansas in force when this suit was commenced (Gen. Stat. of Kansas, ch. 80, art. 3, sec. 18, sub. 1, p. 633) provided, that an action on any agreement, contract or promise in writing could only be brought within five years after the cause of action accrued, and not afterwards. Consequently, this suit was barred as to all the bonds, unless saved under the following provisions of the statute.

"In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same,

shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby." Id. sec. 24, p. 634, 635.

The construction of section 24 by the Supreme Court of Kansas, in *Elder* v. *Dyer*, 26 Kansas, 604, is that a case may be taken out of the operation of section 18, in three ways: (1.) By the payment of part of the principal or interest; (2.) By an acknowledgment in writing of an existing liability, debt or claim, signed by the party to be charged; (3.) By a promise of payment in writing, signed by the party to be charged; that it is not necessary all these things should co-exist, but only requisite that one of them should exist; and that it is not necessary the acknowledgment should amount to a new promise. But it is also held by the same court, in decisions made prior to August, 1878, that the acknowledgment, to be effective, must be made, not to a stranger, but to a creditor, or to some one acting for or representing him. *Sibert* v. *Wilder*, 16 Kansas, 176; *Schmucker* v. *Sibert*, 18 Kansas, 104; *Clawson* v. *McCune's Adm'r*, 20 Kansas, 337.

In the present case, the Circuit Court finds that the committee, in its report, recommended that the circular letter should "be sent to each person holding city and school district bonds, except Macadam bonds;" that the report stated that the committee made no report about Macadam bonds; that, on the report, the city council adopted a motion instructing the city clerk to have 100 copies printed of the circular letter, with the report, to be sent to the holders of the city bonds; and that the clerk caused to be printed 100 copies of the circular letter, and sent a copy of the same to each of the holders of the bonds of the city, except to the holders of the special improvement or Macadam bonds, but did not send the circular to the plaintiff, or to any agent or representative of his, or to any other holder of the special improvement or Macadam bonds. It is not found that any copy of the circular was received from the city, or from any one acting for it, by any holder of any Macadam bond or his agent or representative. The recom-

mendation of the committee, and its statement that it made no report about the Macadam bonds, and the fact that the circular letter offers no compromise as to those bonds, was a sufficient reason for not communicating with the holders of those bonds. In this connection, it may be observed, that by the report of the case of *United States* v. *Fort Scott*, 99 U. S. 152, it appears that in that case, the city of Fort Scott, at October Term, 1878, contested in this court, its obligation to impose a tax on all the taxable property of the city to pay like bonds of the same issue, claiming that it was bound to levy a tax only on property benefited, and that this court reversed the decision of the Circuit Court of the United States for the District of Kansas, which had decided in favor of the city, and against a holder of Macadam bonds, as to that question. That decision by this court was announced after the report of the committee was made, and after the date of the circular letter.

It is plain that the city made no acknowledgment to the plaintiff. It held no communication with him. It sent no copy of the circular letter to him. It intentionally refrained from doing so. It had a cogent reason for refraining, in the decision which had been so made in its favor. He received no circular letter from the city. Nor did the exhibition to him of the circular letter by persons who held other bonds than Macadam bonds amount to an acknowledgment by the city to him. The circular letter states that the city council addresses it to each person holding bonds of the city, but it also states that this is done with a view to a compromise, and then it proposes compromises as to other bonds, not including the Macadam bonds. So, also, the circular letter, at its close, asks that each bondholder will express his views fully, stating the amount and kinds of bonds he holds. But this applies, necessarily, only to those who hold bonds which are to be compromised and refunded. There is nothing in the circular letter which makes, or which evinces any intention of making, an acknowledgment to holders of Macadam bonds. In view of all this, the placing in the list, under the heading "A statement of our indebtedness," of the item, "City special improvement bonds and accrued interest, 45,000," cannot be held to amount to an ac

knowledgment to the plaintiff of any then existing liability to him on the Macadam bonds he held. It was merely a statement that the city had issued that amount of special improvement or Macadam bonds, which it classed generally as "indebtedness," which others might claim was valid indebtedness against it, but which it carefully omitted from any proposal of compromise, and said no more about in the circular.

Although an acknowledgment need not, under the Kansas statute, amount to a new promise, yet the rule is applicable, that an acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference, or to leave it in doubt whether the party intended to prolong the time of legal limitation. *Roscoe* v. *Hale*, 7 Gray, 274.

Nor is there any ground for holding that what was entered upon the records of the city council is to be regarded as having been addressed to all the holders of bonds, including the plaintiff, and as having been in that way a sufficient acknowledgment to him, without the sending to him of a copy of the circular letter. For, that record states distinctly, that no report is made about Macadam bonds, and that the circular letter is not to be sent to their holders; and the observations before made as to the contents of the circular letter, and as to the circumstances attending what is said in it about the indebtedness on the Macadam bonds, apply with even more force to this branch of the case. The record, taken as a whole, did not amount to an acknowledgment to the plaintiff, as a holder of Macadam bonds. It is not found that the plaintiff ever knew of the record till after he brought this suit.

The settled doctrine in Kansas, and the weight of authority elsewhere, is, that statutes of limitation are statutes of repose, and not merely statutes of presumption of payment. Therefore, to deprive a debtor of the benefit of such a statute, by an acknowledgment of indebtedness, there must be an acknowledgment to the creditor as to the particular claim, and it must be shown to have been intentional. *Roscoe* v. *Hale*, before cited. "An acknowledgment of an existing liability, debt or claim," within the meaning of the Kansas

statute, implies a meeting of minds, the right of the creditor to take what is written as an acknowledgment to him of the existence of the debt, as well as the intention of the debtor, as deduced from the contents of the writing and all the facts accompanying it, to make such acknowledgment. In *Wetzell* v. *Bussard*, 11 Wheat. 309, 315, Ch. J. Marshall said: "An acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part." To the same effect are *Bell* v. *Morrison*, 1 Pet. 351, 362, and *Moore* v. *Bank of Columbia*, 6 Pet. 86, 92. In *Barlow* v. *Barner*, 1 Dillon, 418, this statute of Kansas was under consideration by Mr. Justice Miller and Judge Dillon, and the court said: "Courts, by their decisions as to the effect of loose and unsatisfactory oral admissions and new promises, had almost frittered away the statute of limitations, and, to remedy this, statutes similar to the one in force in this State have been quite generally enacted. The statute of Kansas requires the acknowledgment to be in writing and signed by the party, and the acknowledgment must be of an existing liability with respect to the contract upon which a recovery is sought."

The statement of the city treasurer to the agents of the city in New York, in his letter of August 6, 1875, that special improvement bonds of certain numbers, which included those now sued on, were then unpaid, can avail nothing, for it was not a letter to the plaintiff or to his agent. The same remark is true as to the letter of August 11, 1875, and it remits $500 to apply on Macadam bonds generally.

As to the payment of the $290, it was paid on bond No. 78 only, as is found, no others of the bonds sued on having been presented to that date. It was not a payment on any other bond or on the bonds as a whole.

It follows, from these considerations, that the conclusion of law made by the Circuit Court on the facts found was erroneous. It ought to have rendered judgment for the defendant, except as to bond No. 78. Its special finding of facts is, under § 649 of the Revised Statutes, equivalent to the special verdict of a jury, *Norris* v. *Jackson*, 9 Wall. 125; *Copelin* v. *Insurance*

Co., 9 Wall. 461, 467; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 249; *Retzer* v. *Wood*, 109 U. S. 185; and, as such special finding covers all the issues raised by the pleadings, this court has the power, under § 701 of the Revised Statutes, to direct such judgment to be entered as the special finding requires. In cases like the present one, the proper practice is to direct a judgment for the defendant, instead of awarding a new trial. *National Bank* v. *Insurance Co.*, 95 U. S. 673, 679; *Fairfield* v. *County of Gallatin*, 100 U. S. 47; *Wright* v. *Blakeslee*, 101 U. S. 174; *People's Bank* v. *National Bank*, 101 U. S. 181; *Warnock* v. *Davis*, 104 U. S. 775; *Lincoln* v. *French*, 105 U. S. 614; *Ottowa* v. *Carey*, 108 U. S. 110; *Kirkbride* v. *Lafayette Co.*, 108 U. S. 208; *Retzer* v. *Wood*, 109 U. S. 185; *Canada Southern Railroad Co.* v. *Gebhard*, 109 U. S. 527; *East St. Louis* v. *Zebley*, 110 U. S. 321. The trial being without error, if the finding is sufficient, the same judgment is to be given as would be given on a special verdict. Where the special finding embraces only a part of the issues, as in *Ex parte French*, 91 U. S. 423, a different rule prevails. Accordingly,

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with direction to enter a judgment for the plaintiff, on bond No. 78, *for* $500, *with proper interest thereon, less a credit on said bond, of* $290, *of the date of November* 8, 1875; *and, as to the other bonds sued on, to enter a judgment for the defendant, with costs.*

BUENA VISTA COUNTY *v.* IOWA FALLS & SIOUX CITY RAILROAD COMPANY.

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

Argued October 31, 1884.—Decided November 10, 1884.

The right of review of the official acts of the Commissioner of the Land Office conferred upon the Secretary of the Interior by general laws extends to acts of the Commissioner under the act of March 5, 1872, 17 Stat. 37, directing him to receive and examine selections of swamp lands in Iowa, and allow or disallow the same.

Statement of Facts.

The facts in this case do not estop the defendant in error from objecting to the list of swamp lands in Buena Vista County, which was filed by the agent of the county in the office of the Surveyor-General in Iowa in accordance with provisions of a law of that State.

This suit in equity was commenced by the plaintiff in error, who was plaintiff below, in the District Court of Buena Vista County, in the State of Iowa, for the purpose of establishing its equitable title in fee simple to five hundred and fifty-three forty-acre tracts of land, lying within its limits, and seeking a conveyance of the legal title thereto, held by the defendant.

It was claimed that the lands in question were granted by the Swamp-land Act of September 28, 1850, 9 Stat. 519, to the State of Iowa; all such lands having been granted by the State by an act passed January 13, 1853, to the counties respectively in which the same were situated.

The bill of complaint further alleged as follows:

"V. That each and every parcel of said lands was of the description specified in said act of Congress at the date of the passage thereof; that afterwards, to wit, in the year eighteen hundred and fifty-nine, the plaintiff caused a list of said lands to be made in legal subdivisions in all respects in accordance with the requirements of the said act of Congress and the rules and regulations of the General Land Office of the United States; that the said list, with the proper proof thereunto attached, was duly filed in the office of the Secretary of State of the State of Iowa on or about the first day of January, 1860, and was thereafter duly recorded in the office of the register of the State land office, and thereafter filed in the office of the Surveyor-General of the United States for the State of Iowa, and thereafter, to wit, in the month of January, 1866, the same was duly filed in the office of the Commissioner of the General Land Office of the United States, where it has ever since remained on file.

"VI. That from time to time, since the filing of said list in said last-mentioned office, the plaintiff has applied to the said Commissioner of the General Land Office to examine and pass upon the sufficiency thereof and to allow the same; that prior to the 7th day of July, 1875, it was wholly unable to

obtain any hearing or decision thereon. That the defendant, by its agents and attorneys, appeared before said commissioner and resisted said application, and the said refusal to take up and examine said list was wholly by reason of defendant's resistance thereto and its claim to said lands. That upon the day last aforesaid the said Commissioner decided to allow plaintiff's said list; that defendant appealed from said decision to the Secretary of the Interior, who, upon the 30th day of August, 1876, reversed the decision of said Commissioner, and directed him to take no further proceedings upon plaintiff's application for the examination and allowance of said list.

"VII. Plaintiff further says that upon the 5th day of July, 1871, the Governor of the State of Iowa, without being in any way authorized so to do, issued to the defendant a patent for a part of said lands, which said patent is now of record in the office of the register of the land office of the said State, at page two hundred and fifty-two of record 'A, Miscellaneous Conveyances.' That on the 10th day of August, of said year, he issued a patent to said defendant for all the remaining lands aforesaid, which is recorded in the book aforesaid at page two hundred and eighty-three. That both of said patents are recorded in the office of the recorder of deeds for said county of Buena Vista. That said patents are a cloud upon the title of the plaintiff and wholly prevent it from making sale of its said lands, and greatly impair the value of its property therein."

The defendant claimed title to the lands in dispute in itself, and denied the plaintiff's equitable title and the material facts upon which it was based.

The defendant's title was derived through a grant made by an act of Congress, passed May 15, 1856, to the State of Iowa, to aid in the construction of certain railroads, which was accepted by the State and by it granted to a company whose line was located through Buena Vista County, whereby the limits of the grant were determined so as to embrace the lands described in the plaintiff's petition. Thereafter, on February 28, 1858, the same were certified by the Secretary of the Interior to the State as inuring to it under said grant, and were accepted by it and passed by subsequent legislative grants from the

State to the defendant in error, to whom patents for the land were issued in the name of the State by the governor. It was not denied, however, that, if the lands in controversy passed by the swamp-land grant of 1850, they were excepted out of the subsequent railroad grant, which is the foundation of the defendant's title.

The terms of the act of Congress of September 28, 1850, granted to the several States within which they were situated "the whole of those swamp and overflowed lands, made thereby unfit for cultivation, which shall remain unsold at the passage of this act." It was thereby made the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor of the State, and at his request to issue a patent to the State therefor; but "in making out a list and plat of the land aforesaid all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom." The legal subdivisions contemplated by the law were forty-acre tracts.

The first instructions issued by the Commissioner of the General Land Office, on November 21, 1850, in execution of this act, directed the Surveyors-General to make out lists of the lands in each State falling within the description of the grant, based upon the notes of surveys in their offices, provided the authorities of the States were willing to adopt them; "if not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." Provision was made for surveys to be made to determine the boundaries of the swamp or overflowed lands, where the State authorities concluded to have them made, and it was added that "the affidavits of the county surveyor, and other respectable persons, that they understand and have examined the lines, and that the lands bounded by lines thus examined, and particularly designated in the affidavit, are of the character embraced by the law, should be sufficient. The line or boundary of the overflow that renders the land unfit for

regular cultivation may be adopted as that which regulates the grant." The lists were to be made out on forms prescribed for that purpose, and transmitted to the department, the lands selected reserved from sale, and the selections, when approved by the Secretary of the Interior, were directed to be entered by the register as granted to the State.

The State of Iowa adopted the alternative of making its own designations of lands, claimed by it as corresponding to the description of the grant, and passed, at different times, laws directing by whom they should be made. A statute of 1853 required a full and complete return of the examination and survey of the swamp and overflowed lands, when completed by the county surveyor or other person appointed for that purpose, to be forwarded to the Secretary of State, whose duty it was to report the same to the Surveyor-General.

A subsequent statute, passed January 25, 1855, authorized the governor to adopt such measures as to him might seem expedient to provide for the selection of the swamp lands of the State, and to secure the title thereto. The governor accordingly issued circulars, one in 1855 and one in 1858, to the county judge of the several counties, requesting the selection to be made in his county by the county surveyor or other agent, the lists thereof to be forwarded to the Surveyor-General or to the Secretary of State of Iowa, to be by him forwarded to the proper department for recognition and approval. The act of January 13, 1853, was carried into the Revised Statutes of the State of 1860, as follows:

"SECTION 927. In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall, at the next regular term thereof, after the taking effect of this act, appoint some competent person, who shall, as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands and make due reports and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made marked on said plats, to the county courts respectively, which courts shall

transmit to the proper officers lists of all said swamp lands in each of the counties, in order to procure the proper recognition of the same on the part of the United States, which lists, after an acknowledgment of the same by the general government, shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court."

On the trial of the cause, in the District Court of Buena Vista County, the plaintiff offered in evidence a paper, claimed to be a certified copy of plaintiff's list of swamp-land selections and accompanying proofs. It was headed, "A list of the swamp and overflowed lands situated in the county of Buena Vista and State of Iowa." Then followed a list containing a description, among others of all the lands described in the plaintiff's original petition or complaint. To this were annexed affidavits by George S. Ringland, W. H. Hait, and Zachariah Tucker, stating that, having been appointed by the county judge of Buena Vista County to select the swamp and overflowed lands in said county, "do solemnly swear that we understand and have examined the lines bounding each of the tracts of land particularly designated in the foregoing list, and we do further solemnly swear that the greater part of each and every forty-acre tract or smallest legal subdivision therein named is swamp and overflowed land, and of the character embraced in the act of Congress approved the twenty-eighth day of September, 1850." And then appeared the following:

"STATE OF IOWA, }
Black Hawk County, } *ss.:*

"I, J. W. Tucker, late county judge of Buena Vista County, in the State of Iowa, do solemnly swear that George S. Ringland, Zachariah Tucker, and W. H. Hait were duly appointed by me while county judge of said county of said Buena Vista as agents to select the swamp and overflowed lands in Buena Vista County aforesaid, and that the agents aforesaid are reliable and responsible men; and I do further swear that the within is the original report of said agents, and that the correctness of the report has been sworn to by the said agents, as will more fully appear by the affidavits hereto attached; the

reason that I do not certify said report is that since employing said agents I have removed from said county of Buena Vista to the county of Black Hawk, in said State; so help me God.

J. W. TUCKER."

"Sworn to and subscribed before me this twenty-sixth day of December, A.D. 1859. Witness, J. B. Severance, clerk of the District Court of Black Hawk County, Iowa, and the seal of said court affixed, this twenty-sixth day of December, A.D. 1859, in said county and State. ——— ———."

[L. S.]

"STATE OF IOWA, STATE LAND OFFICE.

"I hereby certify that the foregoing report of the swamp-land selections in Buena Vista County is recorded in this office in book 'B,' pages one hundred and ninety-three to two hundred and twenty-eight, inclusive. J. B. MILLER, *Register*."

The introduction of this paper as evidence was objected to by the defendant below on the several grounds that the persons appearing to have made the selections had not been appointed by the County Court of Buena Vista County; that there were no plats accompanying it; that there was no evidence of the appointment of the persons claiming to have examined the lands; that the affidavit of J. W. Tucker was not verified and was not competent evidence of the facts it recites; that it was not shown that the said selections were ever filed in the proper offices or were ever approved by any officer of the State of Iowa or of the United States.

The paper, however, notwithstanding these objections, was received in evidence; but no other proof was offered by the plaintiff that the lands in controversy were in fact swamp or overflowed lands, so as to be unfit for cultivation within the description of the act of Congress of September 28, 1850, at the date of its passage.

The District Court rendered a judgment in favor of the plaintiffs, and the whole case, upon the evidence, reduced to writing and embodied in the record, was taken by appeal to the Supreme Court of the State.

That court reversed the judgment of the District Court, on

the ground that the list of lands on which it was based was improperly admitted in evidence, and rendered a judgment in favor of the defendant, dismissing the plaintiff's petition.

To reverse that judgment this writ of error was prosecuted.

Mr. Galusha Parsons for plaintiff in error.

Mr. E. E. Bailey for defendant in error.

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

The grounds on which the Supreme Court of Iowa proceeded are stated in its opinion, reported in 55 Iowa, 157, as follows:

"We think the evidence incompetent upon several grounds. Section 929 of the revision requires that the agent shall be appointed by the County Court at a regular term thereof. The proper evidence of the appointment is the production of the record of the county court. If no record was made, or it has been lost, the written appointment of the agent should be produced. If that is not available, and parol evidence of the fact is proper, the evidence should be the testimony of witnesses subject to cross-examination, and not the mere *ex parte* affidavit of the person making the appointment. This section does not provide that the lists so made shall be evidence of any fact. They are authorized to be made merely for the purpose of procuring the proper recognition of the same on the part of the United States, and are in the nature of a claim or demand. The lists are required to be transmitted by the County Court to the proper officers for approval. The regulations and instructions of the department show that this person is the Surveyor-General. There is no proof that the list in question was ever transmitted to the Surveyor-General, or that he ever had any opportunity of passing upon it. It is not shown that this list ever came into the possession of the Commissioner of the General Land Office, or of the Secretary of the Interior, or that its correctness or validity was at any time recognized by any department of the government. It is true the Surveyor-General, under instructions from the department of the government, submitted forms of proof; but his instructions required

that the proofs made should be transmitted to his office for approval, and to aid him in making up the lists of lands embraced in the grant, which is not shown by the evidence to have been done. So far as the evidence shows, the list constitutes no more than the claim of Buena Vista County, which has never been recognized, approved, or allowed by any department of the government. That it is exceedingly inaccurate and unreliable is evidenced by the fact that, while it embraces 551 tracts, the defendant established affirmatively and satisfactorily that 398 of them were high and dry, and fit for cultivation."

In opposition to this conclusion, it is now claimed by the plaintiff in error that the list of lands in question was not only erroneously ruled out as incompetent evidence, but that it ought to have been accepted as sufficient and conclusive proof that the lands embraced in it were within the grant of swamp and overflowed lands, thus establishing the title of the plaintiff in error.

This proposition is supposed to be supported by facts connected with the history of this list, and the mode in which it has been dealt with by the State authorities, the General Land Office, and the representatives of the defendant in error, whereby it is alleged an estoppel has arisen against the last named to deny the legal effect claimed for it. These facts appear in official correspondence and documents which were admitted in evidence, showing the various efforts made on behalf of the county to obtain a recognition of its claim by the Interior Department and the decisions of that department which resulted in their failure.

It thus appears that a list of selections for Buena Vista County was delivered to the Surveyor-General, but not filed by him in the General Land Office, but was rejected because the lands were not both swamp and overflowed, the Commissioner of the Public Lands having issued instructions that no lands came within the grant except such as were both swamp and overflowed. This ruling of the Commissioner, however, was reversed by the Secretary, September 15, 1860. The Buena Vista list remained in the office of the Surveyor-General, without

further action thereon, until that office, in 1866, was abolished, when, with all other lists remaining there, it was removed to the General Land Office. In 1869 an application was made by an agent of the State, to the Commissioner of the Land Office, to confirm the selections according to this list, which application was rejected on the ground, "that the established method of making swamp selections was through the Surveyor-General, and that the list in question was never reported by him, but came before this office by the removal of the archives of the Surveyor-General's office; that to receive them now would be in the nature of new selections, from which we are barred by the limitations of the act of March 12, 1860, 12 Stat. 3." That act required that all selections to be made thereafter from lands already surveyed under the act of September 28, 1850, should be made within two years from the adjournment of the legislature of the State at its next session after the date of the act. Upon appeal to the Secretary of the Interior, this decision of the Commissioner was affirmed, October 23, 1871. On March 5, 1872, an act of Congress took effect, 17 Stat. 37, which enacted, "That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections of swamp lands in Lucas, O'Brien, Dickinson, and such other counties in the State of Iowa as formerly presented their selections to the Surveyor-General of the district including that State, and allow or disallow said selections and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries and rights of *bona fide* settlers under the homestead or pre-emption laws of the United States at the date of this act."

An application was made under this act, on April 21, 1875, to the Commissioner of the General Land Office to adjust the claims of the county for swamp lands on the basis of its lists theretofore filed. Upon this application the Commissioner, on July 7, 1875, notified the railroad companies, to which in the mean time the lands in question had been certified as embraced in the grant to them, that his office had no right to refuse to make the investigation asked for "in regard to the swampy

character of these lands, and if any of them are found, on examination, to be of the description of lands granted to the State as swamp and overflowed lands, it will be the duty of the Department to cause the same to be certified, and, on the request of the governor, patented to the State as such." An appeal was taken from this decision of the Commissioner to the Secretary of the Interior, on the ground that the subject-matter of the proceeding, so far as it related to lands already certified to the railroad companies, had passed from the jurisdiction of the Department. On August 24, 1676, the Acting Secretary of the Interior sustained the appeal and reversed the decision of the Commissioner, being of opinion that no examination or certification of the lands in question should be made.

Upon this recital of the proceeding in the General Land Office it is claimed for the plaintiff in error:

1. That by the terms of the act of March 5, 1872, the decision of the Commissioner was intended to be final, from which no appeal would lie to the Secretary.

But there is nothing in the act which alters the relation between the two officers as otherwise established, or puts the decisions of the Commissioner, under that act, upon a footing different from his other decisions. And if there were it would make no difference, for the only decision made was that the State of Iowa was entitled to the examination of the question as to the lands claimed for Buena Vista County, whether they were not swamp and overflowed lands. But he did not, in fact, enter upon the examination, and made no decision as to the character of the lands. The statement casually made in the letter of the Commissioner, that the State had long since claimed the lands as swamp lands, and furnished *prima facie* evidence that they were of that character, certainly has no value, either as evidence or adjudication, especially as he immediately adds, that "this claim has not yet been examined by this office, and until it is so examined and either rejected or approved, the duty of this Department is not performed."

2. It is further claimed by the plaintiff in error, that the defendant having notice of its application to the Land Department of its claim, based upon the list in question, and having

objected to its consideration solely on the ground that the Department had no jurisdiction to entertain it, which objection prevailed, is now estopped from making in any other form, any other objection to the list itself, or to the character of the lands described in it.

But this claim is equally without foundation. The defendant in error, if it could be considered as a party to the proceeding in the Land Office, contested its jurisdiction, as it had the right to do; and, having prevailed on that point, cannot be charged with waiving other objections it was not called on to make. If the Department had decided to entertain the claim, the inquiry would have been open, upon evidence from both parties, as to the actual character of the lands in question at the date of the swamp-land grant of September 28, 1850; and the Department would, in that event, have decided the question of fact according to the weight of the evidence adduced by both parties bearing upon it.

The very theory of the case of the plaintiff in error is, that, because the officers of the Land Department have neglected or refused to perform their duty in determining the question of fact on which the validity of its claim depends, it has an equity to require the investigation to be made in a court of justice, which ought to have been made by them, so that if, in point of fact, the lands claimed passed under the terms of the grant, the legal title wrongfully granted to the defendant may be decreed to it. According to the principle stated in the case of the *Railroad Co.* v. *Smith*, 9 Wall. 95, the same evidence which might have been required in the Land Office would be necessary to establish the plaintiff's claim in a court of equity, which would not decree the defendant to convey to the plaintiff the legal title, unless clearly satisfied, by full proof of the disputed fact, that the lands in controversy were swamp and overflowed lands at the date of the act of Congress of September 28, 1850.

The plaintiff in error did not choose to go into a trial of that issue, and rested its case simply upon the list purporting to be the selection on behalf of the county, of its swamp and overflowed lands. That instrument had no value as evidence, as to

the only matter in issue, for the reasons given by the Supreme Court of Iowa.

Other errors are assigned upon the record, relating, however, to matters of pleading and practice under the laws of the State, which, as they involve no federal question, are not proper for our consideration.

The judgment of the Supreme Court of Iowa is accordingly

Affirmed.

EX PARTE VIRGINIA COMMISSIONERS.

ORIGINAL.

Submitted October 27, 1884.—Decided November 10, 1884.

A writ of mandamus is not ordinarily granted when the party alleging the grievance has another adequate remedy, and that remedy has not been exhausted.

This was a motion for a rule to show cause why a writ of mandamus should not issue. The motion showed that the petitioners in their public official capacities constituted the Commissioners of the Sinking Fund of the State of Virginia; that in a cause pending before the Circuit Court of the United States for the Eastern District of Virginia, a peremptory mandamus had been ordered, requiring them to give to the plaintiff in that cause or his attorney of record "in exchange therefor dollar for dollar coupon bonds under the act of the General Assembly of the State of Virginia, approved February 14, 1882, commonly known as the Riddleberger Debt Law;" that the court below certified that "it was shown by the evidence that the matter in dispute in this cause exceeds, exclusive of costs, the value of $500, and is less than the value of $5,000;" that the amount of the coupons so directed to be exchanged was in fact $22,716; that the said certificate was inconsistent with the judgment and must be regarded as surplusage; that the judges of the court below by an order entered of record, refused to allow the petitioners a writ of error to said judgment; and that

the petitioners had a clear right to such a writ: wherefore the petitioners prayed for a rule to the judges of the court below to show cause why mandamus should not issue commanding them to allow a writ of error to said judgment, and to fix the penalty of the bond in error, and to sign a citation on said writ of error.

Mr. F. S. Blair, Attorney-General of Virginia, for petitioners.

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

A writ of mandamus is not ordinarily granted when the party aggrieved has another adequate remedy. No formal allowance by the Circuit Court of a writ of error from this court to review a judgment of that court is required. *Davidson* v. *Lanier*, 4 Wall. 453. The writ issues in a proper case as a matter of right, but, when sued out, security must be given, and a citation to the adverse party signed. This security may be taken and the citation signed by a judge of the Circuit Court, or any justice of this court. No action of the Circuit Court as a court is required. It does not appear from the petition that any application has been made to either of the judges of the Circuit Court to approve security or to sign a citation. If they should refuse on application hereafter, resort may be had to either of the justices of this court. It will be time enough to apply for a mandamus when all these remedies have failed.

Motion denied.

EX PARTE CROUCH.

ORIGINAL.

Submitted October 14, 1884.—Decided November 10, 1884.

The writ of habeas corpus from this court cannot be used to correct or prevent possible future errors, in violation of the Constitution of the United States, by a State court in a cause pending in that court in which the parties and the subject matter are within its jurisdiction.

Opinion of the Court.

This was a motion for leave to file a petition for a writ of habeas corpus. The grounds for the motion are stated in the opinion of the court.

Mr. William L. Royall for the motion.

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

This petition is denied. The general revenue law of Virginia provides that no person shall do business in the State as a "sample merchant" until he has obtained a license therefor, on payment of a tax of seventy-five dollars; and that, if he does, he shall pay a fine of five hundred dollars for the first offence, and six hundred dollars for each succeeding offence. Acts of Virginia, 1884, ch. 445, §§ 30, 31, pp. 578, 579. The petitioner has been informed against, and is now held in custody for trial by order of the Hustings Court of the City of Richmond, for a violation of this law. According to the statements in the petition presented to us, the defence of the petitioner, upon the trial of that case, will be a tender by him, before commencing business, to the proper revenue officer of the State, of the amount of the required license tax, in coupons cut from State bonds, which the State when it issued the bonds agreed should be receivable in payment of all State dues; and a refusal of the officer to accept the tender and give a proper certificate therefor, because by a statute, enacted after the issue of the bonds, the tax-receiving officers were prohibited from taking the coupons for this tax. The right of the petitioner to a writ of habeas corpus from this court is put in the petition on the ground that the petitioner is detained in custody by the State court, in violation of the Constitution of the United States, because the statute which prohibits the officer from accepting the coupons impairs the obligation of the contract of the State to receive them, and is, on that account, inoperative and void, by reason of the provision of the Constitution which precludes the States from passing such laws.

It is not claimed that the law which imposes the tax and fixes the penalty for doing business without its payment is unconstitutional. Neither is it pretended that the Hustings Court

has not plenary jurisdiction for the trial of persons charged with a violation of the law. The petitioner is, therefore, in the custody of a State court of competent jurisdiction, and held for trial upon an information for violating a criminal statute of the State. He seeks to be discharged by habeas corpus, not because, if guilty of the charge which has been made against him, the court is without jurisdiction to hold him for trial, and to convict and sentence him, but because, as he alleges, he has a valid defence to the charge, which grows out of a provision in the Constitution of the United States, and, for this reason, he insists he is detained in violation of the Constitution. It is elementary learning that, if a prisoner is in the custody of a State court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offence for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defence to the information under which he is held. Whether his defence is sufficient or not is for the court which tries him to determine. If in this determination errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of habeas corpus is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own reports are numerous. *Ex parte Watkins*, 3 Pet. 202; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Parks*, 92 U. S. 18, 23; *Ex parte Siebold*, 100 U.S. 371, 374; *Ex parte Virginia*, Id. 339, 343; *Ex parte Rowland*, 104 U. S. 604, 612; *Ex parte Curtis*, 106 U. S. 371, 375; *Ex parte Yarbrough*, 110 U. S. 651, 653. Of course, what is here said has no application to writs of *habeas corpus cum causa*, issued by the courts of the United States, in aid of their jurisdiction, upon the removal of suits or prosecutions from State courts for trial under the authority of an act of Congress.

Denied.

EX PARTE ROYALL.

ORIGINAL.

Submitted October 14, 1884.—Decided November 10, 1884.

The act of March 27, 1868, 15 Stat. 44, took from this court the jurisdiction to review on appeal a decision of a Circuit Court upon a writ of habeas corpus. The court has no jurisdiction to review it on a writ of error.

This was a motion for leave to file a petition for a writ of certiorari. The objects of the writ and the grounds for the motion are stated in the opinion of the court.

Mr. William L. Royall, the petitioner, in person.

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

The petition which we are asked to grant permission to file prays for a writ of *certiorari* commanding "the clerk of the Circuit Court of the United States for the Eastern District of Virginia to certify to this court a full, true and perfect transcript of the record, judgment and proceedings had in the Circuit Court," under a writ of *habeas corpus*, issued by that court on the application of the petitioner, for the purpose of an inquiry into the cause of his detention by the Hustings Court of the city of Richmond for trial upon an indictment found against him in that court. The Circuit Court refused to discharge the prisoner, but, on his "stating that he intended to apply to this . . . court to review the order made by the Circuit Court," that court admitted him "to bail, the condition of his bond being that he should appear here on the first day of the present term, . . . and if this court should fail to make any order in the case, then to appear before the . . . Circuit Court . . . and abide by the further order of that court." The petition further prays that this court "may make all such other orders as . . . petitioner's case may require, and as may be necessary to give him the full protection of the Constitution and laws of the United States. That the cause of . . . petitioner's unlawful custody may be inquired into, and that the erroneous judgment of the Circuit Court may be

reviewed and reversed, and . . . petitioner restored to the liberty of which he has been illegally and unconstitutionally restrained."

This court has no jurisdiction, under the form of an appeal or writ of error, to review a decision of a Circuit Court upon a writ of *habeas corpus* in the case of a person "alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States." Such an appeal was given by the act of February 5, 1867, ch. 28, 14 Stat. 385, but it was taken away by the act of March 27, 1868, ch. 34, 15 Stat. 44, and has never been restored.

In *Ex parte Yerger*, 8 Wall. 85, 103, it was held "that, in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, review the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded." The jurisdiction is acquired by this court in such a case through its own writ of *habeas corpus*, and, until that is issued, there is no power to proceed. In the present case no such writ is asked for, and, as the Circuit Court has not yet remanded the prisoner to the custody from which he was taken, he is in no condition to apply for one under the ruling in *Yerger's Case*. We know of no authority in the Circuit Court to take a bond from a prisoner brought before it, by its own writ of *habeas corpus*, to appear in this court to answer that writ. It follows that, if we had before us the record which it is sought to bring up by the *certiorari*, we could not proceed to a review of the decision complained of, and the motion for leave to file a petition for the writ is *Denied.*

SCOTLAND COUNTY *v.* HILL.

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

Argued October 21, 22, 1884.—Decided November 10, 1884.

The judgment of a State court in Missouri adverse to the validity of bonds issued by a county in that State in payment of the subscription to stock in a railroad company, which judgment was made in a suit brought by citizens and tax-payers against county officers in order to enjoin the issue of the bonds, and to have them declared invalid, is a binding adjudication in a suit against the county by a holder of the bonds who took with notice of the pendency of the suit. The fact that this court, in another case, on a different state of facts held the issue to be valid does not affect this result.

An offer of proof being made and rejected, and exceptions duly taken, the appellate court must, in the absence of an indication in the record of bad faith in the offer, assume that the proof could have been made if allowed.

This action was brought to recover on bonds of the same issue sued upon in *County of Scotland* v. *Thomas*, 94 U. S. 682. It differs from that case in this: The fourth plea avers that after the bonds, from which the coupons sued for were cut, had been executed by the officers of the County Court, they were placed in the hands of Charles Metz, as trustee of the county; that on the 11th of September, 1871, while they were in his hands, Levi Wagner and other citizens and tax-payers of the county brought a suit against him, the justices of the County Court, the treasurer of the county, and the Missouri, Iowa and Nebraska Railway Company, in the Circuit Court of the county, the object and purpose of which was to enjoin Metz from delivering the bonds to the railroad company, and to have them declared void and cancelled for want of authority in the county to subscribe to the stock of the company; that all the defendants were served with process and appeared in the suit; that a preliminary injunction was allowed as prayed for; and that, upon final hearing, a decree was rendered, which was afterwards affirmed by the Supreme Court of the State, declaring the bonds void for want of authority in the county to sub-

scribe to the stock of the railroad company, and directing that they be delivered up for cancellation. The plea then further avers that Metz delivered the bonds to the railroad company after this suit was begun and after the preliminary injunction was granted, and that Hill, the plaintiff, and all the persons who have ever held the coupons sued for, took them without giving value therefor, "and with full actual notice of every fact" in the plea set forth. Issue was taken on this plea, and at the trial the county offered in evidence the record in the Wagner suit. To the introduction of this evidence the plaintiff objected, "on the ground that the bonds were delivered to the railroad company before any injunction was issued, and that the bond is a legal act of the county and valid in anybody's hands." This objection was sustained. The county then offered in evidence, after due proof of execution, a bond executed by the railroad company to Metz on September 21, 1871, to indemnify him "against all damages, costs, expenses, &c., which the said Metz, as trustee of the county of Scotland aforesaid, . . . may incur by reason of certain injunction suits now pending in the Scotland County Circuit Court, or by reason of any petition for injunction which may be filed before Judge E. V. Wilson, in Clark County, Missouri, on September 22, 1871." This was objected to, and the objection sustained.

The defendant then "offered to prove by Charles Metz, the agent named in the pleadings, that he had actual notice of the pendency of the aforesaid suit of *Levi Wagner et al.* v. *Metz et al.*, at the time he delivered the instruments (described in the defendant's pleading) to the Missouri, Iowa and Nebraska Railway Company, and offered to prove that the Missouri, Iowa and Nebraska Railway Company, and each subsequent holder, received the instruments referred to in the plaintiff's petition with actual notice of the pendency of the aforesaid suit . . . as set up in the fourth count of this answer." This was also objected to and the objection sustained. To all these rulings excluding testimony exceptions were duly taken, and error is assigned here thereon.

Mr. Henry A. Cunningham for plaintiff in error.

Mr. F. T. Hughes (*Mr. A. J. Baker* was with him) for defendant in error.

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

All the rejected evidence was, in our opinion, improperly excluded. The decree in the Wagner suit was set up as a bar to the action, on the ground that the liability of the county for the coupons was *res judicata* between the parties. The suit, although brought by citizens and tax-payers of the county, was, in effect, the same as though brought by the county itself to test the validity of the subscription which had been made to the stock of the company and the power of the County Court to bind the county to pay the bonds which it was proposed to issue for the subscription. The county was itself a party through the justices of the County Court, which, in Missouri, is the governing board and represents the county in all such matters. The whole purpose of the suit was to keep the bonds from the market as commercial paper, and to have them cancelled. The suit was about the bonds and the liability of the county thereon. The decree was in accordance with the prayer of the bill, and certainly concluded both Metz and the railroad company. After the rendition of this decree the company could not sue and recover on the bonds, because, as between the company and the county, it had been directly adjudicated that the bonds were void and of no binding effect on the county. But it is equally well settled that the decree binds not only Metz and the company, but all who bought the bonds after the suit was begun, and who were chargeable with notice of its pendency or of the decree which was rendered. The case of *County of Warren* v. *Marcy*, 97 U. S. 96, decides that purchasers of negotiable securities are not chargeable with *constructive* notice of the pendency of a suit affecting the title or validity of the securities; but it has never been doubted that those who buy such securities from litigating parties, with *actual* notice of the suit do so at their peril, and must abide the result the same as the parties from whom they got their title. Here the offer was to prove *actual* notice, not only to the plaintiff when he bought,

but to every other buyer and holder of the bonds from the time they left the hands of Metz, pending the suit, until they came to him. Certainly if these facts had been established, the defence of the county, under its fourth plea, would have been sustained, and this whether an injunction had been granted at the time the bonds were delivered by Metz or not. The defence does not rest on the preliminary injunction, but on the final decree by which the rights of the parties were fixed and determined.

It is claimed, however, that error cannot be assigned here on the exception to the exclusion of the oral proof, because the record does not show that any witness was actually called to the stand to give the evidence, or that any one was present who could be called for that purpose, if the court had decided in favor of admitting it, and we are referred to the cases of *Robinson* v. *State*, 1 Lea (Tenn.) 673, and *Eschbach* v. *Hurtt*, 47 Md. 61, 66, in support of that proposition. Those cases do undoubtedly hold that error cannot be assigned on such a ruling unless it appears that the offer was made in good faith, and this is in reality all they do decide. If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly.

It is evident, from the whole record, that the court below proceeded on the theory that the decree in the Wagner suit could not conclude the plaintiff, and that consequently it was a matter of no importance whether he had notice of the pendency of the suit or not. In our opinion, the error began with the exclusion of the record in that suit. As notice of the pendency of the suit was, however, necessary to bind the plaintiff by the decree, proof of that fact was offered, so that the question as to the effect of the decree upon this suit might be properly presented for review if deemed advisable. The court below seems not to have doubted the good faith of the offer, and so ruled against it without first requiring the defendant to

produce his witnesses and show his ability to furnish the testimony if allowed to do so.

It is a matter of no importance whether the decision in the Wagner suit was in conflict with that of this court in *Scotland County* v. *Thomas*, *supra*, or not. The question here is not one of authority but of adjudication. If there has been an adjudication which binds the plaintiff, that adjudication, whether it was right or wrong, concludes him until it has been reversed or otherwise set aside in some direct proceeding for that purpose. It cannot be disregarded any more in the courts of the United States than in those of the State.

Without considering any of the other questions which have been argued, we reverse the judgment and

Remand the cause for a new trial.

AYRES & Others *v.* WISWALL & Others.

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

Submitted October 20, 1884.—Decided November 10, 1884.

In a proceeding commenced in a State court to foreclose a mortgage, which prays judgment that the mortgage debtors be adjudged to pay the amount found due on the debt, and in default thereof that the property be sold, a mortgage debtor who has parted with his interest in the property subject to the debt (which the purchaser agreed to assume and pay), is a necessary party to the suit ; and if he is a citizen of the same State with the mortgagees, or one of them, the suit cannot be removed to the Circuit Court of the United States under the provision of the first clause of § 2, act of March 3, 1875, 18 Stat. 470.

The filing of separate answers by several defendants in a suit for the foreclosure of a mortgage, which raise separate issues in defending against the one cause of action, does not create separate controversies within the meaning of the second clause in § 2, act of March 3, 1875, 18 Stat. 470.

This is an appeal under § 5 of the act of March 3, 1875, ch. 137, 18 Stat. 470, from an order of the Circuit Court remand-

ing a case which had been removed from a State court. The suit was brought on the 15th of April, 1879, in the Circuit Court of Huron County, Michigan, by the appellees, citizens of New York, against Ebenezer Wiswall, also a citizen of New York; Ebenezer R. Ayres, a citizen of Ohio; Frederick S. Ayres, James S. Ayres, Charles G. Learned, citizens of Michigan, and many others whose citizenship did not appear, to foreclose a mortgage executed by Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall, to Catharine E. Wiswall, a citizen of New York, to secure a debt owing by them jointly to her. This mortgage, and the debt it secured, were assigned to the appellees before the suit was brought. After the mortgage was made, Ebenezer Wiswall contracted in writing to sell to Frederick S. Ayres his interest in the mortgaged property, subject to the mortgage debt which Ayres assumed to pay as part of the consideration money. Afterwards Learned sold and transferred to Ebenezer R. Ayres all his remaining interest in a part of the mortgaged property, subject to the mortgage which Frederick S. Ayres, James S. Ayres and Ebenezer Ayres bound themselves to pay. Between the time of the execution of the mortgage and the commencement of the suit, the mortgagors and their grantees sold and conveyed a large number of the parcels of the mortgaged property to various persons whose citizenship did not appear. All these purchasers were made parties. The bill, after setting forth the execution of the mortgage, and the various transfers and conveyances, and giving credit for certain payments on the mortgage debt, prayed that Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall be decreed to pay the amount found due on the mortgage debt, and in default that the property, or so much thereof as was necessary, might be sold and the proceeds applied to that purpose. It further prayed for execution against Frederick S. Ayres, Charles G. Learned, Ebenezer Wiswall and James S. Ayres for any balance of the debt which might remain due after the property was exhausted.

Ebenezer Wiswall and Learned filed separate answers to the bill, in which they admitted the execution of the mortgage and the debt for the security of which it was given, and asked

that their respective grantees, who had assumed the payment of the mortgage debt, might be decreed to be first personally liable for any money decree that should be rendered.

Frederick S. Ayres and James S. Ayres also answered, denying that the original debt for which the mortgage was executed amounted to as much as it was stated in the mortgage to be, and averring that other payments had been made beyond those stated in the bill. They insisted that there was not more than $20,000 due, and this they offered to pay.

In this state of the pleadings Frederick S. Ayres, James S. Ayres and Ebenezer R. Ayres, on the 28th of November, 1879, filed in the State court a petition, accompanied by the necessary bond, for the removal of the cause to the Circuit Court of the United States for the Eastern District of Michigan. The parts of the petition material to the present inquiry were as follows:

"That said complainants are, and were at the time said suit was commenced, citizens of New York. That your petitioners, Frederick S. Ayres and James S. Ayres are, and were when said suit was commenced, citizens of Michigan, and your petitioner, Ebenezer R. Ayres, is, and was when said suit was commenced, a citizen of Ohio. That in said suit, which is for the foreclosure of a mortgage on a large tract of land in the Eastern District of Michigan, there is a controversy which is wholly between said complainants and these petitioners, and which can be fully determined, as to them, without the presence of the other defendants."

Under this petition the case was taken to the Circuit Court of the United States, where it remained until the 29th of December, 1881, and until after a hearing and a decree finding the amount due on the mortgage and ordering a sale of the property. While the case was in the United States court, Ebenezer R. Ayres filed an answer, presenting substantially the same issues as those of Frederick S. and J. S. in the State court. On the 29th of December, 1881, and during the same term in which the final decree was rendered, the following order was made:

"It appearing to the court that the record in this cause was

improperly removed to the court from the Circuit Court of the County of Huron, in chancery, and that this court hath not jurisdiction of the cause, it is ordered that the proceedings had thereon in this court be, and the same are hereby set aside and held for naught, and that the said cause be remanded to the said Circuit Court for Huron County, in chancery, and that this cause be dismissed from this court for want of jurisdiction."

From this order the present appeal was taken on the 12th of November, 1883.

Mr. John F. Dillon and *Mr. John Atkinson* for appellants.

Mr. J. H. McGowan and *Mr. W. T. Mitchell* for appellees.

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

The 5th section of the act of March 3, 1875, makes it the duty of the Circuit Court of the United States to remand a cause which has been removed from a State court when it shall appear to the satisfaction of the court, at any time after the suit has been removed, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court. For this purpose the Circuit Court retained its power over the suit and the parties until the end of the term at which the final decree was rendered. The parties were not, in law, discharged from their attendance in the cause until the close of the term, and the decree, though entered, was "in the breast of the court" until the final adjournment. Bac. Abr. tit. Amendment and Jeofail, A; *Ex parte Lange*, 18 Wall. 163; *Goddard* v. *Ordway*, 101 U. S. 745, 752. The order to remand can be made at *any* time during the pendency of the cause when it shall appear there is no jurisdiction. The fact that Ebenezer R. Ayres had filed his answer in the United States court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the State court, when the case gets back there, to determine what shall be done with pleadings filed and testi-

mony taken during the pendency of the suit in the other jurisdiction.

The suit was brought for the foreclosure of the mortgage, and a personal money decree for any balance that might remain due on the debt after the security of the mortgage was exhausted. The mortgage and the debt it secured presented the subject matter of the controversy in the case. Ebenezer Wiswall was one of the mortgagors and one of the debtors. The relief sought was against him and the other defendants. It involved a finding of the amount due from him and the others who were bound for the payment of the debt, and in a certain event an order for an execution against him personally for the collection of the money. The debt was a unit. Whatever sum was due from one was also due from all who were chargeable with its payment. There could not be a decree against a part of the defendants for one sum, and against the rest for another. Although Wiswall did not contest the amount of the claim of the complainants as set out in their bill, Frederick S. Ayres, one of the joint debtors, did; and if he succeeds in his defence it will, of necessity, inure to the benefit of Wiswall. The matter in dispute between the parties on the opposite side of the suit to enforce the mortgage, was the amount due on the mortgage debt. The complainants, citizens of New York, are on one side of the suit, and Ebenezer Wiswall, also a citizen of New York, and others, citizens of Michigan and Ohio, on the other. If the claim of the complainants is sustained, the decree will be against all the defendants. In order that the complainants may get all the relief they ask, and which, upon their showing in the bill, they are entitled to, Wiswall is a necessary and substantial party to the suit, and on the opposite side from them.

The material facts of this case are entirely different from those in the *Removal Cases*, 100 U. S. 457, where there was one controversy between the construction company and the railroad company as to the existence of a mechanics' lien and the amount due thereon, and another between the construction company and certain mortgage trustees as to the priority of their respective liens. In the progress of the cause the

mechanics' lien was established against the company, and the property sold under the lien to pay the mechanics' debt. This ended that controversy. There then remained to be settled the other controversy between the construction company and the mortgage trustees, and we held that, as the railroad company was not interested in that dispute, it was to be treated as a nominal party only. It stood indifferent between the two real parties. No decree was asked against it, and the rights of the parties who were really contending could be fully settled without its presence.

So in *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, 298, we held that the trustees of a mortgage, which was being foreclosed at the suit of bondholders, might properly be arranged on the same side of the controversy about the foreclosure with the complainants, although they were nominally defendants, because there was no antagonism between them and the complainants, and no relief was asked against them. Here, however, relief is asked against Wiswall, and it grows directly out of the subject matter of the action, to wit, the collection of the mortgage debt which Wiswall owes jointly with the other debtors.

It follows that, as Wiswall was a citizen of the same State with the complainants, the suit was not removable under the first clause of § 2 of the act of 1875. All the parties on one side of the controversy were not citizens of different States from those on the other. *Removal Cases*, *supra*.

It remains to consider whether it was removable under the second clause, on the ground that there was in the suit "a controversy which is wholly between citizens of different States, and which can be fully determined as between them." The petition for removal was framed to meet this provision of the statute. What we have already said applies equally well to this branch of the case. The rule is now well established that this clause in the section refers only to suits where there exists "a separate and distinct cause of action, on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those

on the other. To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Frazer* v. *Jennison*, 106 U. S. 191, 194. As has already been seen, this is not such a case. There is here but one cause of action. The personal decree which is asked against Wiswall is incident to the main purpose of the suit. It presents no separate cause of action. The fact that separate answers were filed which raised separate issues in defending against the one cause of action, does not create separate controversies within the meaning of that term as used in the statute. They simply present different questions to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought. *Hyde* v. *Ruble*, 104 U. S. 407; *Winchester* v. *Loud*, 108 U. S. 130; *Shainwald* v. *Lewis*, 108 U. S. 158.

It follows that the suit was properly remanded, and the order of the Circuit Court to that effect is consequently

Affirmed.

GREAT WESTERN INSURANCE COMPANY *v.* UNITED STATES.

PAULSON, Receiver, *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Argued October 14, 15, 1884.—Decided November 10, 1884.

A claim against the United States for a part of the money received from Great Britain in payment of the award made at Geneva under the Treaty of Washington, is both a claim growing out of a treaty stipulation and a claim dependent upon such stipulation, and is excluded from the jurisdiction of the Court of Claims by § 1066 Rev. Stat.

These were suits against the United States to recover portions of the Geneva award. The insurance company sued on

its own account; the plaintiff Paulson, as receiver of the Columbian Insurance Company. Motions to dismiss for want of jurisdiction were made in both cases, and were heard together. The facts making the case are stated in the opinion of the court.

Mr. A. J. Willard and *Mr. Edwin B. Smith* for the Great Western Insurance Co., appellant.

Mr. John McDonald for Paulson, receiver, appellant.

Mr. Solicitor-General for appellee.

Mr. Justice Miller delivered the opinion of the court, in the case of the Great Western Insurance Company as follows:

This is an appeal from a judgment of the Court of Claims, dismissing a petition for want of jurisdiction. This was not done on a demurrer or plea, but on the following motion:

"The Assistant Attorney-General, on behalf of the United States, moves the court to dismiss the petition in this cause, for the reason that it does not disclose a cause of action within the jurisdiction of the court."

The motion, on hearing, was sustained (see 19 C. Cl. 206), and it is this judgment of dismissal we are asked to review.

The petition sets forth that the claimant was an insurance company, engaged in the business of insuring against losses by sea, and that it insured, in numerous cases, vessels, cargoes, and freight, owned by citizens of the United States, against war risks during the civil war between the United States and the Confederate States. That by reason of the losses and destruction of the vessels and cargoes so insured, inflicted by the Confederate cruisers Alabama and Florida, this claimant paid the sum of $309,635 to the owners of the vessels and cargoes, and that claimant not only became by law subrogated to rights of such owners against the parties who caused the loss, but took assignments of the claims from the losers to itself.

The petition then alleges that the British government, by its laches and unfriendliness, in permitting these cruisers to be built, fitted out, and furnished with supplies within its domin-

ion, became responsible for the losses inflicted on the owners of the vessels and cargoes captured and destroyed by them. That petitioner placed these claims in the hands of the Secretary of State, with the evidence to prove them against that government. The negotiation, treaty, and award known as the Alabama Claims Treaty and the Geneva Award are then set out, with the allegation that the sum now claimed by petitioner entered into and constituted a part of the $15,500,000 which was awarded to the United States in satisfaction of all claims of this character.

It is alleged that the money so awarded was paid to the United States, by reason of which and certain subsequent dealings with this money, which was finally paid into the treasury of the United States by order of Congress, an implied contract arose on the part of the defendants to pay to claimant the amount of the losses thus set forth, with interest thereon, which is alleged to be over $500,000. The names of the vessels and the amounts insured in each case, on vessel, cargo, and freight, are shown by a schedule attached to the petition. From this it appears that twelve of these vessels were captured by the Alabama and eight by the Florida. The names of the owners of the vessels, cargoes, and freight are distinctly set forth and the amounts paid to each.

The claimant, in its petition, places the right to recover on the ground that by virtue of the transactions between this government and Great Britain, and the receipt by the former of the money paid by the latter on account of these claims, the United States became a trustee for the claimant to the amount of its loss, and liable to pay the same; or, as expressed in another form, the money was received by the government for the use and benefit of the petitioner, and when it was paid into the treasury the United States became indebted to the petitioner for that amount.

The same ground is assumed in the argument of counsel in this court, the claim being treated essentially as *indebitatus assumpsit* for money had and received to the use of plaintiff.

If, therefore, the claim is well "founded on a contract, express or implied, with the United States," within the meaning

of § 1059 Rev. Stat., and is not forbidden by any other act of Congress, the petition should not have been dismissed; but if it does not present such an implied contract (for there is no pretence of an express contract), or if for any other reason the case is one of which the Court of Claims is forbidden to entertain jurisdiction, then the judgment of dismissal was correct.

The case has been mainly argued here on the proposition that the transaction does raise an implied promise on the part of the government of the United States to pay appellant the amount of money paid by it on account of the losses inflicted by the Alabama and Florida, or such proportion of that loss, if it be any less than the whole, as was covered by the award. And the judgment of the court below is defended largely upon the ground that no such legal obligation or contract arises from the transaction.

The opinion of the learned Chief Justice of the Court of Claims is an able presentation of this view.

But the judgment of that court is also defended on the ground that whatever may be the moral or the legal obligation of the government to the appellant, growing out of the treaty, the award, and the receipt of the money, it does not present a case cognizable in the Court of Claims, both because the acts of Congress creating the court and conferring its jurisdiction were not intended to embrace this class of cases, and because they were in express terms excluded from it.

If this latter proposition be sound, we deem it inappropriate to express any opinion on the other, because the fund in the treasury, paid under the Geneva Award, has been already largely distributed under the decisions of one special commission appointed for that purpose, whose powers have expired, and is now under administration by another commission created for the same purpose by another act of Congress. And although it is said that neither of these commissions could, under the law of its creation, take cognizance of appellant's claim, it is matter of public notoriety that the subject of claims of this class is occupying the attention of Congress, and bills on that subject are now pending before it.

Under these circumstances we do not think it appropriate to

express an opinion on the legal or moral obligation of the government in the matter, unless it is in the line of a plain duty.

The question of jurisdiction is the one raised by the motion, and is always to be decided before the court can properly inquire into the merits, and we are of opinion that, even if the circumstances recited in the petition can be held to raise an implied obligation on the part of the United States, the Court of Claims is forbidden to take jurisdiction in this class of cases.

§ 1066 Rev. Stat. enacts that "the jurisdiction of said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with Indian tribes."

This language is comprehensive and explicit. If the cause of action *grows out* of a treaty stipulation, the court cannot entertain it. If it is *dependent* on any such stipulation, the same result follows.

In any ordinary or usual sense of the words here used, appellant's claim, as set forth in the petition, grows out of the stipulations of the Treaty of Washington. The allegation is, that the United States took charge of the claim of petitioner against Great Britain for the injuries inflicted by the Alabama and the Florida. That, by a treaty on that subject, Great Britain stipulated that she would pay this claim to the United States, as petitioner alleges, for the use of said petitioner. In accordance with said stipulation, Great Britain did pay it to the United States, and the purpose of payment under the treaty inhering in the receipt of the money constitutes the foundation of appellant's claim. The intervention of the Board of Arbitration and its award as a means of ascertaining the liability of Great Britain, does not change the fact that the final recognition and payment of the claim *grows out of the stipulation of the treaty.*

In a still clearer sense it is obvious that this recognition of the claim by the award and its payment to the United States, were dependent on the treaty stipulation. Without the treaty the award would have bound nobody, and would have been at most a friendly recommendation. By virtue of the treaty it

became a most solemn and important international obligation, whereby Great Britain became bound, as much as a nation can be bound, to pay the amount of the award, and, at the same time, became freed and discharged from any further liability on account of any claims of that class.

The effort of counsel to ignore the treaty, the award and the receipt of the money by the United States as the foundation of appellant's claim, and rest the right to recover solely upon the act of March 31, 1877, by which the fund was changed from an investment in government bonds and paid into the government treasury, is too fanciful for serious consideration. If the government had not become liable, by reason of the original receipt of the money from Great Britain, under the treaty by which that country was discharged and released from the claim of plaintiff, it is difficult to comprehend how it became liable by a mere change in the manner of keeping the account. Whether the United States was liable on the bonds held in its own treasury vaults, or on account of the actual money represented by those bonds in the same vaults, cannot be material in estimating the nature and extent of that obligation.

Nor can we assent to the proposition that the section cited was designed to prevent foreign governments or Indian tribes from suing the United States to enforce rights founded on treaties. No such suit has ever been brought, either before or since the enactment of this provision. It is not believed that without it any one ever supposed that the Court of Claims had jurisdiction of suits by Indian tribes or foreign nations against the United States. It could not have been passed, therefore, to prevent such a suit.

That the restriction was intended to apply to cases of the character of the one now before us was substantially decided in *Atocha's Case*, 17 Wall. 439.

In that case, under the treaty of Guadaloupe Hidalgo with Mexico, of February 2, 1848, our government undertook to satisfy the claims of her citizens against Mexico to the amount of $3,250,000. In execution of this stipulation Congress passed an act creating a board of commissioners, before whom such citizens should appear and establish their claims.

When the two years which terminated the existence of the commission had expired, a considerable balance of this sum remained in the hands of the government, against which no claims had been established.

In this condition a special act of Congress authorized Atocha to present his claim to the Court of Claims, and if established to the satisfaction of that court, it was to be paid out of this fund. That court found in his favor, and the United States asking an appeal it was refused. On an application to this court for a writ of mandamus to compel the Court of Claims to allow the appeal, it was urged by counsel for the government that the case being one cognizable under the general jurisdiction of that court on an implied contract, there was a right to appeal, though by the special statute referring the case to that court no such right was given.

The court, in reply to this, said that since the act of March 3, 1862, in which the provision, embodied as § 1066 of the Rev. Stat., was first passed, the Court of Claims had no jurisdiction over this class of cases by virtue of the acts conferring its general powers. "These acts have since then (said the court) applied only to claims made directly against the United States, and for payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty. The act of June 25, 1868, whilst allowing appeals in behalf of the United States from all final judgments of the Court of Claims, did not change the character of the claims of which that court could previously take cognizance. Claims under treaty stipulations are not brought within it, and when jurisdiction over such claims is conferred by special act, the authority of that court to hear and determine them is limited and controlled by the provisions of that act."

That was a case in which, by the express terms of the treaty, the United States had assumed the debt of Mexico to Atocha and others of his class. The present is a case in which such assumption is implied from the circumstances of the treaty and the receipt of the money.

In the former case the United States agreed, for a valuable

consideration in land or territory, to pay to Mexico $3,250,000 to her creditors residing in the United States. In the latter the government received $15,500,000 from England, under what is alleged to be an implied promise to pay a class of American claims against her. We can see no difference in principle in the two cases, as they have relation to the fact that both claims grew out of, and were dependent on, treaty stipulations.

This limitation of the jurisdiction of the Court of Claims is in accord with the uniform course of the government in dealing with claims of our citizens against foreign governments. In such cases, where those governments have acknowledged a liability, but the amount or the number of the claims is in controversy, mixed commissions, composed of arbitrators appointed by each party, and an umpire, have usually been created by a treaty, which made the award of the commission obligatory.

In cases like that of Guadaloupe Hidalgo and the Treaty of Washington, under which the present claim arises, where the foreign nation pays, or agrees to pay, to this government a fixed sum in discharge of the class of claims which is the subject of treaty, Congress has provided a commission at home to pass upon the claims asserted under the treaty.

In no case that we are aware of has Congress conferred on any judicial tribunal the power to adjudicate such claims as a class, and in the case of Atocha, where a reference of a single claim was made to the Court of Claims, its action was rather in the nature of a commission to ascertain the facts than a judicial tribunal, as in other cases, and hence no appeal was allowed.

In the case of the Geneva Award, one such commission has been created by act of Congress, and its term of service has expired. Another is now in existence, under another act, for the same purpose, namely, the distribution of the sum paid under that award, and Congress is still devoting its attention to other means for the proper distribution of the remainder of this fund.

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

had no jurisdiction of the case presented by the petition of appellant, and its decree dismissing it is

Affirmed.

In Paulson's case the learned Justice added: This case was tried at the same time, in the Court of Claims, as the Great Western Insurance Co. *v.* the same defendant, and was decided on the same facts and the same judgment was then rendered.

It was argued in this court with that case, and the judgment of the Court of Claims is affirmed for the reasons given in the opinion in that case.

FOSTER *v.* KANSAS, *ex rel.* JOHNSTON, Attorney-General.

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

Submitted October 14, 1884.—Decided October 27, and November 10, 1884.

A writ of error operates as a suspersedeas only from the time of the lodging of the writ in the office of the clerk where the record to be examined remains.

§ 1007 Rev. Stat., concerning stay of execution does not apply to judgments of highest State courts. *Doyle* v. *Wisconsin*, 94 U. S. 50, affirmed.

When a judgment of a State court removes a State officer and thereby vacates the office, and a writ of error from this court is allowed for the reversal of that judgment, one appointed to the vacancy with knowledge of the granting of the writ of error on the part of the judge of the Supreme Court of the State making the appointment, but before the filing of the writ in the clerk's office where the record remains, is guilty of no contempt of this court in assuming to perform the duties of the office.

A State law prohibiting the manufacture and sale of intoxicating liquors, is not repugnant to the Constitution of the United States. *Bartemeyer* v. *Iowa*, 18 Wall. 129, and *Beer Co.* v. *Massachusetts*, 97 U. S. 25, affirmed.

Information in the nature of *quo warranto* is a civil proceeding in Kansas. *Ames* v. *Kansas*, 111 U. S. 449, affirmed.

A State statute regulating proceedings for removal of a person from a State office is not repugnant to the Constitution of the United States, if it provides for bringing the party into court, notifies him of the case he has to meet, allows him to be heard in defence, and provides for judicial deliberation and determination. *Kennard* v. *Louisiana*, 92 U. S. 480, affirmed.

Argument against the Motion.

The suit below was a proceeding to remove Foster from the office of County Attorney of Saline County, Kansas. Judgment for removal, to reverse which a writ of error was sued out. The defendant in error moved to dismiss the writ for want of jurisdiction, and coupled the motion with a motion to affirm under the judgment. After the writ of error and supersedeas were obtained from this court, but before presentation in the court below, one Moore was appointed successor to Foster and assumed the duties of the office. The other facts connected with the appointment and assumption of office appear in the opinion. The counsel for the plaintiff in error obtained a rule against Moore to show cause why he should not be committed for contempt in violating the supersedeas. The two motions were heard together.

Mr. W. Hallett Phillips for the rule and against the motion to dismiss or affirm.—The appointment of Moore after the date of such allowance was nullity, and Moore by accepting the appointment and undertaking to discharge the functions of the office, acted in gross violation of the *supersedeas*. Unless we are correct in this position, the *supersedeas* was a mere mockery. Thus in *Green* v. *Van Buskerk*, 3 Wall. 448, which came here under the 25th section, an order for execution on a judgment was entered, notwithstanding the plaintiff in error had obtained a *supersedeas*, within ten days after judgment. On application of the plaintiff in error, this court ordered a writ of *supersedeas* to issue. The Chief Justice delivering the unanimous opinion of the court says: "The unsuccessful party had ten days from that entry (of judgment) to take out a writ of error and make it a *supersedeas;* and he duly availed himself of this right by service of the writ of error on the 30th of February, 1866, and giving the required bonds." See also *Slaughter-House Cases*, 10 Wall. 273, 291; *Stafford* v. *Union Bank of Louisiana*, 16 How. 135, 139; *Adams* v. *Law*, 16 How. 144, 148. We would confidently submit this view, were it not for the fact that this court, in the recent case of *Doyle* v. *Wisconsin*, 94 U. S. 40, has declared that the provision in the act of 1875, re-enacting the stay of ten days contained in the act of 1789, has reference only to the

courts of the United States. No reference is made in the opinion of the court to the previous decisions. We submit that it cannot be reconciled with those decisions, nor with the long settled practice of the court. In *Commissioners* v. *Gorman*, 19 Wall. 661, no bond having been given within the ten days from judgment, execution issued. The plaintiff in error gave bond within sixty days. A motion was made that a writ should issue from this court to restore the plaintiff in error to the office, from which he had been ousted under the execution. The contention was that under the act of June 1, 1872, a party had sixty days within which to give the bond, and that no execution could issue during that period. This court, however, held, that under the act there was only an absolute stay of execution for ten days from judgment; that although a bond might be given within the sixty days, the *supersedeas* only dated from the time of the approval and filing of the bond. In that case the execution had issued prior to the filing of the bond, and no notice was given that any had been approved. It nowhere appeared from the record when the bond was approved. The court held that under these circumstances the writ of error operated as a *supersedeas* only from the filing.

Mr. A. L. Williams (*Mr. Garver* and *Mr. Bond* were with him) for the State of Kansas *contra*.

Mr. Chief Justice Waite, on the 27th of October, delivered the opinion of the court on the matter of the rule.

The showing under this rule presents the following facts: The Supreme Court of Kansas rendered a judgment on the 1st of April, 1884, removing Foster, the plaintiff in error, from the office of county attorney of Saline County. A statute of the State makes it the duty of the judge of the District Court of a county to fill the office of county attorney when a vacancy exists. A writ of error from this court for the reversal of the judgment of the Supreme Court was duly allowed in Washington on the 5th of April, and a supersedeas bond approved, and a citation signed. Notice of these facts was telegraphed on the same day, by the counsel of Foster in Washington, to his

counsel in Kansas. On the 7th, the counsel in Kansas called on the judge of the District Court of the county, and exhibited to him the telegram and notified him of what had been done in Washington. After this, and a little before twelve o'clock of the night of the 7th, the judge appointed Joseph Moore to the office in place of Foster. The bond of Moore, which had been executed on the 7th, and then approved by the clerk of the county, was accepted by the county commissioners on the 8th of April, and Moore thereupon assumed to discharge the duties of his office. Before this appointment was made, an authenticated copy of the record of the Supreme Court removing Foster from the office was presented to the judge. On the same day, the 8th, the writ of error and supersedeas bond arrived from Washington, and were duly lodged in the office of the clerk of the Supreme Court of the State. At the next term of the District Court, which began on the 12th of May, Moore appeared and acted as county attorney, the judge ruling that he, and not Foster, was properly in office.

On the 26th of May a rule was granted by one of the justices of this court requiring Moore to appear here on the second day of the present term and show cause why he should not be attached for contempt in violating the supersedeas. There is no dispute about the facts, and the simple question is whether they make out a case of contempt on the part of Moore. We have no hesitation in saying they do not. It was decided in *Board of Commissioners* v. *Gorman*, 19 Wall. 661, which was followed in *Kitchen* v. *Randolph*, 93 U. S. 86, that a writ of error operates as a supersedeas only from the time of the lodging of the writ in the office of the clerk where the record to be re-examined remains; and in *Doyle* v. *Wisconsin*, 94 U. S. 50, that the provision of sec. 1007 of the Revised Statutes, to the effect that in cases where a writ of error may be a supersedeas executions shall not issue until the expiration of ten days, does not apply to judgments in the highest court of a State. We see no reason to modify these rulings. It follows, that the supersedeas was not in force when Moore was appointed to and accepted the office.

The judgment operated of itself to remove Foster and leave

his office vacant. It needed no execution to carry it into effect. The statute gave the judge of the District Court authority to fill the vacancy thus created. The judge was officially notified of the vacancy on the 7th, when the authenticated copy of the record of the Supreme Court was presented to him. The operation of that judgment was not stayed by the supersedeas until the 8th, that being the date of the lodging of the writ of error in the clerk's office. It follows that the office was in fact vacant when Moore accepted his appointment, gave his bond, and took the requisite oath. He was thus in office before the supersedeas became operative. What effect the supersedeas had, when it was afterwards obtained, on the previous appointment, we need not consider. This is not an appropriate form of proceeding to determine whether Foster or Moore is now legally in office.

The rule is discharged

Mr. Chief Justice Waite, on the 10th of November, deliv ered the opinion of the court on the motions to dismiss and to affirm.

This record shows that the Attorney-General of the State of Kansas commenced proceedings in *quo warranto* in the Supreme Court of the State against John Foster, county attorney of Saline County, to remove him from office because he had neglected and refused to prosecute persons who were guilty of selling intoxicating liquors in the county in violation of a statute of the State known as the prohibitory liquor law. Among other defences relied on by the defendant was one to the effect that the statute under which the prosecutions were to be instituted was in violation of the Constitution of the United States, and therefore void. It was also claimed that the writ of *quo warranto* in Kansas was a criminal proceeding, and that under the Constitution of the United States the defendant was entitled to a trial in accordance with the criminal code of procedure. The court ruled against the defendant on all these claims and defences, and charged the jury that the sections of the prohibitory liquor law involved in the proceeding were not repugnant to the Constitution of the United States.

The trial resulted in a verdict against the defendant and a judgment thereon removing him from office. This writ of error was brought to reverse that judgment, and the State now moves to dismiss the case for want of jurisdiction, and with that has united a motion to affirm. This can be done under Rule 6, sec. 5, of this court.

As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction, and the motion to dismiss must be overruled; but, as every one of the questions which we are asked to consider has been already settled in this court, the motion to affirm is granted. In *Bartemeyer* v. *Iowa*, 18 Wall. 129, it was decided that a State law prohibiting the manufacture and sale of intoxicating liquors, was not repugnant to the Constitution of the United States. This was reaffirmed in *Beer Co.* v. *Massachusetts*, 97 U. S. 25, and that question is now no longer open in this court. In *Ames* v. *Kansas*, 111 U. S. 449, it was decided, at the last term, that the remedy by information in the nature of *quo warranto*, in Kansas, was a civil proceeding, and in *Kennard* v. *Louisiana*, 92 U. S. 480, that a State statute regulating proceedings for the removal of a person from a State office was not repugnant to the Constitution of the United States if it provided for bringing the party against whom the proceeding was had into court, and notifying him of the case he had to meet, for giving him an opportunity to be heard in his defence, and for the deliberation and judgment of the court.

Affirmed.

RANNEY, Administrator, *v.* BARLOW & Another.

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

Argued October 20, 21, 1884.—Decided November 3, 1884.

A & B, residents in New York, were owners of one undivided half of a tract of land in Cleveland. C, residing in Cleveland, was owner of the other undivided half. A & B gave C their power of attorney to sell their undivided half in a proposed sale to a railroad company. C sold the whole tract for $500,000, the consideration being $200,000 for the half belonging to A & B, and $300,000 for the half belonging to C, and A & B received the said consideration coming to them. At the trial of an action brought by A & B against C to recover one-half of the surplus above $200,000 received by him, there was evidence tending to show that A & B before sale consented that C might negotiate for the sale of the whole tract, and get what he could for his own half, if he got $200,000 for their moiety. *Held*, That a charge that the plaintiffs were entitled to recover unless the defendant informed them at what price he could sell or had sold his share and they assented to it, virtually withdrew this evidence from the jury, and instructed them that nothing but the assent of A & B after the sale could be effectual; and that it was error.

This was an action at law brought by the defendants in error, Samuel L. M. Barlow and Charles Day, against the plaintiff in error, Silas S. Stone. The petition was framed according to the rules prescribed by the code of Ohio, and was "for money only."

The action, generally stated, was based on the following averments of the petition, to wit, that the defendant, being the joint owner in common with the plaintiffs of a tract of land, and being their agent to take care of and negotiate sales of the land, either in parcels or as a whole, sold the entire tract for $500,000, paid them $200,000 of the purchase money, and fraudulently retained $300,000 for himself. The suit was brought to recover $50,000 and interest, that sum being, as the petition alleged, the share of the plaintiffs in that part of the purchase money which the defendant had unlawfully and fraudulently retained and appropriated.

The answer of the defendant denied all the charges of fraud

made in the petition, and alleged that the defendant made the sale of the plaintiffs' half of the property by virtue of a power of attorney authorizing him to sell it for $200,000, and stated facts showing, as the defendant insisted, that he was guilty of no fraud in procuring the power of attorney; and that the plaintiffs, before executing it, were fully advised by the defendant of his purpose to sell his own half of the land for a larger price than that for which the power of attorney authorized the sale of the plaintiffs' half, the defendant undertaking to pay all the expenses of bringing about a sale; and that, with full knowledge of the facts, plaintiffs agreed to the arrangements for selling the property and executed the power of attorney.

The pleadings and the bill of exceptions, which embodied all the evidence, disclosed the following facts respecting the parties below: The plaintiffs, on or before November 6, 1871, were the owners of an undivided half in common of certain lots, forming a part of what was known as the Central Tract, situate in the city of Cleveland, in the State of Ohio, and the defendant, Stone, was the owner of the other undivided half in common. For several years previous to November 6, 1871, and until the sale of the property as hereafter mentioned, the defendant was the agent of the plaintiffs, having the charge and management of their estate in said property, with power to "work up" sales of the same, either in parcels or as a whole, but without power to make contracts of sale or to convey. On or about November 6, 1871, the defendant, who was a resident of Cleveland, sent by mail to the plaintiffs, who resided in New York, a power of attorney, dated November 7, to be executed by them, which, when executed, would authorize him to sell, by contract in writing, their undivided half of the real estate above mentioned for the consideration of $200,000, of which $40,000 was to be paid cash down, and the residue in eight annual payments of $20,000 each, with interest at six per cent., to be secured by mortgage on the property sold. The authority conferred by the power was to expire in sixty days from the date of the power. In a letter written by the defendant to the plaintiffs, which enclosed the power of attorney, and which bore date November 6, 1871, the defendant said, referring to

the power of attorney: "I think I can sell, on the terms therein set forth, the land therein mentioned to a responsible party, within sixty days from now, and perhaps by the first of December next, but, in order to do so, entire secrecy must be observed in regard to the matter, and I must be allowed to bring about the sale in my own way." He added: "I advise the sale and desire an immediate reply. If a sale is made, I expect to make special terms for my interest." After the receipt of this letter and the draft of the power of attorney, to wit, about November 12, the plaintiffs sent their agent, Mr. Tatlow Jackson, to Cleveland, with a letter to the defendant, in which they said: "He," Mr. Jackson, "goes at our express request to confer with you in reference to the subject matter of yours of the sixth instant. You will oblige us by communicating to him as freely as you would to us. The proposition contained in your letter is of such magnitude as to enjoin the most thorough canvass and consideration—hence Mr. Jackson's mission."

There was evidence tending to show that Jackson passed three days in Cleveland, much of the time in the company of the defendant; that he was taken by the defendant over, and shown a large part of, the city, and that the land in question was shown to him, and its situation explained by the defendant; and that during that time the defendant repeatedly told Jackson that he would not sell his half of the land for the price he had named in the power of attorney as the price for the plaintiff's half, but would demand a larger price, and gave, as reasons why he was entitled to more for his half than the plaintiffs were for theirs, that he could make a good title at once, which the plaintiffs, on account of the encumbrances on their half, could not do; that there would be large expenses incurred in bringing about a sale, which he expected to pay, and the payment of which would compel him to sell other lands; that he might be compelled, in order to make a sale, to put other property out of the market by buying it; that he had made expensive improvements on other property belonging to him in Cuyahoga Valley, with a view to enhance the value of the Central Tract, which embraced the property in question; and

that the use to which their common property might, if sold, be put would depreciate the value of other adjacent real estate on the Cuyahoga River owned by him.

On November 17, 1881, which, as the testimony tended to show, was about the close of his visit to the defendant in Cleveland, Jackson wrote a letter to Day, one of the plaintiffs, which was received by the person addressed, in which he said: "I am confirmed in the opinion that you had best permit Mr. Stone to do as he thinks best with the Central Tract. I put it to him that you would prefer to go half-and-half with him in any sale he might make, in place of putting any valuation on your half interest. He responded that it was probable that, for his half interest, he might have to make a trade, which would bring in some other property belonging to him, making it impossible for such an arrangement, and that he intended to sell with you—that is, that he is not a purchaser."

Evidence was also introduced tending to show that, on December 1, 1871, Charles Day, one of the plaintiffs, had an interview, in Cleveland, with the defendant, in reference to the sale of the property, in which interview the defendant told him that, if the sale was made, he was unwilling to divide the property equally; that if he sold his half he should sell it for more than the price named in the power of attorney; that he did not want the power of attorney, unless he was going to be left perfectly free to manage his half. To which Day replied, that the power of attorney would come very quick after he got back to New York; that he was perfectly satisfied and ready to sell the property; and that, in the same interview, the defendant told Day, as reasons why he proposed to demand more for his half of the property than he demanded for the plaintiffs' half, that he intended to pay the expenses of the sale, that he had to use land for that purpose, and might have to buy other land.

On the same day, December 1st, Day wrote to his co-plaintiff, Barlow, as follows: "After a lengthy interview with Mr. Stone, I am strongly inclined to believe that we had better authorize him to sell that portion of the Central Tract, 485 lots, in the manner proposed by him;" and then, after giving his

reasons for the opinion, added, "I therefore think it wise to conform to the terms of his proposition."

Testimony was giving to the jury tending to show that after all this, and about December 7, the power of attorney sent by the defendant to the plaintiffs, was executed by them and mailed to the defendant, who received it about December 9.

After receiving from the plaintiffs the power of attorney, the defendant, on December 9, 1871, made a written proposition to the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company for the sale to it of the entire tract of land for $500,000, and added, "For one undivided half of the property I am prepared to give a good and sufficient warranty deed, free of encumbrance, and take a mortgage to secure the deferred payments; for the other half, which is slightly encumbered, I am prepared to give a contract from S. L. M. Barlow and Charles Day, who hold the legal title and will speedily clear it of encumbrance, and have consented that the cash payment and the contract itself shall be placed in the hands of the Society for Savings until they can make a clear title."

In pursuance of this proposition a contract was executed bearing date December 16, 1871, by which the plaintiffs, acting by the defendant as their attorney in fact, sold and agreed to convey their undivided half of the premises to the railroad company for the consideration of $200,000, in the instalments mentioned in the written proposition of December 9, which the railroad company agreed to pay. The contract was executed in less than sixty days after the date of the power of attorney, and was in all respects in conformity with the authority conferred thereby. The defendant, by a contract also dated December 16, 1871, agreed to convey by a deed of general warranty his own undivided half of the same premises to the railroad company for the consideration of $300,000, sixty thousand dollars whereof was to be paid on the delivery of the deed, and the residue in eight annual instalments of $30,000 each. The latter contract contained a provision that unless the plaintiffs within one year delivered the deed to the railroad company for their undivided half of the land, the railroad com-

pany should elect whether it would carry out its contract with the defendant or rescind the same.

There was some evidence tending to show that $200,000 was a fair price for the plaintiffs' undivided half of the land, and there was no evidence that when the power of attorney was executed the plaintiffs were ignorant of its value.

There was no evidence tending to show that before December 7, 1871, the day when the power of attorney was executed by plaintiffs, the defendant had received any offer or intimation from the railroad company that it would pay $500,000 for the property, or that such an offer had been received by the defendant from any one else.

On January 29, 1872, the railroad company, on account of the precarious health of the defendant, decided to receive at once his deed for his share of the property. The deed was executed and delivered on that day, and the railroad company paid the defendant $60,000 of the consideration and gave its note, secured by mortgage, for the residue. In July following the plaintiffs, having cleared the encumbrances from their half of the property, executed a deed therefor to the railroad company and received $40,000, the cash payment of the consideration, and notes secured by mortgage for the deferred payments.

Upon this state of the evidence the court, besides other charges, gave the jury the following:

"It is not enough that the defendant should have written the plaintiffs, when he applied for the power of attorney, that he expected to make special terms for himself, or that he should have told the plaintiffs or their agent that he would not sell for the price fixed by them, but expected to get more for his share. He cannot claim and take to himself the benefit of the discrimination in his favor, unless the evidence satisfies you that he had fully communicated all the facts to the plaintiffs before he consummated the sale—all the facts known to him in relation to the chances of selling—so as to enable the plaintiffs intelligently to decide whether they would consent to the proposed discrimination in defendant's favor or not. Such would be the rights of the parties, even if the defendant did not know or had not reason to believe, before he accepted the said

power of attorney, and undertook to execute it, that the land could be sold for more."

The bill of exceptions states that "the jury, having been charged by the court, retired for deliberation, and, after being out for the space of about one day, came into court and made a written request to the court for further instructions as follows:

"'Shall the jury understand the court to charge that the defendant is liable as agent, if it is found that he failed to reveal any material facts to plaintiffs relative to the value of the property and terms of sale?'

"And thereupon the court gave to the jury the further instruction or charge following, to wit:

"In answer to your inquiry, propounded by your foreman, I have to repeat that an agent is required by law to deal fairly with his principals in all things. One contention of the defendant in this case is, that the power of attorney under which the defendant made the sale of the plaintiffs' interest in the land, fixed the price and terms of the sale; and that plaintiffs were concluded by the authority thus given. This would be true, if the defendant obtained the power after fully and fairly communicating to them all the knowledge or trustworthy information which he possessed, so that they could as well judge of the value of the property, and the propriety of selling it on the terms authorized by the power, as the defendant could himself do. But if he failed to communicate the facts, and thereby induced plaintiffs to execute to him the power under which he acted in making the sale and conveying the title to the purchaser, plaintiffs could not be concluded or estopped by reason of anything contained therein.

"The court further instruct you that if you shall find that the power of attorney was obtained fairly, and after the communication by defendant to the plaintiffs of all the material facts and information, as aforesaid, but that he ascertained afterwards that he could sell the land, the whole of it, at $500,000, and that he refused to disclose the price or the name of the purchaser, but undertook to bring about the sale in his own way, he was in duty bound to accept the offer of $500,000

made by the purchasers, as well for his principal as for himself; and if he, instead of making the sale for the benefit of both, sold plaintiffs' part for $200,000 and his own for $300,000, he is not authorized to retain the excess to himself, but that he is, in equity and good conscience, bound to share the same with his principals, unless he made a full disclosure to them of all the facts material for them to know, and they, with such full knowledge and for reasons which they deemed sufficient, consented to the unequal division of the purchase money which the defendant made of it. If he did not so disclose the material facts in regard to the value or the amount received, and obtain plaintiffs' consent that he might retain three-fifths of the purchase money, as it is admitted he did, the plaintiffs are entitled to recover the one-half of such excess, so received and retained by defendant, as per my former instructions."

The jury again retired, and, after further deliberation, returned a verdict for the plaintiffs for $57,944.82, for which sum, with costs to be taxed, the court rendered judgment against the defendant. To reverse that judgment this writ of error is brought.

The defendant below, plaintiff in error in this court, assigned for error the charges of the court above recited.

Mr. J. M. Adams and *R. P. Ranney* for plaintiff in error.

Mr. Stevenson Burke (*Mr. William B. Sanders* was with him) for defendants in error.

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

We think there was error in the charges complained of. To test their correctness we must assume the truth of the facts which the testimony submitted to the jury tended to prove. It was the duty of the court to submit to the consideration of the jury the testimony adduced by the defendant to sustain the defences set up in his answer, and the charge should have been based on the hypothesis that the defences which the testimony tended to prove were proven. The evidence tended to show that no fraud was practised by the defendant in procur-

ing the power of attorney; in fact, the charge proceeds on this assumption; it tended to show that the plaintiffs, after full conference with the defendant, consented that he might secretly conduct the negotiations for the sale, that he might manage the sale of the property in his own way, and that he should be free to dispose of his own half as he pleased; that, in case he sold their half for $200,000, he might sell his own half for any price he could get. If the plaintiffs gave their consent in advance of any sale, it was immaterial to them what price the defendant got for his share of the land, and he was under no obligation to disclose the price to the plaintiffs and ask their consent to retain it. The effect of the charge of the court was to withdraw from the jury all the evidence tending to show the antecedent assent of the plaintiffs, fairly obtained, to the sale made by the defendant, and to instruct the jury that nothing but their subsequent assent could be effectual. This was error. *Adams* v. *Roberts*, 2 How. 486; *Reese* v. *Beck*, 24 Ala. 651; *Grube* v. *Nichols*, 36 Ill. 92; *Chappell* v. *Allen*, 38 Missouri, 213, 220.

The charge having assumed that there was no fraud in the procuring of the power of attorney, and the defendant having submitted testimony tending to show that there was no fraud in his doings after the power of attorney was procured, but that whatever was subsequently done by him in making the sale was done with the consent of the plaintiffs given in advance, it was error to charge the jury that the plaintiffs were entitled to recover, unless the defendant informed the plaintiffs at what price he could sell or had sold his share, and they renewed their consent that he might retain it.

For the error indicated

The judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.

SNYDER *v.* UNITED STATES.

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

Submitted November 4, 1884.—Decided November 17, 1884.

A general verdict, upon an information in several counts for a single forfeiture under the internal revenue laws, is valid if one count is good.

A verdict which speaks of "evaluating," instead of "valuing," is not therefore insufficient to support a judgment.

This was an information in several counts under section 3372 of the Revised Statutes, for the forfeiture of the tobacco, machinery, tools and materials in a tobacco manufactory, for violations of the internal revenue laws. The property was released upon the claimant's giving a bond to abide the final decree. The claimant demurred to the information as not setting forth any facts warranting the seizure or forfeiture of the property. The demurrer was overruled, the claimant filed an answer, and upon a trial a verdict was returned in this form: "We, the jury, find a verdict for the government, evaluating the goods and machinery seized at a sum of one thousand dollars." The claimant moved, in arrest of judgment, that several of the counts were insufficient, and that the verdict was general upon all the counts, and was vague and uncertain, and not responsive to the issue. The motion was overruled, and judgment rendered for the United States, and the claimant sued out a writ of error.

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

Mr. Assistant Attorney-General Maury for defendant in error.

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

Informations under the revenue laws for the forfeiture of goods, seeking no judgment of fine or imprisonment against

any person, are not strictly criminal cases, in which the decisions of the Circuit Court are final, unless a division of opinion is certified; but they are civil actions, of which this court has jurisdiction in error, without regard to the sum or value in dispute. Rev. Stat. § 699; *Pettigrew* v. *United States*, 97 U. S. 385. Yet, as has been expressly adjudged, they are so far in the nature of criminal proceedings, as to come within the rule that a general verdict, upon several counts seeking in different forms one object, must be upheld if one count is good. *Clifton* v. *United States*, 4 How. 242, 250. As one of the counts in this case is admitted to be good, it is unnecessary to consider the objections taken to the other counts.

The verdict, though expressed in bad English, clearly manifested the intention and finding of the jury upon the issue submitted to them, and the court rightly gave judgment upon it. Rev. Stat. § 954; *Parks* v. *Turner*, 12 How. 39, 46; *Lincoln* v. *Iron Co.*, 103 U. S. 412.

Judgment affirmed.

LABETTE COUNTY COMMISSIONERS & Others *v.* UNITED STATES *ex rel.* MOULTON.

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

Submitted October 24, 1884.—Decided November 17, 1884.

Mandamus will lie against county commissioners to compel steps to enforce a judgment recovered against an incorporated township within the county, when the law casts upon them the duty of providing for its satisfaction, and when mandamus is, in other respects, the proper remedy.

Under the statutes of Kansas referred to in the case and opinion, it was the duty of the county commissioners to make the proper levy of a tax for payment of bonds of a township in the county issued in payment of a subscription to railroad stock. The assent and concurrence of the trustee of the township was not necessary.

One writ of mandamus against all officers concerned in the separate but cooperative steps for levying and collecting a tax is the proper and effective remedy to enforce its collection.

Statement of Facts.

The relator, on June 7, 1877, recovered a judgment in the Circuit Court of the United States for the District of Kansas, against the township of Oswego, in the county of Labette, in that State, for $9,221.34, with interest and costs, which is still in force and unpaid. That judgment was recovered upon coupons for unpaid interest on bonds, issued in the name and on behalf of Oswego township, by the Board of County Commissioners of Labette County, pursuant to the act of the Legislature of the State, entitled "An Act to enable municipal townships to subscribe for stock in any railroad and to provide for the payment of the same," approved February 25, 1870, and were payable to the Missouri, Kansas & Texas Railway Company or bearer.

On his information, an alternative writ of mandamus was allowed by the Circuit Court, June 10, 1881. The command of the writ was as follows: That "the said Board of County Commissioners of Labette County, State of Kansas, do forthwith levy and collect and pay over, or cause to be collected and paid over, to the relator, a tax on all the taxable property within the township of Oswego as constituted in the year 1870, and to do and perform in the manner and at the time required by law each and every and all singular the matters and things in respect to this special tax that are required by law by you to be done in respect to general taxation; and we do further command that you, the said clerk of the said board of the said county, do enter or record the levy of such tax, and enter the same on a tax roll or list, and record the proceedings of said board in respect to such taxation, and all proceedings that by law should be had and recorded in reference to taxation, and determine, extend and carry out the sum or sums of money to be levied or extended against each and every tract or lot of land, and all other taxable property, as provided by said laws, and set down such tax in a separate column, and complete the said tax roll or list in the manner and at the time required by law, and attach thereto your certificate and the seal of your office and the seal of your county and corporation, and that you deliver the same, so sealed and signed, to the treasurer of your said county, at the time and in the manner required by law, and

that you do and perform in the proper manner and at the proper time each and every act and thing by law required to be done in respect to taxation; and we command you, the said treasurer of said county, to accept and receive the said tax roll or list from said clerk, and to proceed as provided by law to collect such tax and to publish the list required by law, and to distrain for said tax, and to advertise lands for sale for the non-payment of such tax, and to offer the same for sale, and to strike them off at such sale, all to be done in the manner and at the time required by law, and to take each and every and all and singular the process and proceedings, and do and perform each and every act and thing imposed upon you by the law in respect to the enforcement or collection of taxes, the same in respect to this tax as to other and general taxes, at the time and in the manner provided by law, and that you pay the said moneys to the relator, or into this court for his use."

To this the respondents jointly and severally demurred, and, for causes of demurrer, assigned the following:

1. Because the court has no jurisdiction of the persons of the respondents or the subject of the action.

2. Because of defect of parties defendant.

3. Because several causes of action are improperly joined.

4. Because the writ does not state facts sufficient to entitle the relator to the relief demanded against the respondents.

This demurrer was overruled by the Circuit Court, and a peremptory writ of mandamus awarded (see 2 McCrary, 25), to reverse which judgment this writ of error has been sued out.

Mr. B. W. Perkins for plaintiffs in error.—I. This is a proceeding to enforce against a county (Labette) a judgment obtained against a township in that county (Oswego). In Kansas a township is an independent corporation. Comp. Laws 1879, § 5965. The county officers were in no way connected with the former suit. Hence this is an original action; and it is settled that circuit courts have no original jurisdiction in actions of mandamus. *Marbury* v. *Madison*, 1 Cranch, 137; *McIntire* v. *Wood*, 7 Cranch, 504; *Bath County* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 Wall. 427.—II. The officers

of the township of Oswego should have been made respondents in this suit. The failure to make them so is a fatal defect. —III. There were several causes of action improperly joined. —IV. The writ did not state facts sufficient to entitle the relator (defendant in error) to the relief demanded against the respondents and against each and all of them. Mandamus is not a prerogative writ. It is in the nature of an ordinary action between the parties, and a writ of right only to the extent to which the party aggrieved shows himself entitled to the relief sought. *Gilman* v. *Bassett*, 33 Conn. 298; *Arberry* v. *Beavers*, 6 Texas, 457; *Kendall* v. *United States*, 12 Pet. 524; *Commonwealth* v. *Dennison*, 24 How. 66. Mandamus issues only when there is a clear legal right, without another adequate legal remedy. It never issues in doubtful cases. *Free Press Association* v. *Nichols*, 45 Vt. 7; *People* v. *Solomon*, 46 Ill. 415; *People* v. *Chicago*, 51 Ill. 1, 28; *United States* v. *Clark County*, 95 U. S. 769, 773. When the rights, or acts to be performed are wholly independent, not one writ, but several, will be awarded, and the application should be several. Hence the writ must be good as to all demands, and as against all respondents, or it is bad in whole and as to all. *People* v. *Yates*, 40 Ill. 126; *State* v. *Beloit*, 20 Wis. 79, 85; *Haskin* v. *Supervisors of Scott County*, 51 Mississippi, 406 and authorities cited. It is well settled that mandamus will not issue until the officer against whom it is asked is in default; and he is not in default until he has been in a condition to perform the act desired, and has, after demand by the party who has the right to have it performed, refused to perform it. The duties of these officers are distinct under the laws. A county clerk cannot act respecting a tax till the commissioners have acted; the treasurer cannot act until the county clerk has acted. This proceeding asks that the commissioners shall levy a tax and deliver the tax roll to the clerk; that the clerk shall enter it and deliver the roll to the treasurer; that the treasurer shall collect the tax; and this though none of the officers were parties to the original suit. How could the commissioners be in default if they were not parties to the original suit? or the clerk be in default till the treasurer had performed his duty?

or the treasurer be in default until the clerk had performed his? We know that the recent case of *Cherokee County* v. *Wilson*, 109 U. S. 621, will be cited against us on these points; but we ask a reconsideration of the question.

Mr. S. E. Brown for defendant in error.

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

The objection that the Circuit Court had no jurisdiction to issue its mandamus to the plaintiffs in error is based upon the supposition that because they are not parties to the judgment against Oswego Township, and are not officers of or representatives of that municipal corporation, but are officers of the county of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court. It is quite true, as it is familiar, that there is no original jurisdiction in the Circuit Courts in mandamus, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced. An illustration to the contrary is found in that class of cases of which *Krippendorf* v. *Hyde*, 110 U. S. 276, is an example.

The question is, whether the respondents, to whom the writ is addressed, have the legal duty to perform, which is required of them, and whether the relator has a legal right to its performance from them, by virtue of the judgment he has already obtained. If so, then they are, as here, the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction. They are not strangers to it, as being new parties, on whom an original obligation is sought to be charged, but are bound by it, as it stands, without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment.

Opinion of the Court.

It is next objected that the trustee of Oswego Township is a necessary party in the mandamus, as the officer charged by law with the duty of levying and collecting the tax for the payment of judgments against it; or at least whose concurrence in the levy is made necessary to the valid action of the county commissioners.

The statutes of Kansas which govern this question were considered by this court in the case of *Cherokee County Commissioners* v. *Wilson*, 109 U. S. 621. It was there held to be the duty of the county commissioners, when the office of township trustee was vacant, to levy the tax upon the township property for the payment of township debts, under the general law regulating the subject. In the present case it does not appear that there was no trustee of the township who could act. But we are of opinion that in regard to bonds issued for railroad purposes, and to judgments rendered thereon, for principal or interest, as in the present case, the concurrence of the trustee of the township is not necessary to the levy of the tax necessary for their payment, but that the duty is laid upon the commissioners of the county to levy the tax upon the township for that purpose. This we think is the fair result of a comparison of the various provisions on the subject contained in the original legislation under which the bonds were issued, with the amendments passed and in force at the time these proceedings were begun, including the act of March 9, 1874, Session Laws of Kansas, 1874, p. 41, and sec. 6, ch. 107, Laws of Kansas, 1876. Indeed, it was expressly decided in *Cherokee County Commissioners* v. *Wilson*, *ubi supra*, that in no event was the assent and concurrence of the township trustee necessary to the action of the commissioners of the county, as the latter were required to levy all taxes required by law upon the township, even though the township trustee refused to consent; and when it was a matter of discretion and expediency, the judgment of the county commissioners was paramount. As to the bonds upon which the relator's judgment is founded, we think it was the legal duty of the commissioners of the county to make the proper levy of a tax for their payment, without regard to the trustee of the township.

Opinion of the Court.

It is further objected that the demurrer to the alternative writ of mandamus should have been sustained by the Circuit Court, on the ground of a misjoinder of parties defendant, it being alleged that the duty required of the county clerk and that of the county treasurer were separate and distinct from each other, and from that of the county commissioners, that neither the clerk nor the treasurer could act in the collection and payment of the tax until after its levy by the commissioners, and that as to each of those officers it was shown on the face of the writ that he could not be in default.

The clerk and the treasurer do not, it will be observed, make returns to the alternative writ of their willingness to perform their several duties in reference to this tax when the time for them to act shall arrive; nor are they satisfied with several demurrers to the writ, on the single ground that, as to them, it is premature and therefore defective by reason of the misjoinder; but they join with the county commissioners in demurring to the writ, on the ground that it does not state facts sufficient to entitle the relator to the relief demanded. Their position in the record is not altogether consistent with the presumption they claim the benefit of, that they will each perform the duty required of him by the law when the time arrives for its punctual performance.

But the objection does not apply in the present case.

Speaking of the writ of *mandamus*, as employed here, this court, in *Riggs* v. *Johnson County*, 6 Wall. 166–198, described it as "a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract." An ordinary execution upon a judgment at law commands the officer to whom it is addressed to perform a series of acts—to levy on goods and chattels, lands and tenements of the judgment debtor, and, if on the latter, to appraise their value, to advertise the same for sale, to make sale of the same at the time and place and in the manner prescribed by law, and apply the proceeds to the payment of the judgment—and these are to be performed successively. There is no incongruity in such a writ. It would not be com-

plete or effective without it embraced all the particulars which, in law, are essential to the full duty contemplated by it, the performance of which is necessary to secure its benefits to the party who sues it out. So here, the object of this writ, though including many particular steps in obeying it, is, nevertheless, single, in that it is intended to obtain an end which is the result of the means prescribed. The command of the writ is to perform the general duty, which is obeyed by performing the successive steps which constitute it. Clearly, the writ would not be chargeable with duplicity if addressed to one person, although it commanded the performance of a series of acts, each of which was a condition of the performance of its successor, where the right of the relator consists in the result legally flowing from the combined whole. It can make no difference in principle that in a particular case the law, instead of casting the performance of the entire duty upon a single person, has divided it among several, each to perform but one act in the series, and each acting independently and not as responsible to any of the others, but all required to co-operate in the attainment of the single result, and by a continuous and uninterrupted succession, so as to preserve the integrity and unity of the performance as an entire duty.

The relator is entitled to an effective writ, and he can have it only on the terms of joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps, in the performance of those official duties, which is necessary to secure to him his legal right. Otherwise the whole proceeding is liable to be rendered nugatory and abortive. For the levy and collection of a tax is not only an entire thing, although accomplished by successive steps and by separate officials, but is a continuous transaction, each one taking it up where his predecessor left it; and if the relator was compelled to obtain a separate mandamus against each person charged with the performance of a single service, the very delay and break in the continuity of the process might be, by the terms of the law itself, a sufficient answer to each succeeding writ; and if it were not, it would prolong the proceeding to such indefinite length as to deprive the writ of the very

character of a remedy. So that, if such a precedent could be regarded as an innovation upon established practice, it could not be considered a departure from the principle of the jurisdiction; for, to quote what Lord Mansfield said in *Rex* v. *Barker*, 3 Burr. 1267, "The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one."

The present writ, however, is not without precedent, modern and ancient. It is, indeed, precisely like that which was passed upon in the case of the *Cherokee County Commissioners* v. *Wilson*, *ubi supra*, although there the objection was made by the commissioners alone, who, it was held, were not entitled to complain on that account.

In the case of *Farnsworth* v. *Boston*, 121 Mass. 173, cited and approved in *Attorney-General* v. *Boston*, 123 Mass. 460, where an owner of land, assessed to pay for an improvement, had, under the statute, a right to surrender his estate, and receive compensation for its value, which the city council sought to defeat by an attempted vacating of the assessment, which it was held they could not lawfully do, a mandamus was issued, not only to the city council to take the land, but also to the mayor to sign the description and statement, although he could not do so, or be in default for not doing so, until the city council had passed an order taking the land, and although he might, by the statute, sign the description and statement at any time within sixty days after the taking.

The case of *The King* v. *The Mayor and Burgesses of Tregony*, 8 Mod. 111, was a motion for a peremptory *mandamus*, where a former *mandamus* was directed to the mayor and burgesses of Tregony, in Cornwall, commanding them, "*quod eligetis et juretis majorem, &c., secundum authoritatem vestram, &c.*" "It was moved," says the report, "for a *supersedeas* to that *mandamus*, for that the writ was not good, because it was directed to the mayor and burgesses to elect and swear a

mayor, whereas the power of electing is only in the burgesses, and the power of swearing in the mayor alone; so that the mayor cannot make a return of this writ as directed to him to elect; nor the corporation as directed to them to swear a mayor, so that if the burgesses should make a return as to the swearing part, they would be usurpers, and if they do not make a return, they will be in contempt of this court. Besides, it is incongruous for a *mandamus* to be directed to swear a mayor not yet elected," &c. But the court were all of opinion in this case that they ought to make a return, for the writ commanding them "*quod eligetis et juretis secundum authoritatem vestram*," it shall be taken *reddendo singula singulis*, and to be the return of both. Accordingly, a return having been made, the objection was renewed, and was further argued, but the court remained of the same opinion on this point, and on the final argument for a peremptory writ, it was finally said (p. 128): "The objection to the writ is that it is directed 'To the mayor and burgesses to elect and swear a new mayor,' which is wrong; for though the mayor and burgesses are to elect, yet it is the mayor alone who must administer an oath to the person, for the burgesses cannot; therefore, this direction is wrong. But this may receive a very plain answer by a reasonable construction of the matter distributively in the manner as directed by the writ, the words being '*eligetis et juretis secundum authoritatem vestram*,' so that it is a writ to the body corporate to elect, they having the inheritance as to the election of a mayor; and it is a writ to the mayor, who has a special power to swear the person elected into the office; so that *reddendo singula singulis*, the writ is well directed. And it could not be otherwise, unless there had been two writs granted, the one to elect, and the other to swear the person elected; so that this, being a ministerial writ, is so far good."

The same point had been previously raised and decided in *The King* v. *The Mayor of Abingdon*, 1 Ld. Raym. 559, by Chief Justice Holt, who said: "There have been a hundred writs directed to the mayor and aldermen of London in cases of acts to be done by them separately." The report continues: "The second exception to the writ was to that part of the writ

Counsel for Parties.

which commanded the mayor to swear Sellwood and Spinnage, that they sued this too soon; for a *mandamus* ought not to go until the officer has refused to do the act and his duty; or at least that there was some person who had right to have the thing done to them; which was not in this case, because they were not yet elected. That this was to sue a *mandamus quia timet*, and, like the case of an original bearing *teste*, before the cause of action accrued. But *per* Holt, Chief Justice, it will be well enough in this case, because they are acts depending the one upon the other; first, they ought to elect him, and then the mayor ought to swear him. And the writ was held good and the return disallowed, and a peremptory *mandamus* was granted."

We are of opinion, therefore, that there is no error in the judgment of the Circuit Court, and it is accordingly

Affirmed.

BRADSTREET COMPANY *v.* HIGGINS.

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

Submitted October 27, 1884.—Decided November 17, 1884.

When the jurisdiction of this court for review of the judgments and decrees of circuit courts depends upon the amount in controversy, that amount is the sum shown by the whole record, including counter-claims, and not by the claims set up by the plaintiff only. *Hilton* v. *Dickinson*, 108 U. S. 165, affirmed.

This was a motion to dismiss for want of jurisdiction, it being alleged that the amount in controversy was not sufficient to give jurisdiction. The facts are stated in the opinion of the court.

Mr. W. Hallett Phillips (*Mr. Charles L. Dobson* was with him) for the motion.

Mr. Henry Wise Garnett, opposing.

Opinion of the Court.

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

This record shows that Higgins, the defendant in error, brought suit against the Bradstreet Company for $8,000, the price and value of certain property of his which the company had appropriated to its own use. The answer of the company contained, 1st, a general denial of the allegations of the petition; 2d, a counter-claim of $1,104.18 for moneys collected by Higgins for the use of the company and not paid over; and, 3d, a counter-claim of $1,833.42, the expenses of the office of the company at Kansas City over its receipts, which Higgins, as superintendent of the office, was bound to pay. Higgins in his reply admitted the first counter-claim, and consented to its being applied as a credit upon the demand for which his suit was brought. As to the second counter-claim, his defence was, in effect, that the legitimate expenses of the office at Kansas City while he was superintendent, which he was bound to pay, did not exceed its legitimate receipts. Upon these issues a trial was had, which resulted in a verdict and judgment in favor of Higgins for $3,333.92. Upon the trial a bill of exceptions was taken by the company, from which it appears that evidence was introduced by the company "tending to show that the legitimate expenses of the Kansas City office exceeded its legitimate receipts during the time plaintiff acted as its superintendent in the sum of $61.10, including plaintiff's salary of $100 per month as expenses." This writ of error was brought by the company, and Higgins now moves to dismiss because the value of the matter in dispute does not exceed $5,000.

In *Hilton* v. *Dickinson*, 108 U. S. 165, it was decided, on full consideration, that our jurisdiction for the review of the judgments and decrees of the circuit courts, in this class of cases, depends on the value of the matter in dispute here, and that it is the actual matter in dispute, as shown by the whole record, and not the *ad damnum* alone, which governs. Here the recovery against the company was less that $5,000, and that, according to all the cases which were fully collected and commented on in *Hilton* v. *Dickinson*, is not of itself enough to give us jurisdiction. The right of the company to bring the case here, therefore, depends on the jurisdictional effect of its various

counter-claims. As the first of these claims was admitted by Higgins in his reply, there could not have been below, and there cannot be here, any dispute about that. The conclusive presumption upon the record is, that the amount of this claim was credited upon the sum found due from the company for the property about which the suit was brought, and the verdict and judgment given only for the balance remaining after that deduction was made. As to the second, the record shows that while the claim in the pleadings was for $1,833.42, the evidence introduced in support of it only tended to prove that there was $61.10 due from Higgins on that account. The dispute in this court, therefore, according to the record is, 1st, as to the right of Higgins to retain his judgment against the company for $3,333.92, and 2d, as to the right of the company to recover $61.10 from Higgins. As these two sums combined do not make $5,000, it is clear we have no jurisdiction, and the motion to dismiss must be granted. Had it not been for the statement in the bill of exceptions, which, in effect, limited the counter-claim to the amount which the evidence tended to prove, the case would have been different, for then it would have appeared that the company might have been entitled to recover the whole amount of $1,833.42, after defeating the entire claim of Higgins, thus making the apparent value of the matter in dispute here in excess of our jurisdictional requirements. As it is, however, we can look only to the statement in the bill of exceptions of what the amount in dispute under this claim actually was.

Dismissed.

HANCOCK *v.* HOLBROOK & Others.

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

Argued November 4, 1884.—Decided November 17, 1884.

When a cause commenced in a State court, and removed to a circuit court, is brought to this court, and it does not appear on the face of the record that

the citizenship of the parties was such as to give the Circuit Court jurisdiction on removal, the judgment below will be reversed without inquiry into the merits, and the cause sent back with instructions to remand it to the State court from which it was improperly removed. *Mansfield, Coldwater & Lake Michigan Railway* v. *Swan*, 111 U. S. 379, affirmed.

In so remanding the cause this court will make such order as to costs as is just.

This cause was argued by counsel on the merits. The jurisdictional question raised by the pleadings is stated in the opinion of the court.

Mr. Jeff. Chandler, *Mr. Eppa Hunton* and *Mr. J. D. Rouse* for appellants.

Mr. Thomas J. Semmes (*Mr. Robert Mott* was with him) for appellees.

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

This suit was brought in a State court of Louisiana, on the 25th of November, 1876, by Edward C. Hancock, a citizen of Louisiana, against Eliza Jane Holbrook, George W. Nicholson, R. W. Holbrook, and Chas. T. Howard, all of the city of New Orleans, as stated in the petition, to establish an alleged title of Holbrook to $\frac{20}{24}$ parts of all the property, rights, assets and good will of the "New Orleans Picayune Newspaper and Printing Establishment," then in the possession of the defendants at New Orleans. All the defendants were served with process by the sheriff of the parish of Orleans.

On the 13th of December, 1876, Nicholson filed in the State court a petition for the removal of the suit to the Circuit Court of the United States for the District of Louisiana. In this petition he stated that he was a citizen of the State of Mississippi and Hancock a citizen of the State of Louisiana. No mention was made of the citizenship of the other defendants, and no other ground of removal was given than that Hancock and Nicholson were citizens of different States. It does not appear that this petition was ever formally presented to the State court. The transcript only shows that it was filed. On the 19th of December, 1876, after the date of the filing of the petition for removal, the petition in the suit was amended by add-

ing the name of Richard Fitzgerald, a citizen of Louisiana, as a defendant, and a summons was thereupon issued to bring this new defendant into court.

On the 11th of December, 1877, nearly a year after the petition for removal was filed, the clerk of the State court made a transcript of the record and proceedings in that court, and annexed his certificate of its correctness. On the same day the attorney of Hancock indorsed on the transcript the following:

"I consent, on behalf of plaintiff, that this shall be considered a correct transcript of the record of the suit of *E. C. Hancock* v. *Mrs. E. J. Holbrook*, No. 23,653, Third District Court, Parish of Orleans, the same to be filed in the U. S. Circuit Court, in accordance with the order to transfer."

The transcript, thus certified and indorsed, was filed in the Circuit Court of the United States on the 13th of December, 1877. No motion was ever made to remand the cause, and on the 10th of January, 1878, proceedings were begun in the Circuit Court, at the instance of the attorney for the plaintiff. Answers were afterwards filed by the defendants and testimony taken, upon which the parties went to a hearing, which resulted in a decree, on the 13th of March, 1881, dismissing the bill. From this decree Hancock appealed.

It was decided at the last term, in *Mansfield, Coldwater & Lake Michigan Railway Co.* v. *Swan*, 111 U. S. 379, that when a suit which has been removed from a State court is brought here by appeal or writ of error, and it does not appear on the face of the record that the citizenship of the parties was such as to give the Circuit Court jurisdiction upon the removal, the judgment or decree of the Circuit Court will be reversed without inquiry into the merits, and the cause sent back with instructions to remand it to the State court from which it was improperly removed. This is such a case. All the defendants except one were citizens of the same State with the plaintiff, and there is no pretence of a separable controversy. Under these circumstances the cause was not removable (*Removal Cases*, 100 U. S. 457), and the Circuit Court consequently had no jurisdiction.

In the same case it was also decided that upon such a reversal

this court may make such order in respect to costs of the appeal or writ of error as justice and right shall seem to require. In that case the removal was made on the application of the appellant, and, although a judgment of reversal was entered, costs were given against him. It appeared there, however, that the appellee, after the case got to the Circuit Court, moved that it be remanded to the State court, and only remained in the Circuit Court, because his motion was overruled. He submitted to the jurisdiction of the Circuit Court upon compulsion.

Here the appellee petitioned for the removal. The cause was not, however, docketed in the Circuit Court until a year after the petition for removal had been filed in the State court, and it nowhere appears that any action was taken in the latter court in reference to its own jurisdiction. Neither does it appear by which party the case was docketed in the Circuit Court. It does appear, however, that the appellant consented to the docketing, and that he made no effort whatever to have the case remanded. He was the first to move in the Circuit Court, and there is nothing to show that he remained in that court against his will. We are strongly inclined to the opinion that the removal was effected with the consent of both parties and without the attention of either of the courts having been called to the jurisdictional facts. Under these circumstances each party should pay one-half the costs in this court.

The decree of the Circuit Court is reversed, and the cause returned to that court with instructions to remand it to the State court from which it was improperly removed, and with liberty to make such order as to costs accruing in the Circuit Court after the removal as equity and justice may require. A judgment will be enterod against the appellees for one-half the costs in this court.

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* HASTINGS *v.* JACKSON & Another.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Submitted October 31, 1884.—Decided November 17, 1884.

This court has no jurisdiction over the decision and judgment of a State court upon adverse claims to real estate made under a common grantor whose title was derived from the United States and is not in dispute. *Romie* v. *Casanova*, 91 U. S. 379, and *McStay* v. *Friedman*, 92 U. S. 723, affirmed.

This was a suit brought by the State of California, at the instance of S. C. Hastings, to set aside a patent of the State granting the south half of sec. 14, T. 5 N., R. 1 W., to A. P. Jackson. The lands were part of the 500,000 acres which went to California on its admission into the Union, September 9, 1850 (9 Stat. 452, ch. 50), under the provisions of the act of September 1, 1841, ch. 16, § 8, 5 Stat. 455. By that act the lands granted were to be selected by the State in such manner as the legislature thereof should direct, and by the Constitution of California (Art. IX., sec. 2) they were devoted to the support of schools. The legislature of California, by an act passed May 3, 1852, ch. 4, Acts of Cal. 1852, 41, authorized the governor to issue land warrants to the amount of five hundred thousand acres in all and deposit them with the Treasurer of State. These warrants were to be sold by the treasurer at two dollars per acre, and the interest of the proceeds was set apart "as a permanent fund for the support of schools." The purchasers were authorized to locate their warrants in behalf of the State "upon any vacant and unappropriated lands belonging to the United States within the State of California subject to such location." Provision was then made for the issue of patents to locators by the State as soon as the lands were surveyed.

The material averments in the complaint filed by the State were that one Isaac Thomas located a school warrant on the lands in question on the 20th of June, 1853; that, as the government surveys had not then been made, the lines of the

location were run by the county surveyor, and a correct entry thereof made in the office of the county clerk; that the government surveys were completed and plats thereof filed in the General Land Office on the 1st of October, 1853; that on the 24th of December, 1853, Thomas presented his location to the register of the United States land district in which the lands were situated; that the register accepted and approved the location; that afterwards Thomas filed with the register the warrant under which his location was made; that the register wrote the word "surrendered" across the face of the warrant and gave to Thomas a certificate setting forth these facts; that Hastings has been duly invested with all the rights of Thomas under his location; that on the 14th of February, 1857, Jackson, one of the defendants, with full knowledge of all that had been done by Thomas, located other warrants on the same land, and, on the 18th of March, 1863, procured a certificate to that effect from the Land Office of the United States, under which a patent was issued to him by the State; that the lands were "listed" to the State by the United States on the 10th of February, 1870; and that on the 8th of September, 1871, the Commissioner of the General Land Office cancelled the location of Jackson, and returned to him the warrants which had been used in making that location.

The prayer was "that the said defendants be decreed to deliver up the said patent to be cancelled, and that they and each of them, and every person claiming by, through, or under them, or either of them, be perpetually enjoined and restrained from setting up any claim or title to the said premises under and by virtue of said alleged patent," and for general relief.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in this:

"The performance of the acts stated in the complaint did not make valid selection of the premises mentioned in the complaint, under said school land warrant No. 133. No valid location of said warrant is shown, nor any valid selections of land under it.

"The allegations in the complaint as to the effect of the pre-

tended locations and the rights of I. Thomas and S. C. Hastings are mere conclusions of law and not allegations of facts.

"The complaint shows upon its face that this action is barred by the statute of limitation of this State.

"The facts stated show that defendant, Jackson, was entitled to the patent when it was issued to him."

The court of original jurisdiction sustained the demurrer and dismissed the complaint, and that judgment was affirmed by the Supreme Court of the State on appeal. This writ of error was brought to reverse the judgment of the Supreme Court.

Mr. John Norton Pomeroy for plaintiff in error, as to the question of jurisdiction.—The Supreme Court of the United States has an appellate jurisdiction of this case. It is properly before this court on writ of error to the Supreme Court of California. The decision of the case necessarily involves, and the record clearly presents, a "federal question," which the court below necessarily passed upon adversely to the plaintiff in error. The title or right of the plaintiff in error in this case is claimed under a statute or statutes of the United States, and the decision of the court below is against such right and title. Rev. Stat. § 709. The title of the plaintiff in error and of the relator is claimed under the act of Congress of July 23, 1866, the act of Congress granting 500,000 acres to the State, and acts of Congress regulating the public lands, &c., and the decision of the State court is necessarily adverse to such claim. All this sufficiently and necessarily appears on the record itself. It is not necessary to state in terms that the law was drawn in question. *Williams* v. *Norris*, 12 Wheat. 117; *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Ryan* v. *Thomas*, 4 Wall. 603; *Furman* v. *Nichol*, 8 Wall. 44; *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Farney* v. *Towle*, 1 Black, 350. The fact that other questions were also involved, growing out of State laws, does not destroy this appellate jurisdiction, if the case shows that a federal question was involved. *Maguire* v. *Tyler*, 8 Wall. 650; *Minnesota* v. *Bachelder*, 1 Wall. 109. See Desty's Federal Procedure, 333, and cases cited.

Mr. M. A. Wheaton for defendant in error.

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

The first question which presents itself on this record is as to our jurisdiction. The suit, although in form by the State to cancel its patent to Jackson, was in reality between Hastings and Jackson to determine which of the two had in equity the better right to the land in controversy by reason of the locations of school warrants under which they respectively claimed. There was no dispute about the grant from the United States to the State. That was conceded, and both parties claimed under it. The controversy related only to the alleged conflicting grants of the State. Hastings claimed that Thomas, whose title he had, was the first locator, and, therefore, under the legislation of the State, in equity the first grantee of the State, while Jackson claimed that the Thomas location was invalid, and that consequently his own title was the best. Both parties thus claimed under the State, and neither asserted title from the United States except through the State.

It is indeed averred in the complaint that the location of Thomas was accepted and approved by the register of the United States Land Office, and that Jackson also obtained a like certificate, which was afterwards cancelled by the Commissioner of the General Land Office, but it is not pretended that either of these things was done by the government officials under the authority of the law of the United States. The act of 1841 provided for a grant by the United States of lands to be selected by the State in such manner as the legislature should direct, and the legislature did, by the act of 1852, in effect, direct that a location of warrants by the holder should operate as a selection by the State of the particular tract located as part of the lands granted. That perfected the right of the State to the land under the act of Congress, but gave the locator no rights as against the United States. By the express provisions of the State statute, under which he proceeded, his location was to be made "in behalf of the State," and he was to look to the State for his patent. What was done by the officers of the United States only showed that the State

had, through a holder of one of its school warrants, made a selection of the particular tract located as part of the lands granted by the act of 1841. This gave the State a right to the title under the act of Congress, but the warrant holder's claim on the State for a conveyance of the land to him grew out of the State statute, and not out of the certificate of the United States officials.

Under these circumstances, the case is clearly governed by *Romie* v. *Casanova*, 91 U. S. 379, and *McStay* v. *Friedman*, 92 U. S. 723, in which it was decided that in a suit for the recovery of lands, where both parties claimed under a common grantor whose title from the United States was admitted, this court had no jurisdiction for the review of the decisions of a State court upon questions relating only to the title acquired by the several parties, under their respective grants, from the common grantor, and which were not in themselves of a federal character.

Some reliance was had in the argument on the act of Congress approved July 23, 1866, ch. 219, 14 Stat. 218, "to quiet land titles in California," but that act was not referred to in the complaint, and, besides, it purports only to confirm the title of the State, which, in this case, is perfect without it. No attempt is made in that act to provide for the settlement of the rights of conflicting claimants under the State. Congress contented itself with the confirmation of the State's title, and left all who claimed under that title to their remedies in the courts or other tribunals provided by law for that purpose.

It follows that we have no jurisdiction of this case, and it is accordingly

Dismissed.

Statement of Facts.

PUGH *v.* FAIRMOUNT GOLD & SILVER MINING COMPANY & Another.

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

Argued October 22, 1884.—Decided November 10, 1884.

If holders of notes of a corporation, secured by a mortgage of its realty, agree to convert their notes into stock upon a condition which fails, the right to foreclose the mortgage is not affected by the agreement.

This was a bill filed on November 26, 1875, by Thomas Hare and Jonathan H. Pugh, trustees, to foreclose a mortgage executed to them on August 22, 1870, by the Fairmount Gold and Silver Mining Company, to secure the bond of the company for $17,000. It appears from the record that at the date of the mortgage the mining company was indebted to various persons, who held its promissory notes or certificates of indebtedness, given and bearing date between August 4, 1868, and May 20, 1870, and amounting in the aggregate to $16,387.05, all bearing interest at the rate of six per cent. per annum. To secure the payment of this indebtedness to the holders of the notes, the mining company, on August 22, 1870, executed a bond of that date to Hare and Pugh in the penal sum of $34,000, conditioned for the payment to them at the expiration of one year from date of the sum of $17,000, with interest at the rate of six per cent. per annum, payable half yearly in gold. This bond was secured by the mortgage which the suit was brought to foreclose, bearing the same date, and conveying to Hare and Pugh certain mines, a mill site, mill and machinery in Clear Creek County, Colorado. Contemporaneously with the execution of the bond and mortgage, Hare and Pugh executed a declaration of trust to the effect that they held the bond and mortgage in trust for the benefit of the holders of the notes of the mining company above mentioned, and that if the mining company should pay off the notes the bond and mortgage should be taken as paid and satisfied, and should be cancelled. The bill averred that the bond was due and wholly unpaid, and prayed a foreclosure of the mortgage.

Statement of Facts.

John W. Thackara, Gilbert B. Reed, and others, who, it was alleged, claimed some interest in the mortgaged premises as judgment creditors or otherwise, were made defendants to the bill.

It appeared from the record that the defendant Thackara had been superintendent of the mine and general agent of the mining company in Colorado, and was a stockholder. He held by purchase some of the notes or certificates of indebtedness secured by the mortgage issued to other parties, and held other notes issued subsequent to the mortgage to himself for his salary, &c. Prior to the institution of this suit, to wit on the 22d day of March, 1873, Thackara began suit against the mining company on his notes and a book account, caused a writ of attachment to be issued against the mining company, and on the 13th day of January, 1875, recovered a judgment for $23,442.12. Upon a sale under execution issued on this judgment, all the real and personal property of the mining company, including that covered by the mortgage, was sold to Thackara for the sum of $24,873.01, and he assigned the certificate of purchase to the defendant Reed, to whom a sheriff's deed was executed December 15, 1875. It was conceded that Reed had succeeded to all the rights and interests of Thackara. The bill was dismissed as to Thackara, and Reed substituted as defendant in his place.

Reed, by his answer, admitted the execution of the mortgage mentioned in the bill to secure the payment of notes made by the mining company, the sum secured by the mortgage not to exceed $17,000. He set up title to the mortgaged premises, claiming under the sheriff's deed executed to him under the sale made to Thackara. He averred that all the notes which had been secured by the bond and mortgage executed to Hare and Pugh, except two held by Samuel Nelson, one for $25 and the other for $150, and one held by W. B. Wharton for $100, had either been transferred to Thackara, and were included in the amount of his judgment against the mining company, or had been converted into stock of the mining company and surrendered, and were thus satisfied. Neither the mining company nor any of the other defendants made any defence to the suit,

and decrees *pro confesso* were taken against them. The answer of Reed was put in issue by replication. Upon final hearing on the pleadings and evidence, the Circuit Court dismissed the bill, and the complainant Pugh (Hare having died pending the suit), appealed.

Mr. John W. Ross (*Mr. Mills Dean* was with him), for appellant.

Mr. J. H. McGowan (*Mr. A. T. Britton* and *Mr. A. B. Browne* were with him) for appellee.

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

It is clear that the complainant was entitled to a decree of foreclosure unless the grounds of defence alleged by the respondent Reed were well taken.

The first of these was, that the directors of the mining company, who executed the bond and mortgage, did so without authority, and the bond and mortgage were therefore null and void. It is a sufficient reply to the defence to say that no issue is taken by the answer upon the averment of the bill that the bond and mortgage were executed and delivered by the proper officers of the mining company. On the contrary, the answer admits that "the said mining company, by its officers, on the date aforesaid, made, executed, and delivered to complainants, as trustees, a certain bond," describing the bond mentioned in the bill, "and that to secure the said sum of seventeen thousand dollars mentioned in said bond, the said Fairmount Gold and Silver Mining Company, by its officers, made the mortgage in said bill mentioned and upon the property in the bill of complaint described to the complainants." These admissions preclude the defence set up for the first time at the hearing, that the officers were not authorized to execute the bond and mortgage. The defendant having admitted the execution of the mortgage by the officers of the company, the complainant had the right to rely on the admission, and was not bound to prove it.

Opinion of the Court.

The other defence relied on was based on the allegation that the notes which the mortgage was given to secure had been satisfied, except those held by Nelson and Wharton, and these the defendant Reed offered to pay. The facts upon which this defence rests are as follows. On February 8, 1873, the board of directors of the mining company passed the following resolution:

"*Resolved*, That the board of directors authorize the conversion of certain outstanding and unpaid certificates of indebtedness of the Fairmount Gold and Silver Mining Company, being numbered from 1 to 87, both numbers inclusive, and Nos. 89 to 100, both numbers inclusive, into stock of the said company at the par value thereof, upon the surrender of the said certificates of indebtedness by the holders thereof: Provided that the holders of the said certificates of indebtedness convert the same into stock of the said company, at the par value thereof, within ten days from the date of the passage of this resolution, and all the holders convert."

The certificates of indebtedness mentioned in this resolution were the notes which the mortgage was given to secure. It is insisted by the defendant Reed that all the notes of the company, except those held by Thackara, Nelson, and Wharton, were converted into stock under the provisions of the foregoing resolution and were thereby satisfied, and that the notes held by Thackara, being merged in the judgment recovered by him, were satisfied by the sale of the company's property under execution, and as he offers to pay the notes held by Nelson and Wharton, there should be no decree of foreclosure.

The record does not sustain the assumption of the defendant. On the contrary, it appears that there never was any conversion of notes secured by the mortgage into the stock of the company. It was a condition of the resolution passed by the directors, under which the conversion is alleged to have taken place, that none of the notes were to be converted unless all were converted. The purposes of the resolution were plain, namely, to relieve the company of its embarrassments by providing for the conversion of its debts into stock. In order that this might be done and no advantage taken by one cred-

itor over the others, the conversion of notes into stock was to take effect only on the condition that all the creditors consented, and that the conversion was made within ten days. This provision in the resolution was necessary to prevent a part of the creditors, after some had converted their notes into stock, from seizing the property of the company, and applying it to the payment of their own debts, to the exclusion of other creditors. A large part of the creditors surrendered their notes and took stock in their stead. But this conversion was conditional, and the notes so exchanged were not cancelled, because the conditions upon which the conversion was to take place were never complied with.

Other holders of notes, among whom was Thackara, refused to convert their notes into stock; and thus the whole scheme fell through. The defendant Reed, who claims under Thackara, insists that all the creditors who surrendered their notes shall lose their debts, and that the notes held by Thackara shall take the entire property of the company. He thus insists upon a result which the resolution of the directors was cautiously framed to prevent. As soon as the ten days prescribed by this resolution had expired, and it appeared that all the holders of notes secured by the mortgage of the mining company had not converted them into stock, those who had offered to convert were remitted to their rights as creditors of the company. A mortgage creditor, who had refused to convert, could not, by assuming that the property of the company was released from the mortgage, seize it for the satisfaction of his own debt to the exclusion of all the other mortgage creditors. By refusing to convert his notes into stock, he left the notes of the other creditors and the mortgage which secured them, in full force and effect. The contention of a creditor, who did not offer to convert, that the conditional offer of the other holders to convert is, in effect, a conversion, and satisfies their notes, and leaves the property of the company unencumbered and liable to seizure, and applicable exclusively to the satisfaction of his claim, is without support in reason or justice.

It appears from the record that a number of the creditors of the mining company, who had surrendered their notes condi-

tionally, required the complainants, Hare and Pugh, who were the mortgagees, to proceed to enforce the mortgage by suit to foreclose, and in compliance with this demand the present suit was brought. There is no ground upon which their right to the relief prayed can be denied.

There is no support for the contention of Reed that it was the duty of the holders of notes, who had offered to convert them into stock, to rescind, within a reasonable time, the contract of conversion, and that, by delaying to do so for three years, they had lost the right to rescind. The answer to this contention is, that there never was any conversion of notes into stock and no binding contract to convert. The most that can be claimed is, that the holders of the notes secured by the mortgage offered to convert them upon the conditions expressed in the resolution. The conditions were never complied with. There was, therefore, no conversion and nothing to rescind. The conditional surrender of the notes secured by the mortgage did not cut off the right to foreclose the mortgage for their satisfaction. *Howe* v. *Lewis*, 14 Pick. 329; *Davis* v. *Maynard*, 9 Mass. 242; *Stover* v. *Woods*, 11 C. E. Greene (26 N. J. Eq.) 417.

The notes which were filed for conversion remained the property of their holders respectively, and the stock the property of the company. It does not appear that any holder of the notes had disposed of stock which he had received conditionally. If there is such a one he will be compelled to account for the stock. Those in whose names the stock still remains will be entitled to their notes and to the security for their payment afforded by the mortgage, and the mining company will be entitled to a re-transfer of the stock.

It being clear that the notes held by the parties for whom the present suit to foreclose was brought have not been satisfied, the right of the complainants to maintain the suit is put beyond question. The sale upon the judgment at law recovered by Thackara could not affect that right. It has been held by many courts that a mortgagee cannot, upon a judgment recovered for a debt secured by his mortgage, levy the execution upon the mortgaged property. *Atkins* v. *Sawyer*, 1 Pick. 351; *Washburn* v. *Goodwin*, 17 Pick. 137; *Tice* v. *Annin*, 2 Johns.

Ch. 125; *Camp* v. *Coxe*, 1 Dev. & Bat. (Law), 52; *Waller* v. *Tate*, 4 B. Mon. 529; *Powell* v. *Williams*, 14 Ala. 476; *Carpenter* v. *Bowen*, 42 Mississippi, 28; *Linnville* v. *Bell*, 47 Ind. 547.

But whether this be the established rule or not, it requires no authority to show that a sale of the mortgaged premises, upon a judgment recovered on a part of the notes secured by the mortgage, does not preclude the holder of other notes secured by the same mortgage from proceeding to foreclose it. A sale on such a judgment could only affect the equity of redemption, and would leave the rights of the holder of other notes secured by the mortgage unaffected.

We are of opinion that the Circuit Court erred in dismissing the bill.

The decree must therefore be reversed, and the cause remanded for such further proceedings in conformity with this opinion as the case may require.

MORRIS & Others, Executors, *v.* McMILLIN & Others, Administrators.

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

Argued November 5, 6, 1884.—Decided November 17, 1884.

The patent granted to John S. McMillin, April 16, 1867, for an improvement in applying steam power to the capstans of steamboats and other crafts, was, in effect, for the application of the power of a steam engine to a vertical capstan, by means of the same well-known agencies by which it had been previously applied to a horizontal windlass: it did not involve the exercise of invention, and is therefore invalid.

The late reported cases decided in this court, holding patents to be invalid for want of invention, cited.

The bill was filed against the appellants to restrain the infringement of letters patent granted to John S. McMillin, one of the appellees, dated April 16, 1867, for "a new and useful improvement in applying steam power to the capstans of steam-

boats and other crafts." The invention as described generally in the specification consisted "in connecting the capstan with the freight-hoisting engine or other engine of steamboats by means of shafts and cog wheels, so as to operate the capstan by steam power instead of hand power, as has been generally used heretofore."

The specification then proceeded:

"The following is the descriptive part of the specification, which will be readily understood by reference to the accompanying drawings, in which the same letters refer to like parts in each:

A is the deck; *A'* the boiler deck; *B* the capstan; *C* the hoisting engine; *F* the wooden framework of the engine; *D* the engine shaft; *E E* the hoisting rollers, connected with engine shaft by the cog wheels *a* and *b*; *G* is a vertical shaft extending from the hold of the boat to the cargo-wheel shaft *g*. With the latter it is connected—the bevel wheels *c d*; *H* is a horizontal shaft in the hold of the boat at the middle bulkhead, extending from the vertical shaft *G* to the capstan *B*. With the former it is connected by the bevel wheels *e f*, and with the latter by the bevel wheels *g h*. The capstan is permanently fastened to its shaft *J*. The vertical shaft *G* is so arranged that it can be lifted or lowered by means of a set screw *l*, whereby the bevel wheels *c d* and *e f* can be set out or in gear at leisure, interrupting or establishing the connection with the engine. *K K* are the bearings of the shaft; *i i* are hooks, which can be taken off and the cargo-wheel shaft lifted aside, so that any of the hoisting rollers may be disengaged."

"The operation is as follows, viz.: When the engine is set in motion the same is communicated by the described shafts and wheels to the capstan. The line is thrown over the capstan as usual, and one man to pay off the line and another to attend the engine are all the hands necessary in the operation."

The claim was as follows:

"Rotating a capstan placed on deck of a boat by means of an auxiliary engine, and capstan and engine are placed forward of the steam boilers of said boat, substantially as hereinbefore described and for the purposes set forth."

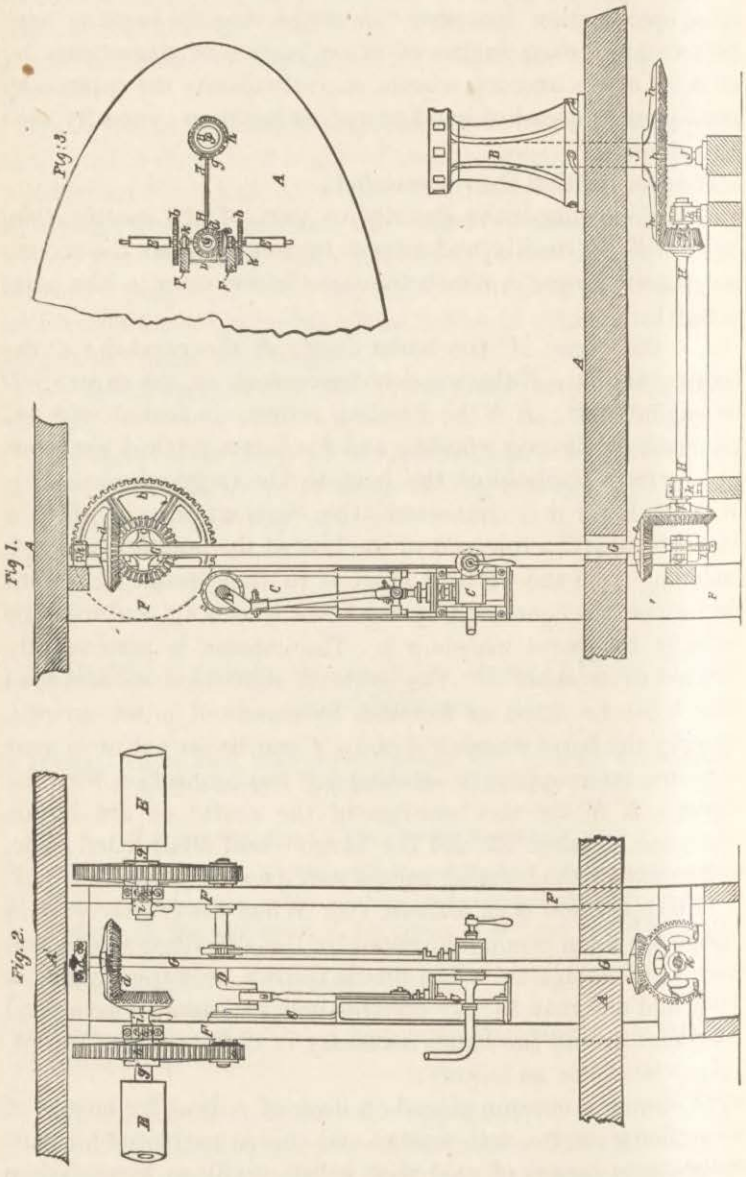


Fig. 3.
A
Fig 1.
A
B
C
Fig. 2.
A
B
B
P
P
G
G

The first application for the patent sued on was filed July 23, 1855. Its claim was for "the application of the steam power of a hoisting or other engine of steamboats, or other crafts, to the capstan, by communicating the power of the engine to the capstan by means of the shafts *G* and *H*, and the bevel wheels *c*, *d*, *e*, *f*, *g*, *h*, or by any other means." This application was rejected. On February 7, 1856, the application was amended by striking out the claim originally made and substituting the following: "I do not claim the application of steam power to the capstan as a principle, but what I do claim is: the arrangement and combination of machinery employed to communicate rotary motion to the capstan from the hoisting or other engine of steamboats and other crafts, namely, the shafts *G* and *H*, and the bevel wheels *c*, *d*, *e*, *f*, *g*, and *h*," &c. This amended application was also rejected, and no change therein was made until February 4, 1867, when it was stricken out, and the claim of the patent sued on was substituted by way of amendment. During all this time the drawings and specifications of the first application remained unchanged, and are embodied in the letters patent.

One of the defences relied on by the appellants to defeat the patent was that it was invalid for want of novelty and patentability. Upon final hearing the Circuit Court rendered a decree for the complainants, and the defendants appealed.

Mr. Rowland Cox for appellants.

Mr. W. Bakewell and *Mr. G. H. Christy* for appellees.

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

We are of opinion that the patent is open to the fatal objection that the device covered thereby did not, in view of the state of the art, involve the exercise of invention, and was therefore not patentable.

The simply working of a capstan by means of steam is not claimed, but, in the amended specification filed February 7, 1856, is expressly disclaimed. The capstan and the auxiliary

engine are both old, the device, consisting in an arrangement of shafts and cog wheels by which the power of the engine is applied to the capstan, was, as averred in the answer, in common public use in flour and grist mills, and cotton and woollen factories, long prior to the alleged invention of McMillin. The testimony shows that both capstans and auxiliary engines have been commonly placed forward of the boilers of the boat, and that, as early as the year 1847, an auxiliary engine had been used for rotating a windlass, both the engine and the windlass being forward of the boilers.

In view of these facts, which are either matters of common knowledge or well established by the evidence, the only field of invention left for the patent to cover was the application, by the old and familiar arrangement of shafts and cog wheels, of the power of an auxiliary engine to a capstan instead of a windlass. A capstan differs from a windlass in this respect only, that its barrel or shaft is vertical, while that of the windlass is usually horizontal. It is plain, therefore, that no such ingenuity as merited the issue of a patent was required for this improvement, but only the ordinary judgment and skill of a trained mechanic.

The following cases illustrate the grounds upon which we base this conclusion:

It was said by Mr. Justice Bradley, in delivering the judgment of this court in *Atlantic Works* v. *Brady*, 107 U. S. 192: "The process of development in manufactures creates a constant demand for new appliances which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different directions. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences."

In *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, Mr. Justice Gray, speaking for the court, declared

it to be the result of the decisions of the court that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not been before contemplated."

In *Hailes* v. *Van Wormer*, 20 Wall. 353, 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.

In the case of *Phillips* v. *Detroit*, 111 U. S. 604, the patent sued on was for an improvement in street and other highway pavements. The improvement consisted in using round blocks of wood, formed of the sections of small trees, set vertically upon a foundation of sand or gravel, and filling the spaces between the blocks with sand or gravel. The court said that the use of blocks, such as were described, set vertically, was old, that the foundation was old, and the use of filling between the blocks was old, and that the only thing left for the patent to cover was the bringing together, in the construction of a pavement, of these three old and well-known elements; and held that this did not require invention, and that the patent was void. See also *Hotchkiss* v. *Greenwood*, 11 How. 248; *Phillips* v. *Page*, 24 How. 164; *Smith* v. *Nichols*, 21 Wall. 112; *Dunbar* v. *Myers*, 94 U. S. 187; *Heald* v. *Rice*, 104 U. S. 737, 754–756.

Upon the ground stated, we think the letters patent upon which this suit is based are void. The decree of the Circuit Court, by which the patent was sustained, must therefore be reversed, and

The cause remanded with directions to dismiss the bill; and it is so ordered.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* UNION TRUST COMPANY.

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

Argued October 20, 1884.—Decided November 17, 1884.

The provision in the New York Civil Code that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that State, in trials at common law.

Section 721 of the Revised Statutes, declaring that "the laws of the several States, except where the Constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," relates to the nature and principles of evidence, and also to competency of witnesses, except as the latter subject may be regulated by specific provisions of the statutes of the United States.

To the question, in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was No: *Held*, that the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease, that is, of a character so well defined and marked as to materially disturb or derange for a time its vital functions; that the question did not require him to state every instance of slight or accidental disorders or ailments, affecting the liver, which left no trace of injury to health, and were unattended by substantial injury, or inconvenience, or prolonged suffering.

An exception to the modification by the court, in its general charge, of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too vague and indefinite.

An action to recover upon a policy of life insurance. The facts which make the several issues are stated in the opinion of the court.

Mr. D. C. Brown for plaintiff in error.

Mr. Wheeler H. Peckham for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

Opinion of the Court.

This was an action upon a policy of life insurance in which a verdict and a judgment were rendered for the plaintiff. The policy was taken out on the 21st of February, 1878, by the Union Trust Company of New York for the benefit of the children of William Orton who might survive him. The insured died on the 22d of April of the same year. In the application, signed by the trust company and by Orton, the following question (the seventh) was propounded: "Have you ever had any of the following diseases? Answer (yes or no) opposite each." Then follows a list of the diseases about which the applicant was asked—apoplexy, paralysis, insanity, epilepsy, habitual headache, fits, consumption, pneumonia, pleurisy, diphtheria, bronchitis, spitting of blood, habitual cough, asthma, scarlet fever, dyspepsia, colic, rupture, fistula, piles, affection of liver, affection of spleen, fever and ague, disease of the heart, palpitation, aneurism, disease of the urinary organs, syphilis, rheumatism, gout, neuralgia, dropsy, scrofula, small-pox, yellow fever, and cancer or any tumor. As to colic, fistula, and fever and ague, the answer was Yes, and as to all the other diseases, No. Being asked, in the same question, to state the number of attacks, character and duration, of all the diseases which he had had, the applicant answered: "Had fistula in 1871, induced by intermittent fever; radically cured."

The eighth question was: "Have you had any other illness, local disease, or personal injury; and if so, of what nature, how long since, and what effect on general health?" The answer was: "Had colic for one day, October, 1877; no recurrence; general health good."

The fourteenth was: "How long since you were attended by a physician; in what diseases? Give name and residence of such physician." The answer was: "October, 1877; for colic; Dr. Hasbrouck, of Dobbs' Ferry; sick one day."

The fifteenth was: "Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer was: "No; nothing to my knowledge."

The sixteenth was: "Have you reviewed the answers to the

above questions, and are you sure they are correct?" The answer was, Yes.

The application concluded in these words:

"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 a 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 misrepresentations 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."

Upon the back of the application were several indorsements, among them the following:

"PROOFS OF DEATH REQUIRED.—Blanks for the several certificates required to be made in proof of death will be furnished upon request."

The policy purports to have been issued in consideration of the representations and declarations made in the application, and of the payment of the annual premium at the time designated therein. It purports, also, to have been issued and accepted upon certain express conditions and agreements, among which are: "That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the assured to be true in all respects, and that, if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void."

This action was brought to recover the amount insured—due notice and satisfactory evidence of death having been given. The company resisted recovery upon two grounds:

1. That the answers to the seventh, eighth, fourteenth, and sixteenth questions were false and untrue, and known to be by Orton, in this: that so far from his general health being good at the time of the making and delivery of the application and of the issuing of the policy, he had, for many years immediately prior thereto, suffered with piles, affection of the liver, and hab-

itual headache, and within less than eighteen months prior to the application had been seriously ill for weeks, during which period several physicians attended him; that the illness in October, 1877, continued for some days; that he visited Europe upon one or more occasions for the benefit of his health, and by reason of disease was much enfeebled in body; that at the time of issuing the policy defendant did not know or have reason to believe that said statements, answers, and declarations, or any of them, were untrue, but, believing them to be true, issued the policy; and that by reason of these facts it was null and void.

2. That in the application it was declared that the statements therein were correct and true, and that there was not, to the knowledge of the insured, any fact relating to his physical condition, personal or family history, or habits, not stated in answer to the questions in the application, with which the officers of the defendant ought to be made acquainted; yet, he had been and was subject to and afflicted with the diseases therein specified; had a very serious illness and been attended by several physicians; was ill in October, 1877, much longer than stated; and had visited Europe for his health; which facts were within his knowledge, and were material circumstances in relation to the past and present state of his health, habits of life, and condition, rendering an insurance on his life more than usually hazardous, and with which the officers of the company should have been made acquainted: that these facts were concealed from, and misrepresented to, the company by Orton, whereby it was injuriously influenced, and induced to omit such examinations and precautions in reference to his condition and health as would have prevented the issuing the policy upon the considerations and conditions therein set forth; and that, by reason of such concealment and misrepresentation, the policy was and is absolutely null and void.

1. In support of the defence, physicians, who had attended the insured professionally, were examined as witnesses; and the first assignment of error relates to the refusal of the court to permit them to answer questions, the object of which was to elicit information which would not have been allowed to go to

the jury, under section 834 of the Code of Civil Procedure of New York, had the action been tried in one of the courts of the State. That section provides that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." It is not, and could not well be, seriously questioned, that the evidence excluded by the Circuit Court was inadmissible under the rule prescribed by that section. *Grattan* v. *Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Same* v. *Same*, 80 N. Y. 281; *Pierson* v. *People*, 79 N. Y. 424; *Edington* v. *Ætna Life Ins. Co.*, 77 N. Y. 564; *Edington* v. *Mutual Life Ins. Co.*, 67 N. Y. 185.

But it is suggested that truth and justice require the admission of evidence which this statutory rule, rigorously enforced, would exclude, and that it can be admitted without disturbing the relations of confidence properly existing between physician and patient; that it would not afflict the living nor reflect upon the dead, if the physician should testify that his patient had died from a fever, or an affection of the liver; and that the rule, as now understood and applied in the courts of New York, shuts out, in actions upon life policies, the most satisfactory evidence of the existence of disease, and of the cause of death. These considerations, not without weight, so far as the policy of such legislation is concerned, are proper to be addressed to the legislature of that State. But they cannot control the interpretation of the statute, where its words are so plain and unambiguous as to exclude the consideration of extrinsic circumstances. Since it is for that State to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the Circuit Court of the United States is required, by the statutes governing its proceedings, to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative. By § 721 of the Revised Statutes, which is a reproduction of § 34 of the Judiciary Act of 1789, it is declared that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or

provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States in cases where they apply." This has been uniformly construed as requiring the courts of the Union, in the trial of all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts are held. *Potter* v. *National Bank*, 102 U. S. 163; *Vance* v. *Campbell*, 1 Black, 427; *Wright* v. *Bales*, 2 Black, 535; *McNeil* v. *Holbrook*, 12 Pet. 84; *Sims* v. *Hundley*, 6 How. 1.

There is no ground for the suggestion that §§ 721, 858, and 914 of the Revised Statutes may be construed as relating to the competency of witnesses rather than to the nature and principles of evidence. While in some of the cases the question was whether a witness, competent under the laws of a State, was not, for that reason, under § 34 of the act of 1789, a competent witness in the courts of the United States sitting within the same State, in others the question had reference to the intrinsic nature of the evidence introduced. In *McNeil* v. *Holbrook* the court held the courts of the United States, sitting in Georgia, to be bound by a statute of that State declaring, as a rule of evidence, that in all cases brought by an indorser or assignor on any bill, bond, or note, the assignment or indorsement, without regard to its form, should be sufficient evidence of the transfer thereof; the bond, bill, or note to be admitted as evidence without the necessity of proving the handwriting of the assignor or indorser. And in *Sims* v. *Hundley* a notary's certificate, held to be inadmissible as evidence under the principles of general law, was admitted upon the ground that, having been made competent by a statute of Mississippi, it was competent evidence in the Circuit Court of the United States sitting in that State.

We perceive nothing, in the other sections of the Revised Statutes to which attention is called, that modifies § 721, except that, by § 858, the courts of the United States, whatever may be the local law, must be guided by the rule that "no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or inter-

ested in the issue tried;" and by the further rule, that, "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." "In all other respects," the section proceeds, "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." As to § 914, it is sufficient to say that it does not modify § 721 in so far as the latter makes it the duty of the courts of the United States, in trials at common law, to enforce—except where the laws of the United States otherwise provide—the rules of evidence prescribed by the laws of the State in which they sit.

For these reasons, it is clear that the Circuit Court properly refused to permit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity.

2. The widow of the insured having been called as a witness on behalf of the company, it is contended that the court erred in not allowing her to answer this question: "Did you not understand from your husband the nature of the disease?" That question, it is claimed, called for information derived from the insured as to the nature of any disease under which he may have been suffering at a particular time prior to his application. If she was a competent witness, and if the statements of the insured to her were admissible upon the issue whether he had concealed any fact in his personal history or condition with which the company ought to have been made acquainted, or upon the issue whether he had made fair and true answers to the questions put to him, still the question did not call for his statements, but only as to what the witness understood from him as to the nature of his disease. Her statement of what she understood may not have been justified

by what the insured actually said, and may have been nothing more than the unwarranted deduction of her own mind. The objection to the question was properly sustained.

3. This brings us to the consideration of questions more directly involving the merits of the case. The first of these relates to the refusal of the court to instruct the jury that if they "believe, on the evidence, that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance, the policy is void, and the defendant is entitled to a verdict." This instruction was refused, and the court, among other things, said to the jury, that disease implied a substantial attack of illness, or a malady, which had some bearing on the general health of the insured, not a slight illness, or temporary derangement of the functions of some organ.

The defendant's request for instruction was properly denied, for the reason that it might have been construed as requiring a verdict for the company, upon its appearing simply that the insured, prior to his application, had experienced a slight, temporary affection of the liver, which had no tendency to shorten life, and all the symptoms of which had disappeared, leaving no trace whatever of injury to health. The insured was directed to answer Yes or No, as to whether he had ever had certain diseases, among which was included "affection of liver." It is difficult to define precisely what was meant by "affection of liver," as a disease, and the difficulty is not removed by the evidence of the only physician who testified upon the subject. While he would ordinarily understand affection of the liver to mean some chronic disease of that organ, yet it is not, he says, strictly a medical term, but a general expression, which, by itself, may include acute as well as chronic disease of the liver. He describes it as "a big bag to put many diseases in," and observes that it "would cover anything in the world the matter with the liver." It seems to the court, however, that the company, by its question, sought to know whether the liver had been so affected that its ordinary operations were seriously disturbed or its vital power materially weakened. It was not contemplated that the insured could recall, with such distinct-

ness as to be able to answer categorically, every instance during his past life, or even during his manhood, of accidental disorder or ailment affecting the liver, which lasted only for a brief period, and was unattended by substantial injury, or inconvenience, or prolonged suffering. Unless he had an affection of the liver that amounted to disease, that is, of a character so well-defined and marked as to materially derange for a time the functions of that organ, the answer that he had never had the disease called affection of the liver was a "fair and true" one; for, such an answer involved neither fraud, misrepresentation, evasion, nor concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted. The charge, upon this point, was in accordance with these views, and no error was committed to the prejudice of the company.

4. There was evidence before the jury tending to show that the insured visited Europe in 1874 under the advice of Dr. Baner, a physician, and that he was ill in 1875 as well as in the month of October, 1876. At the trial the defendant read in evidence, without objection, the proofs of loss received by it from the trust company. The proofs were made on forms supplied by the insurance company. Among them was a certificate from Dr. Baner, who attended the insured in his last illness. That certificate was made up of questions to and answers by the physician. One of the questions required him to state the remote cause of death; if from disease, to give the predisposing cause, the first appearance of its symptoms, its history, and the symptoms present during its progress. His answer was: "The fatal attack was preceded by severe and protracted mental work, and by several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement." He also stated, in the certificate, that the immediate cause of death was cerebral apoplexy; that he did not think the insured had any other disease, acute or chronic, or had ever had any injury or infirmity; and that there was nothing in his habits, or mode of life, predisposing him to disease, except a tendency to overwork.

Several instructions were submitted by the company touch-

ing this part of the case. In the form asked they were refused. But such refusal would not constitute ground for reversing the judgment, if the propositions they involved, so far as correct, were embraced by the charge. The jury were instructed, upon the whole case, that the insured warranted the truth, in all respects, of each answer, statement, representation and declaration contained in the application, which was a part of the policy; that any inquiry as to their materiality, or his good faith, was removed, by the agreement of the parties, from the consideration of the court or jury; that the truth of each answer was an express condition to the existence of liability on the part of the company; and that if the answers, or any of them, were, in fact, untrue, the contract was at an end, although the insured, in good faith, believed them to be true. Their attention was particularly called to the answer to the eighth question in the application, in which the insured—responding to the inquiry, whether he had had any other illness, local disease, or personal injury—stated nothing more than that "he had colic for one day, October, 1877; no recurrence; general health good." The court said: "Illness is a word which may include, properly, an attack of a less grave and serious character than disease; an illness may be slight or severe; in either case it is an illness." Referring also to a question which required the insured to state any fact relating to his physical condition, personal or family history, or habits, not already disclosed, and with which the company ought to be made acquainted, the court—almost in the language of defendant's eighth request—charged the jury, that if they believed, on the evidence, "that the trip to Europe advised by Dr. Baner, the illness in 1875, or the illness in 1876, or the suffering of several attacks of malarial fever, accompanied by cerebral engorgement (if those attacks occurred, or either of them), were facts relating to the physical condition and personal history of the insured, of importance to the ascertainment of the condition of his health at the time of his application, the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to recover." After reviewing all the evidence, the court concluded its charge by instructing the jury that if they found

affirmatively that the insured "did not answer one of these questions truly, then there is nothing more for you to do except to find for the defendant; if you find affirmatively that he was guilty of concealment in his answer to the fifteenth question, then you will find for the defendant."

We are of opinion that the charge—the most important parts of which we have quoted—was not one of which the company had any reason to complain; and the plaintiff, having recovered a verdict, makes no objection to it.

In reference to that portion of the charge referring to the statements in the certificate of Dr. Baner, made part of the proofs of loss, the point is made that the court erroneously instructed the jury, that they could not, upon that certificate—made without cross-examination and simply to inform the company of the death of the insured—find as an affirmative fact that the malarial attacks therein referred to as the remote cause of death existed.

Without determining whether this certificate, so far as it assumes to state the causes of the death of the insured, was required by the contract as a condition of the plaintiff's right to sue on the policy, or whether, under the circumstances of this case, it was proof of all the facts stated in it, it is sufficient to say that the objection that the court, in effect, discredited that certificate as *prima facie* evidence of the facts stated, cannot be entertained. No one of the requests for instructions submitted by defendant covers the precise point now made, nor was any exception taken, at the time, to that part of the charge which, it is claimed, refers to the certificate of the attending physician. The only exception taken by the defendant to the charge was "to the charge of the eighth proposition, as modified by the court and embraced in his general charge." The eighth proposition submitted by the defendant was given, in the words already quoted from the charge, with the modification, that the jury were to determine, on the evidence, whether the insured had had the before-mentioned attacks of malarial fever, accompanied by cerebral engorgement. That modification was entirely proper, since it was the province of the jury to determine the weight of the evidence. *Cushman* v. *U. S.*

Life Insurance Co., 70 N. Y. 70, 77. If the subsequent part of the charge, which is now referred to as discrediting Dr. Baner's certificate as evidence of the facts stated in it, was regarded at the trial as a modification of the defendant's eighth proposition, or as objectionable in itself, the exception taken should have been more specific. The attention of the court should have been called to the particular point by something more definite than the general exception taken. *Beckwith* v. *Bean*, 98 U. S. 284; *Lincoln* v. *Claflin*, 7 Wall. 132; *McNitt* v. *Turner*, 16 Wall. 362; *Beaver* v. *Taylor*, 93 U. S. 46.

No error was committed in overruling the instructions asked by the defendant, since whatever they contained, that ought to have been approved, was embodied in the charge to the jury.

We find no error in the record of which this court can take cognizance, and the judgment must be

Affirmed.

GRENADA COUNTY SUPERVISORS & Others *v.* BROGDEN & Others.

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

Submitted October 22, 1884.—Decided November 17, 1884.

That construction of a statute should be adopted which, without doing violence to the fair meaning of the words used, brings it into harmony with the Constitution.

A municipal subscription to the stock of a railroad company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given.

Suit upon county bonds. Judgment for plaintiff. Writ of error to reverse it. The facts are stated in the opinion.

Mr. H. P. Branham for plaintiff in error.

Mr. Reuben O. Reynolds for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought to recover the amount of certain bonds and interest coupons issued under date of May 1, 1872, in the name of Grenada County, Mississippi, by its board of supervisors, and made payable to the Vicksburg & Nashville Railroad Company, or bearer, at its agency in the city of New York. Each bond, signed by the president of the board and countersigned by its clerk, with his official seal affixed, recites that it is one of a series issued and delivered to the Vicksburg & Nashville Railroad Company, by Grenada County, to meet and pay off the amount subscribed by the county to the capital stock of the railroad company aforesaid, "in pursuance of an act of the legislature of the State of Mississippi, entitled 'An Act to aid in the construction of the Grenada, Houston & Eastern Railroad,' now Vicksburg & Nashville Railroad, approved February 10, 1860, and of an act amendatory thereof passed March 25, 1871, and in obedience to a vote of the people of said county at an election held in accordance with the provisions of said acts."

The county disputes its liability on the bonds or coupons, although the plaintiffs, who are defendants in error, became holders for value, without notice of any defence except such as the law implies. The defence rests mainly on the ground that the subscription was made and the bonds issued without previous legislative authority conferred in conformity with the Constitution of Mississippi.

The history of the issue of these securities, as disclosed by legislative enactments, the proceedings of the board of supervisors of Grenada County, and the bill of exceptions, is substantially as will be now stated.

The Grenada, Houston & Eastern Railroad Company was incorporated by an act approved February 6, 1860, with power to construct a railroad from Grenada, in Yallobusha County, to Houston, in the county of Chickasaw, thence eastwardly to the

Alabama line, and with authority to connect or consolidate with any other company upon such terms as might be mutually agreed upon, not inconsistent with the laws of the State. Laws Miss. 1869–'60, pp. 394, 402. By the act approved February 10, 1860, the boards of police of Yallobusha, Calhoun, Chickasaw and Monroe counties were authorized for their respective counties to subscribe, upon such terms as they saw proper, to the capital stock of the company, in an amount, not exceeding $200,000 for any one county, to be paid by taxation; provided, a majority of the qualified electors voting at an election held for that purpose upon due notice should first assent thereto; in which event, it was made the duty of the board to make the subscription. Ib., 412.

On the 1st day of December, 1869, a new Constitution for Mississippi went into operation, article 12, section 14 of which declares that "the legislature shall not authorize any county, city or town to become a stockholder in, or 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."

On the 9th of May, 1870, the county of Grenada was created out of parts of Yallobusha, Tallahatchie, Carroll and Choctaw counties. Laws Miss. 1870, p. 124.

By an act approved March 25, 1871, amending the preceding statutes, it was declared, among other things, that the act of February 10, 1860, should apply in all its provisions to Grenada County and its officers, and it was made the duty of the board of supervisors of that and other counties along the line of the Grenada, Houston & Eastern Railroad, upon the petition of twenty-five or more citizens, to cause an election to be held in their respective counties to take the sense of the legal voters, whether a sum not exceeding $200,000 to each county, shall be subscribed to the capital stock of said railroad company, to be paid by taxation; also, that whenever, in the act of February 10, 1860, any duty is required of, or authorized to be performed by, the boards of police, or the president thereof, of any of the counties therein named, the same should apply to the board of supervisors of the different counties and to the president

thereof; further, that "all such elections when held shall be conducted in all things as required in the act of which this is amendatory, and of the Constitution and laws of this State in force at the time so held." § 1.

The fourth section authorizes the board of supervisors of any county voting the tax, to issue bonds, maturing at such times, not beyond ten years, and for such sums, as the board deemed necessary, to pay off the subscriptions of said counties, respectively, for capital stock in the Grenada, Houston & Eastern Railroad—the bonds to be signed by the president of the board of supervisors issuing the same, and made payable to the company and their successors and assigns. The sixth section provides that bonds may be issued with interest coupons attached, and, when issued, paid over and delivered to the railroad company in satisfaction of the subscription to the extent of the principal of the bonds; the board taking from the company certificates of stock for the shares paid for, and the stock to be deemed the property of the municipality paying for it.

Under an order made by the board of supervisors of Grenada, in conformity with the petition of more than twenty-five of its citizens, the question was submitted to the qualified voters, at a general election held November 7, 1871, whether the board, by its president, should subscribe, in behalf of that county, $50,000 to the capital stock of the Grenada, Houston & Eastern Railroad Company, and a like sum to the capital stock of the "Vicksburg & Grenada Railroad Company"—each subscription to be met and paid off in eight annual instalments, with eight per cent. interest upon the amount due January 1, 1873, or from the date of the county bonds, if any should be issued, payable annually by taxation upon the property of the tax-payers. The board, at its December term, 1871, caused it to be entered upon its records that the election had been duly advertised and regularly held according to law; that "a constitutional majority of two-thirds of the legal and registered voters of said county were cast" for each subscription, and that the board, by its president, "subscribe for $50,000 each of the capital stock of the Grenada, Houston & Eastern Railroad Company and of the Vicksburg & Grenada Railroad Company,

for and on behalf of Grenada County, to be met and paid by taxation as aforesaid," &c.

When the election was held there was no such corporation as the Vicksburg & Grenada Railroad Company; but the bill of exceptions—setting out what the parties agree are the facts established by the evidence—states, that "for a long time previous to said vote a scheme had been agitated in said county for such a railroad, with its termini at Vicksburg and Grenada, as well as for the construction of the Grenada, Houston & Eastern Railroad; . . . and on the 3d day of January, 1872, the projectors and managers of the railroad, so designated and intended in said vote, were incorporated by an act of the legislature, entitled 'An Act to incorporate the Vicksburg, Yazoo Valley & Grenada Railroad Company.'"

By an act approved January 27, 1872, the Grenada, Houston & Eastern Railroad Company was authorized to extend their road from Grenada via Yazoo City to Vicksburg, thus enabling it to cover the route proposed to be occupied by the so-called Vicksburg & Grenada Railroad, or the Vicksburg, Yazoo Valley & Grenada Railroad. By the same act the name of the Grenada, Houston & Eastern Railroad Company was changed to that of the Vicksburg & Nashville Railroad Company, giving the company all the rights by the latter name which it had under its old name.

Its 4th section is as follows:

"Sec. 4. *Be it further enacted*, That inasmuch as the question of subscription or no subscription for fifty thousand dollars to aid in the construction of a railroad from Vicksburg to Grenada, in this State, was, by the board of supervisors of Grenada County, submitted to the qualified voters of Grenada County, and the same was sustained by a majority of two-thirds of the qualified voters of said county at a general election held therein on the 7th day of November, 1871, it shall and may be lawful for the board of directors of the Vicksburg & Nashville Railroad Company, by resolution made and entered in the minutes of said board at a regular meeting thereof, sanctioned by a majority of said board of directors, to accept all the provisions of this act, and adopt, as a part and portion

of the Vicksburg & Nashville Railroad the extension specified in this act from Grenada to Vicksburg; and when, after such acceptance and adoption, the said so-called Vicksburg & Grenada Railroad shall form and constitute a part and portion of the Vicksburg & Nashville Railroad, and shall be constructed, owned, and held by the Vicksburg & Nashville Railroad Company; and it shall be lawful for, and it is hereby made the duty of the board of supervisors of Grenada County, through the president of said board, upon the application of the president or other authorized agent of the Vicksburg & Nashville Railroad Company, to subscribe for fifty thousand dollars of the capital stock of the Vicksburg & Nashville Railroad Company, based upon the submission to and the approval of the vote of two-thirds of the qualified voters of said county, which is hereby ratified and confirmed to the Vicksburg & Nashville Railroad Company so heretofore had on behalf of the Vicksburg & Grenada Railroad as aforesaid, and bonds of said county to secure the payment of said subscription for the stock and interest thereon, and also certificates of stock in said company shall be used as in other cases provided for in this act."

On the 5th of March, 1872, the Vicksburg, Yazoo Valley & Grenada Railroad Company was consolidated with the Vicksburg & Nashville Railroad Company, the articles of consolidation binding the consolidated company—which retained the name of the Vicksburg & Nashville Railroad Company—among other things, to construct the contemplated road from Vicksburg to Grenada.

Subsequently, in the year 1872, the board of supervisors, by its president, executed and delivered to the Vicksburg and Nashville Railroad Company bonds of the county (those in suit being a part of them), in payment of the subscriptions which had been voted at the election in November, 1871, the county receiving certificates of stock therefor. In 1872 and 1873 the county assessed and collected taxes to pay the coupons maturing at these respective periods on all the bonds in suit. The coupons for those years have been fully paid. The county, by its duly accredited agent, was represented at all the

stockholders' meetings of the company, and voted a stock subscription of $100,000. There has been no meeting of stockholders since 1874, nor of the directors since July 6, 1875. About five miles of the Vicksburg & Nashville Railroad westward from Okolona was graded and ironed. The iron so laid was purchased from plaintiffs, and they received, in payment, the bonds in suit.

Under the acts in question, assuming them to be constitutional, the county had authority, upon certain conditions, to make a subscription to the capital stock of the Grenada, Houston & Eastern Railroad Company, now the Vicksburg & Nashville Railroad Company, and its board of supervisors was invested with power to determine whether those conditions were performed, and, upon their being performed, to issue bonds in payment of such subscription. According to the settled doctrines of this court, the county is estopped, as against the plaintiffs, to say that the conditions were not duly performed; for, the recitals in the bonds import that they were issued in pursuance of the acts of 1860 and 1871, and in obedience to a vote at an election held in accordance with the provisions of said acts. *Coloma* v. *Eaves*, 92 U. S. 484; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608, 617; *Otoe County* v. *Baldwin*, 111 U. S. 1. Upon this general question there seems to be no disagreement between this court and the Supreme Court of Mississippi. *City of Vicksburg* v. *Lombard*, 51 Mississippi, 111, 126; *Cutler* v. *Board of Supervisors*, 56 Mississippi, 115, 123.

But it is contended that the act of March 25, 1871, in violation of the Constitution of Mississippi, authorized—by its reference to the act of February 10, 1860—a subscription upon the assent thereto of a bare majority of its qualified electors voting, and, consequently, the recitals in the bonds do not protect even a *bona fide* holder. This is not, in our judgment, a proper interpretation of that act. Its express requirement is that elections to determine the question of subscriptions be held and conducted, in all things, as required by the act of which it is amendatory, and by "the Constitution and laws of this State in force at the time so held." As Grenada County came into

existence after the Constitution of 1869 went into operation, it could not, even under legislative sanction, make a valid subscription to the stock of a corporation unless two-thirds of its qualified voters, at a special or general election, assented thereto. That the legislature, when passing the act of 1871, had in mind the constitutional provision relating to municipal subscriptions to the stock of corporations, is plain from the second section of the act which authorizes certain incorporated towns, including the town of Grenada, to subscribe to the stock of the Grenada, Houston & Eastern Railroad Company, when such subscription should be approved by "a constitutional majority of two-thirds of the votes polled at an election regularly held" —a provision which this court adjudged in *Carroll County* v. *Smith*, 111 U. S. 556, to be consistent with the Constitution of Mississippi. It cannot be supposed that the legislature intended to invest the town of Grenada with power to make a subscription when assented to by two-thirds of the electors voting; and, in the same act, to invest the county with authority to subscribe upon the assent of a bare majority of the electors voting. And yet the argument imputes such diverse purposes to the legislature of the State, if the act of 1871 be construed as authorizing, in violation of the State Constitution, a county subscription upon the assent of a bare majority of the electors voting. The act of 1860 required twenty days' notice of the election, of the amount proposed to be subscribed, and in what number of instalments to be paid. These provisions were left untouched by the act of 1871. But the requirement in the latter act of conformity, in all things, to the Constitution and laws in force when the election was held, implies that the legislature did not intend to authorize a municipal subscription upon the vote of a bare majority, but only upon the condition prescribed in the Constitution, namely, a two-thirds majority of the electors of the county.

It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the State, assume that it did not overlook the provisions

of the Constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution. Cooley Constitutional Law, 184–5; *Newland* v. *Marsh*, 19 Ill. 376, 384; *People* v. *Supervisors, &c.*, 17 N. Y. 235, 241; *Colwell* v. *May*, 4 C. E. Green (19 N. J. Eq.) 245, 249. And such is the rule recognized by the Supreme Court of Mississippi in *Marshall* v. *Grimes*, 41 Miss. 27, 31, in which it was said: "General words in the act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional. But, if possible, a construction should be given to it that will render it free from constitutional objection, and the presumption must be that the legislature intended to grant such rights as were legitimately within its power." Again, in *Sykes* v. *Mayor, &c.*, 55 Mississippi, 115, 143: "It ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it. And such construction (if the words will admit of it) ought to be put on its legislation as will make it consistent with the supreme law."

It is worthy of observation that the board of supervisors of Grenada County understood the act of 1871 as requiring conformity to the Constitution, for they were careful to make a record of the fact that the proposed subscriptions had been sustained by "a constitutional majority of two-thirds of the legal and registered voters of said county."

It results that, in respect of such of the bonds in suit as, according to the evidence, were issued in payment of the subscription to the stock of the Grenada, Houston & Eastern Railroad Company, that there was valid legislative authority as well for the subscription as for the issue of the bonds; consequently, the county is liable upon them.

It only remains to determine whether the county is liable upon such of the bonds in suit as were delivered to the Vicksburg & Nashville Railroad Company in discharge of the subscription of $50,000 voted in aid of the construction of the "so-called Vicksburg & Grenada Railroad." We have seen

that when that subscription was voted there was no such corporation as the Vicksburg & Grenada Railroad Company, but that the vote had reference to an organization or scheme, the managers of which proposed to construct a railroad connecting the cities of Grenada and Vicksburg; that these managers were shortly thereafter incorporated as the Vicksburg, Yazoo Valley & Grenada Railroad Company, which was subsequently, and before the bonds were issued, merged in the Vicksburg & Nashville Railroad Company. We have also seen that the Vicksburg & Nashville Railroad Company was empowered to construct a railroad from Grenada to Vicksburg, and, by the terms of the consolidation agreement with the Vicksburg, Yazoo Valley & Grenada Railroad Company, obligated itself to do so.

Such were the circumstances attending the passage of the act of 1872, the fourth section of which confirmed and legalized the action of the voters of Grenada County and its board of supervisors in the matter of a county subscription in aid of the construction of a railroad from Grenada to Vicksburg. The evident purpose of that act was to give effect to the will of the voters, as expressed at the election of 1871, by a majority large enough, under any construction of the Constitution, as a basis for a valid municipal subscription to the stock of a railroad corporation. The act of 1872 recites that the proposed subscription was approved by the requisite constitutional majority. Had the action of the voters and of the board of supervisors been taken under legislative authority previously conferred, there could be no doubt of the validity of the subscription, or of the power of the board of supervisors to issue bonds; for it is to be observed, the State Constitution of 1869 does not prohibit municipal subscriptions to the stock of railroad companies under all circumstances, but only forbids the legislature from authorizing them except where two-thirds of the qualified voters of the municipality assent thereto. "It is not an open question in this State," said the Supreme Court of Mississippi, "that the legislature may authorize a county or town to aid a railroad. That power was held to exist under the former Constitution, and the present Constitution distinctly recognized it."

Art. 12, § 4. . . . "If it were not for the constitutional restriction, the legislature could authorize a county, city, or town to aid in any of these modes railroads, or other public enterprises, without the assent of the qualified voters." *N. O., &c., Railroad Co.* v. *McDonald*, 53 Miss. 246. Thus the Constitution recognized subscriptions to railroad companies as within the scope of the powers which municipal corporations might exercise under legislative sanction. While the legislature could not, after the adoption of the Constitution of 1869, have legalized a municipal subscription assented to by a less majority of legal voters than is prescribed in that instrument, its power, by retrospective enactment, to confirm and legalize a municipal subscription to the stock of a railroad corporation to which the constitutional majority of electors had assented at an election of which due notice was given, cannot we think, be successfully disputed. Since what was done in this case by the constitutional majority of qualified electors, and by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority. In *Sykes* v. *Mayor, &c., of Columbus*, 55 Miss. 115, 137, it was held that, after the Constitution of 1869 took effect, the legislature could not, by retrospective enactment, make valid an issue of municipal bonds executed prior to the adoption of that instrument without legislative authority; because, said the court, "the measure of its power was the Constitution of December, 1869, and it could not ratify an act previously done, if at the date it professed to do so it could not confer power to do it in the first instance. It could authorize a municipal loan conditionally. In order to ratify and legalize a loan previously made, it was bound by the constitutional limitation of its power." Further, in the same case: "The idea implied in the ratification of a municipal act performed without previous legislative authority is, that the ratifying communicates authority, which relates back to, and retrospectively vivifies and legalizes, the act, as if the power had been previ-

ously given. Such statute is of the same import as original authority. . . . If the Constitution had altogether denied to the legislature the delegation of such power to counties, cities, and towns, it is manifest that it could not vitalize and legalize a subscription made before its adoption, and without authority of law. If that be so, it follows that, in dealing with the subject at all, it is bound by the limitation of section 14 of article 12 of the Constitution."

In *Cutter* v. *Board of Supervisors*, 56 Miss. 115, the question was as to the power of the legislature to ratify and legalize certain municipal bonds issued to a railroad corporation by a county board of supervisors, in pursuance of a vote of the people, with interest coupons attached, payable semi-annually. The statute under which the board proceeded authorized bonds with interest payable annually. The people, however, voted for bonds with interest payable semi-annually. The court sustained the constitutionality of the curative act. It was said: "This is far from being an effort to impose a debt on the county without its consent. The agreement of the people of the county to incur the debt, in the precise shape which it assumed, has been expressed. Their representatives, the county authorities, in execution of that will, have delivered the bonds and the legislature afterwards affirmed. If there has been any departure from the letter of the original authority, it acquiesces in such deviation, cures the irregularity, and makes valid the bonds. The principles announced in *Supervisors* v. *Schenck*, 5 Wall. 772, 776, 789, fully support these views."

These doctrines are in accord with the views of this court as indicated in several cases. *Ritchie* v. *Franklin*, 22 Wall. 167; *Thompson* v. *Lee County*, 3 Wall. 327; *City* v. *Lamson*, 9 Wall. 477, 485; *St. Joseph* v. *Rogers*, 16 Wall. 644, 663; *Campbell* v. *City of Kenosha*, 5 Wall. 194.

Our conclusion is that the act of 1872, requiring bonds of Grenada County to be issued to the Vicksburg & Nashville Railroad Company in payment of the subscription voted in 1871 by the constitutional majority of its voters, for a railroad from Grenada to Vicksburg, is not in conflict with the Constitution of Mississippi. Consequently, there is no ground upon

which the county can escape liability upon them to the plaintiffs, who are *bona fide* holders for value. Indeed, there is nothing of substance in the defence made by the county beyond the question of legislative authority for the subscriptions, in payment of which the bonds in suit were issued, and passed to the plaintiffs for iron used on one of the proposed roads.

Other questions of minor importance are discussed in the very able brief of counsel for the county. But they do not, in our opinion, affect the right of plaintiffs to judgment, and need not be noticed.

We perceive no error in the record, and the judgment is

Affirmed.

GRAME, Executor, *v.* MUTUAL ASSURANCE COMPANY OF VIRGINIA.

GODDIN, Executor, *v.* SAME.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Argued November 18, 1884.—Decided November 19, 1884.

Whether the destruction of a building by fire, communicated from buildings burned by the Confederate forces on leaving Richmond, was covered by a policy which excepted losses resulting from riots, civil commotions, insurrections, or invasions of a foreign enemy, is not a Federal question but one of general law, the decision of which by a State court is not reviewable here.

This was a motion to dismiss the writs of error on the ground that no federal question was presented, and that the court was without jurisdiction.

Mr. Assistant Attorney-General Maury and *Mr. George F. Edmunds* for the motion.

Mr. Enoch Totten, *Mr. William B. Webb*, and *Mr. John Howard*, opposing.

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

We have no jurisdiction in these cases. The suits were brought on policies issued by the Mutual Assurance Society of Virginia, one to John Grame, and the other to Seymour P. Vial, insuring certain buildings of the respective parties against such losses or damages as might be occasioned by accidental fire or lightning, but expressly excepting from the risks losses which resulted from riots, civil commotions, insurrections, or from the invasion of a foreign enemy. The defence was that the loss was not occasioned by an accidental fire, but that it resulted from a fire purposely set by the Confederate authorities on the evacuation of Richmond in April, 1865, as a war measure, for the destruction of tobacco and military stores which were liable to capture by the forces of the United States. Neither party set up or claimed in the pleadings "any title, right, privilege or immunity . . . under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

On the trial it was conceded that the buildings were destroyed in the progress of a fire purposely set by the order of the Confederate States Government on the evacuation of Richmond "in pursuance of its laws and policy to destroy military stores and tobacco which were liable to capture by the forces of the United States." The buildings insured were not actually set on fire by the Confederate authorities, but they caught from a fire that was so set. On these facts the Supreme Court of Appeals of Virginia decided that the society was not liable under its policies. In the opinion filed the court said: "It is plain that this fire, from which the appellants' buildings were burned, resulted from the act of these military officers, acting under express orders and by virtue of an act of Congress of the Confederate States of America. Certainly it cannot be said that the fire which consumed the buildings of the appellants was an accidental fire or a fire by lightning. The question is, how did such fire result, and how was it occasioned? If it was occasioned by accident or by lightning, the company is responsible. It is not responsible if occasioned by or resulted from riots, insurrection, civil commotion, or the invasion of a foreign enemy." Then, after considering the facts, it is further said: "I suppose

that 'civil commotion' must necessarily arise where there is civil war. It is true there may be civil commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think no man who lived in the late decade would say that there was no civil commotion between 1861 and 1865. But the company not only protected itself against liability for loss occasioned by riots, insurrection, and civil commotions, but against the 'invasion of a foreign enemy.' In the light of history and of facts, familiar to every man who opens his eyes and sees material facts before him, is it not plain that the late war was a war of invasion, and that it was the invasion of an enemy, and that it was the invasion of 'a foreign enemy'?" And again: "Now, many authorities and opinions might be quoted to the same effect, but, I think, those already referred to are sufficient to show that the Confederate States of America were, certainly as long as the war lasted, a separate and independent government and foreign to the United States of America."

It is upon these expressions in the opinion of the court, and others like them, that our jurisdiction is supposed to rest, but it must be borne in mind that the only question for decision was whether the society was liable on its policies for losses which resulted from such a fire as that in which the insured buildings were destroyed. The inquiry was not as to the rights of the respective parties under the Constitution and laws of the United States, but as to what was meant by certain words used in the contracts they had entered into; not whether secession was constitutional, and the Confederate Government, which grew out of it, a lawful government, having authority to order the fire to be set; but whether that government did so order, and, if it did, whether the fire which followed was a fire which resulted from civil commotion, insurrections, or the invasion of a foreign enemy, within the meaning of those terms as used in the policies sued on; not whether the entry of the forces of the United States into Richmond was in fact the invasion of a foreign enemy, but only whether it was so in its legal effect upon the rights of the parties under their contracts. These are clearly questions of general, not Federal law, and such being

the case, the decision of them by the Court of Appeals is not reviewable here.

The motions to dismiss are granted.

EXCHANGE NATIONAL BANK OF PITTSBURGH *v.* THIRD NATIONAL BANK OF NEW YORK.

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

Argued November 6, 1884.—Decided November 24, 1884.

A bank in Pittsburgh sent to a bank in New York, for collection, eleven unaccepted drafts, dated at various times through a period of over three months, and payable four months after date. They were drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," and were sent to the New York bank as drafts on the Tea Tray Company. The New York bank sent them for collection to a bank in Newark, and, in its letters of transmission, recognized them as drafts on the company. The Newark bank took acceptances from Conger individually, on his refusal to accept as secretary, but no notice of that fact was given to the Pittsburgh bank, until after the first one of the drafts had matured. At that time the drawers and an indorser had become insolvent, the drawers having been in good credit when the Pittsburgh bank discounted the drafts: *Held*, That the New York bank was liable to the Pittsburgh bank for such damages as it had sustained by the negligence of the Newark bank.

The Circuit Court having, on a trial before it without a jury, made a finding of facts which did not cover the issue as to damages, and given a judgment for the defendant, this court, on reversing that judgment, remanded the case for a new trial, being unable to render a judgment for the plaintiff for any specific amount of damages.

The Exchange National Bank of Pittsburgh, Pennsylvania, brought this suit against the Third National Bank of the City of New York, in the Circuit Court of the United States for the District of New Jersey, to recover damages for the alleged negligence of the defendant in regard to eleven drafts or bills of exchange indorsed by the plaintiff to the defendant for collection. The suit was tried before the court without a jury. It made a special finding of facts and rendered a judgment for

the defendant, to review which the plaintiff has brought this writ of error.

The facts found were these, in substance: The drafts were drawn by Rogers & Burchfield, at Pittsburgh, to the order of J. D. Baldwin, and by him indorsed, on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," and were discounted before acceptance, by the plaintiff, at Pittsburgh, for the drawers. They bore different dates, from June 8, 1875, to September 20, 1875, and were in all other respects similar except as to the sums payable, and in the following form:

"$1,042.75. PITTSBURGH, June 8, 1875.

Four months after date, pay to the order of J. D. Baldwin ten hundred and forty-two $\frac{75}{100}$ dollars, for account rendered, value received, and charge to account of

ROGERS & BURCHFIELD.

To Walter M. Conger,
Sec'y Newark Tea Tray Co., Newark, N. J."

They were transmitted for collection at different times before maturity, by the plaintiff to the defendant, in letters describing them by their numbers and amounts, and by the words "Newark Tea Tray Co." They were sent by the defendant to its correspondent, the First National Bank of Newark, enclosed in letters describing them generally in the same way, except that, in two of the letters they were described as drawn on "W. M. Conger, Sec'y." The drafts were received by the defendant, in New York, within a day or two of the time of discounting them. They were presented by the First National Bank of Newark, to Conger, for acceptance, who, except in one instance, accepted them by writing on the face these words: "Accepted, payable at the Newark National Banking Co., Walter M. Conger." When the acceptances were taken, the time of payment was so far distant, that there was sufficient time to communicate to the plaintiff the form of the acceptance, and for the plaintiff thereafter to give further instructions as to the form of acceptance. The Newark bank held the drafts for payment, but the plaintiff was not advised of the form of

acceptance until, on the 13th and 19th of October, two of them were returned to it by the defendant. At that time the drawers and indorser were insolvent, but the drawers were in good credit when the drafts were discounted by the plaintiff. The drafts were duly protested for non-payment, but none of them were paid. The Newark Tea Tray Company is a New Jersey corporation, doing business in that State, and Walter M. Conger is its secretary. The drafts were represented to the plaintiff by Burchfield, one of the drawers, who offered them for discount, to be "the paper of the Newark Tea Tray Company," drawn against shipments of iron by Rogers & Burchfield to that company, and were discounted as such by the plaintiff. He also represented that Walter M. Conger was the person who examined the shipments of iron and "accepted the drafts," and that they were drawn in this form for the convenience and accommodation of the company. On drafts of Rogers & Burchfield on the "Newark Tea Tray Co.," dated May 4, 1874, May 20, 1874, and June 30, 1874, discounted by the plaintiff, and transmitted for acceptance to the defendant, and by it sent to the same Newark bank, that bank took acceptances from Walter M. Conger individually, without notice to the plaintiff; and Conger, during the time drafts sent by the plaintiff to the defendant, addressed to the "Newark Tea Tray Co." and to "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," were in the hands of the Newark bank to procure acceptance, informed the cashier of the Newark bank that he would not accept these drafts in his official capacity as secretary.

The judgment was in favor of the New York bank. The Pittsburgh bank sued out this writ of error to reverse it.

Mr. John R. Emery and *Mr. Thomas N. McCarter* for plaintiff in error.

Mr. A. Q. Keasbey for defendant in error.—I. The defendants, as agents of the plaintiff in New York, sufficiently discharged their duty by sending the draft to a competent agent in New Jersey for collection. *The S. C. Tryon*, 105 U. S. 267; *Britton* v. *Nicholls*, 104 U. S. 757; *Allen* v. *Merchants' Bank*,

22 Wend. 215.—II. Assuming that the drafts were in fact on the Tea Company, the defendant was guilty of no negligence creating a liability for damages. The drafts were not transmitted with instructions to procure acceptance. The transmission was made in the regular course of an ordinary business, by a bare letter of transmission. The relation of the parties was that of principal and agent. In order to hold the indorser and drawer it was not necessary to present the drafts for acceptance. Daniel Negotiable Instruments, 351; *Walker* v. *Stetson*, 19 Ohio, 400; *Oxford Bank* v. *Davis*, 4 Cush. 188; *Fall River Bank* v. *Willard*, 5 Met. (Mass.) 216. The case of *Allen* v. *Suydam*, 17 Wend. 368, affirmed 20 Wend. 321, which makes an exception to this rule, is questioned; Parsons Notes & Bills, 346; and is inconsistent with sound principle. See Beawes Lex. Mer. Chapter on Bills of Exchange, par. 18; *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Hamilton* v. *Cunningham*, 2 Brock. 350.—III. The drafts were not drawn upon the company, but upon Conger individually, and were properly accepted by him. The defendants were entitled to look to the drafts for information as to the drawees, and if there was obscurity it was the plaintiff's duty to dispel it. *Tucker Manufacturing Company* v. *Fairbanks*, 98 Mass. 101; Parol proof cannot be given that they were intended to be drawn otherwise than they were drawn. *Chaddock* v. *Van Ness*, 6 Vroom (35 N.J. L.) 517. A secretary of a company has no implied power to accept bills. *Blood* v. *Marcuse*, 38 Cal. 590; *First Nat. Bank* v. *Hogan*, 47 Missouri, 472. The fact that the bills were drawn on the secretary, who had no power to accept, shows that they were not intended to be drawn on the company. There must be something to show that it was intended to be the company. *Tucker Company* v. *Fairbanks*, 98 Mass. 101; *Moss* v. *Livingston*, 4 Comstock, 208; *Sturdivant* v. *Hull*, 59 Maine, 172; *Walker* v. *Bank of New York*, 9 N. Y. 582. The drafts cannot be both on Conger and on the company. *Tabor* v. *Cannon*, 8 Met. (Mass.) 460. Where there is no other mark than the addition of official character to the signature, it is not sufficient to bind the corporation, but only *descriptio personæ*. *Burbank* v. *Posey*, 7 Bush, (Ky.) 372; *Fiske* v. *Eldridge*, 12 Gray, 474;

Haverill Ins. Co. v. *Newhall*, 1 Allen, 130; *Fowler* v. *Atkinson*, 6 Minn. 579; *Drake* v. *Fluellen*, 33 Ala. 106; *Dutton* v. *Marsh*, L.R. 6 Q.B. 361; *Powers* v. *Briggs*, 79 Ill. 493.—IV. Even if the drafts are held to be on the company, they were properly presented, and were accepted.—V. If there was a failure it was caused by a doubt on the face of the draft, and defendant cannot be held liable in tort if it did not succeed in solving that doubt correctly. In the case of *Kean* v. *Davis*, 1 Zab. 683, the Supreme Court of New Jersey had held that such a draft must be deemed *prima facie* on the individual. Defendant would have been so advised had it consulted counsel. See *Merchants' Bank at Baltimore* v. *Merchants' Bank in Boston*, 6 Met. (Mass.) 13.—VI. If a failure occurred it was caused by the negligence of the plaintiff in failing to give proper information as to the party on whom the notes were drawn. As to what is contributory negligence, see *Dean* v. *Murphy*, 101 Mass. 455; Sherman on Negligence, 23, and cases cited, *Allen* v. *Suydam*, 17 Wend., already cited. See also Chief Justice Marshall's opinion in *Hamilton* v. *Cunningham*, 2 Brock. 350.

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

The negligence alleged consisted in not obtaining acceptance of the drafts by the Tea Tray Company, or having them protested for non-acceptance by that company, or giving notice to the plaintiff of such non-acceptance, and in failing to give notice to the plaintiff that the company would not accept the drafts, or that Conger would not accept them in his official capacity.

The decision of the Circuit Court proceeded on the ground that, at most, the defendant erred in judgment as to the import of the address on the drafts; that it had no information to qualify or explain such import; that for it to regard the drafts as addressed to Conger in his individual capacity was not a culpable error, because it followed decisions to that effect made by courts of the highest standing in New Jersey and New York and elsewhere; that it exercised intelligent and cautious judgment on the information it had; and that the plaintiff knew

who was the intended drawee, as understood between it and the drawers, and ought to have advised the defendant, but failed to do so. 4 Fed. Rep. 20.

The only question presented by the record is that of the sufficiency of the facts found to support the judgment.

It is contended by the defendant, that its liability, in taking at New York for collection these drafts on a drawee at Newark, extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent, with proper instructions; and that the Newark bank was not its agent, but the agent of the plaintiff, so that the defendant is not liable for the default of the Newark bank, due care having been used in selecting that bank. Such would be the result of the rule established in Massachusetts, *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Dorchester Bank* v. *New England Bank*, 1 Cush. 177; in Maryland, *Jackson* v. *Union Bank*, 6 Har. & Johns. 146; in Connecticut, *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *East Haddam Bank* v. *Scovil*, 12 Conn. 303; in Missouri, *Daly* v. *Butchers' & Drovers' Bank*, 56 Mo. 94; in Illinois, *Ætna Insurance Co.* v. *Alton City Bank*, 25 Ill. 243; in Tennessee, *Bank of Louisville* v. *First National Bank*, 8 Baxter, 101; in Iowa, *Guelich* v. *National State Bank*, 56 Iowa, 434; and in Wisconsin, *Stacy* v. *Dane County Bank*, 12 Wis. 629; *Vilas* v. *Bryants*, Id. 702. The authorities which support this rule rest on the proposition, that since what is to be done by a bank employed to collect a draft payable at another place cannot be done by any of its ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the sub-agent; and that the incidental benefit which the bank may receive from collecting the draft, in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from the negligence of the sub-agent.

The contrary doctrine, that a bank, receiving a draft or bill of exchange in one State for collection in another State from

a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers or from that of its correspondent in the other State, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York, *Allen* v. *Merchants' Bank*, 22 Wend. 215; *Bank of Orleans* v. *Smith*, 3 Hill, 560; *Montgomery County Bank* v. *Albany City Bank*, 3 Selden, 459; *Commercial Bank* v. *Union Bank*, 1 Kernan (11 N. Y.), 203, 212; *Ayrault* v. *Pacific Bank*, 47 N. Y. 570; in New Jersey, *Titus* v. *Mechanics' National Bank*, 6 Vroom (35 N. J. L. 588); in Pennsylvania, *Wingate* v. *Mechanics' Bank*, 10 Penn. St. 104; in Ohio, *Reeves* v. *State Bank*, 8 Ohio St. 465; and in Indiana, *Tyson* v. *State Bank*, 6 Blackford, 225. It has been so held in the Second Circuit, in *Kent* v. *Dawson Bank*, 13 Blatchford, 237; and the same view is supported by *Taber* v. *Perrott*, 2 Gall. 565, and by the English cases of *Van Wart* v. *Woolley*, 3 B. & C. 439; *S. C.* 5 D. & R. 374, and *Mackersy* v. *Ramsays*, 9 Cl. & Fin. 818. In the latter case, bankers in Edinburgh were employed to obtain payment of a bill drawn on Calcutta. They transmitted it to their correspondent in London, who forwarded it to a house in Calcutta, to whom it was paid, but, that house having failed, the bankers in Edinburgh, being sued, were, by the House of Lords, held liable for the money, on the ground, that, they being agents to obtain payment of the bill, and payment having been made, their principal could not be called on to suffer any loss occasioned by the conduct of their sub-agents, between whom and himself no privity existed.

The question under consideration was not presented in *Bank of Washington* v. *Triplett*, 1 Pet. 25; for although the defendant bank in that case was held to have contracted directly with the holder of the bill to collect it, the negligence alleged was the negligence of its own officers in the place where the bank was situated.

In *Hoover* v. *Wise*, 91 U. S. 308, a claim against a debtor in Nebraska was placed by the creditor in the hands of a collecting agency in New York, with instructions to collect the debt, and with no other instructions. The agency transmitted the

claim to an attorney at law in Nebraska. The attorney received the amount of the debt from the debtor in Nebraska, in fraud of the bankrupt law, and paid it over to the agency, but the money did not reach the hands of the creditor. The assignee in bankruptcy having sued the creditor to recover the money, this court (three justices dissenting) held that the attorney in Nebraska was not the agent of the creditor, in such a sense that his knowledge that a fraud on the bankrupt law was being committed was chargeable to the creditor, on the ground that, the collecting agency having undertaken the collection of the debt, and employed an attorney to do so, the attorney employed by it, and not by the creditor, was its agent, and not the agent of the creditor; and the creditor was held not to be liable to the assignee in bankruptcy for the money. In the opinion of the court it is said, that the case falls within the decisions in the above-mentioned cases of *Reeves* v. *State Bank*, 8 Ohio St. 465; *Mackersy* v. *Ramsays*, 9 Cl. & Fin. 818; *Montgomery County Bank* v. *Albany City Bank*, 3 Selden, 459; *Commercial Bank* v. *Union Bank*, 1 Kernan, 203, and *Allen* v. *Merchants' Bank*, 22 Wend. 215; and it is said that those cases, the first three of which are stated at length, show "that where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents and not the sub-agents of the owner of the note." The court proceeds to say, that those authorities go far towards establishing the position, that the collecting agency was an independent contractor, and that the attorney it employed was its agent only, and not in such wise the agent of the defendant as to make the defendant responsible for the knowledge of the attorney in Nebraska. The court then cites, as a case in point, *Bradstreet* v. *Everson*, 72 Penn. St. 124, as holding that where a commercial agency at Pittsburgh received drafts to be collected at Memphis, and sent them to its agent at Memphis, who collected the money and failed to remit it, the agency at Pittsburgh was to be regarded as undertaking to collect, and not merely receiving the drafts for transmission to another for collection, and as being liable for the negligence

of its agent at Memphis. It also cites, as to the same purport, *Lewis* v. *Peck*, 10 Ala. 142, and *Cobb* v. *Becke*, 6 Ad. & El. 930. It then says that these authorities fix the rule, before stated, on which the decision is rested. So far from there being anything in that case which goes to exonerate the defendant in the case at bar, its reasoning tends strongly to affirm the principle on which the defendant must be held liable. Indeed, its language supports the view that the Newark bank, in this case, would not be liable directly to the plaintiff. If that be so, and the defendant is not liable, the plaintiff is without remedy.

The case of *Britton* v. *Niccolls*, 104 U. S. 757, is cited to show that the defendant is not liable. In that case, the defendants, bankers in Natchez, Mississippi, received from the plaintiff, a resident of Illinois, for collection, two promissory notes, dated at Natchez, but not stating any place of payment. They were sent to the defendants, through a banking-house in Bloomington, Illinois, with instructions to collect them, if paid, and, if not, to protest them and give notice to the indorsers. The defendants placed the notes in the hands of a reputable notary in Natchez, to make demand of payment and give notice to the indorsers. It was held that the defendants were not liable for negligence on the part of the notary, whereby the liability of a responsible indorser was released. The negligence consisted in not presenting the notes to the maker at maturity and demanding payment. The maker resided twelve or fifteen miles from Natchez, and had no domicile or place of business in Natchez. No information as to his residence was given to the defendants with the notes, and the plaintiff was ignorant of it. All the instructions which the defendants gave to the notary were given on the several days the notes matured, when they handed the notes to the notary, with instructions to demand payment, and, if they were not paid, to protest them and send notice of non-payment to the indorsers. The notary knew where the maker resided, and that he had no place of business in Natchez; but he inquired for him at three public places in Natchez, and, not finding him, protested the notes for non-payment, and gave notice to the indorsers. The

defendants had inquired at Natchez as to the residence of the maker, but had not learned it, and had sent notices to him, through the post office there, of the amount and date of maturity of the notes, a reasonable length of time in advance. On these facts it is apparent, that the only question raised was as to the liability of bankers in Natchez, in respect to a note sent to them for collection, dated at Natchez, and not payable at any specified place there or elsewhere, for the negligence of a public notary there. The suit was not against the banking-house in Bloomington, which was only the agent to transmit the notes to the defendants for collection. The opinion of the court states the question to be as to "the liability of the collecting bankers for the manner in which the notary to whom the notes are delivered for presentment and protest discharges his duty." The court says: "The notes being dated at Natchez, the presumption of law, in the absence of other evidence on the subject, is, that that was the place of residence of the maker, and that he contemplated making payment there. The duty of the bankers, as collecting agents, was, therefore, to make inquiry for his residence or place of business in that city, and, if he had either, to make there the presentment of the notes, but, if he had neither, to use reasonable diligence to find him for that purpose." The court then refers to the case of *Allen* v. *Merchants' Bank*, 22 Wend. 215, in the Court of Errors of New York, as declaring the doctrine, that a bank receiving paper for collection is responsible "for all subsequent agents employed in the collection of the paper," and states that, though that decision has been followed in New York, and its doctrine has been adopted in Ohio, it has been generally rejected in the courts of other States. The case of *Dorchester Bank* v. *New England Bank*, 1 Cush. 177, is then cited, as holding that if a bank acts in good faith in selecting a suitable sub-agent at the place where the bill is payable, it is not liable for his neglect; and the opinion states that this doctrine has been followed in the Supreme Courts of Connecticut, Maryland, Illinois, Wisconsin, and Mississippi. The court, however, does not adopt either of these views, or rest the decision of the case before it on the latter view. For it proceeds to say: "In

the New York case, in the Court of Errors, it was conceded, that the general liability of the collecting bank might be varied and limited by express agreement of the parties, or by implication arising from general usage; and, in some of the cases in other States, proof of such general usage of bankers in the employment of notaries was permitted, and a release thereby asserted from liability of the bank for any neglect by them." The court then states that there was in the case no proof of any general usage of bankers at Natchez, as to the employment of notaries public in the presentment and protest of notes left with them for collection. But, as there was a statute of Mississippi, passed in 1833, authorizing notaries to protest promissory notes, and requiring them to keep a record of their notarial acts in such cases, and making the record admissible in evidence in the courts, as if the notary were a witness, and, as the courts of that State had held, *Tiernan* v. *Commercial Bank*, 7 How. (Miss.) 648; *Agricultural Bank* v. *Commercial Bank*, 7 Smedes & Marshall, 592; *Bowling* v. *Arthur*, 34 Mississippi, 41, under that statute, that it was a part of the duty of the notary, when protesting paper, to give all notices of dishonor required to charge the parties to it, and that a bank receiving commercial paper as an agent for collection, properly discharged its duty, in case of non-payment, by placing the paper in the hands of such notary, to be proceeded with in such manner as to charge the parties to it, and that the bank was not liable, in such cases, for the failure of the notary to perform his duty, the court says, that, "judged by the law of Mississippi," the defendants "discharged their duty to the plaintiff when they delivered the notes received by them for collection to the notary public," and adds: "What more could they have done, as intelligent and honest collecting agents, desirous of performing all that was required of them by the law, ignorant, as they were, of the residence or place of business of the maker of the notes, and having unsuccessfully made diligent inquiry for them?" It further says: "The notary was not, in this matter, the agent of the bankers. He was a public officer, whose duties were prescribed by law; and when the notes were placed in his hands, in order that such steps

should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was liable." On these grounds the court held that the defendants were not guilty of negligence, and were not liable for the negligence of the notary. The decision was not placed on any general rule of commercial law, but rested on the fact that the notary was a public officer, with duties prescribed by statute, and has no application to the case at bar. No reference was made to the case of *Hoover* v. *Wise*, nor any suggestion that the views stated in the opinion in that case were doubted or dissented from. There is, in the case at bar, no negligence of a notary, or of a public officer, or of any person whose duties or functions are prescribed by statute; and the question of the liability of the defendant is to be determined on principles not involved in the actual decision in *Britton* v. *Niccolls.*

The question involves a rule of law of general application. Whatever be the proper rule, it is one of commercial law. It concerns trade between different and distant places, and, in the absence of statutory regulations or special contract or usage having the force of law, it is not to be determined according to the views or interests of any particular individuals, classes or localities, but according to those principles which will best promote the general welfare of the commercial community. Especially is this so when the question is presented to this tribunal, whose decisions are controlling in all cases in the Federal courts.

The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest; and the question presented is, whether the New York bank, first receiving these drafts for collection, is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts with the New York bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all

necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. From the facts found, it is to be inferred that the New York bank took the drafts from the plaintiff, as a customer, in the usual course of business. There are eleven drafts in the case, running through a period of over three months, and the defendant had previously received from the plaintiff two other drafts, acceptances of which it had procured from Conger, at Newark, through the Newark bank. The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties, and the accommodation to the customer, must all be considered together, and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. *Smedes* v. *Bank of Utica*, 20 Johns. 372, and 3 Cowen, 662; *McKinster* v. *Bank of Utica*, 9 Wend. 46; affirmed in *Bank of Utica* v. *McKinster*, 11 Wend. 473. The contract, then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of its contract; and, whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer. This general principle applies to all who contract to perform a service. It is illustrated by the decision of the Court of King's Bench, in *Ellis* v. *Turner*, 8 T. R. 531, where the owners of a vessel carried goods to be delivered at a certain place, but the vessel passed it by without delivering the goods, and the vessel was sunk and the goods were lost. In a suit against the owners for the value of the goods, based on the contract, it was contended for the defendants that they were

not liable for the misconduct of the master of the vessel in carrying the goods beyond the place. But the plaintiff had judgment, Lord Kenyon saying that the defendants were answerable on their contract, although the misconduct was that of their servant, and adding: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them."

The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or sub-agents, when defaults occur injurious to his interest.

Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where from the nature of the business, it was evident he must employ sub-agents. The distinction recurs, between the rule of merely personal representative agency

and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used.

We regard as the proper rule of law applicable to this case, that declared in *Van Wart* v. *Woolley*, 3 B. & C. 439, where the defendants, at Birmingham, received from the plaintiff a bill on London, to procure its acceptance. They forwarded it to their London banker, and acceptance was refused, but he did not protest it for non-acceptance or give notice of the refusal to accept. Chief Justice Abbott said: "Upon this state of facts it is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondent) have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect." In that case there was a special pecuniary reward for the service. But, upon the principles we have stated, we are of opinion that, by the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage, or of any express agreement to that effect, liable for a neglect of duty occurring in that collection, from the default of its correspondent in Newark.

What was the duty of the defendant and what neglect of duty was there? An agent receiving for collection, before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and, if chargeable with negligence therein, is liable to the

owner for all damages he has sustained by such negligence. *Allen* v. *Suydam*, 20 Wend. 321; *Walker* v. *Bank of the State of New York*, 5 Selden, 582. The drawer or indorser of such a draft is, indeed, not discharged by the neglect of the holder to present it for acceptance before it becomes due. *Bank of Washington* v. *Triplett*, 1 Pet. 25, 35; *Townsley* v. *Sumrall*, 2 Pet. 170, 178. But, if the draft is presented for acceptance and dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser, or he will be discharged. 3 Kent's Comm. 82; *Bank of Washington* v. *Triplett*, 1 Pet. 25, 35; *Allen* v. *Suydam*, 20 Wend. 321; *Walker* v. *Bank of the State of New York*, 5 Selden, 582; *Goodall* v. *Dolley*, 1 T. R. 712; Bayley on Bills, 2d Am. ed. 213. Moreover, the owner of a draft payable on a day certain, though not bound to present it for acceptance in order to hold the drawer and indorser, has an interest in having it presented for acceptance without delay, for it is only by accepting it that the drawee becomes bound to pay it, and, on the dishonor of the draft by non-acceptance, and due protest and notice, the owner has a right of action at once against the drawer and indorser, without waiting for the maturity of the draft; and his agent to collect the draft is bound to do what a prudent principal would do. 3 Kent's Comm. 94; *Robinson* v. *Ames*, 20 Johns. 146; *Lenox* v. *Cook*, 8 Mass. 460; *Ballingalls* v. *Gloster*, 3 East, 481; *Whitehead* v. *Walker*, 9 M. & W. 506; *Walker* v. *Bank of the State of New York*, 5 Selden, 582.

In view of these considerations, it is well settled, that there is a distinction between the owner of a draft and his agent, in that, though the owner is not bound to present a draft payable at a day certain, for acceptance, before that day, the agent employed to collect the draft must act with due diligence to have the draft accepted as well as paid, and has not the discretion and latitude of time given to the owner, and, for any unreasonable delay, is responsible for all damages sustained by the owner. 3 Kent's Comm. 82; Chitty on Bills, 13th Am. ed. 272, 273.

The defendant being thus under an obligation to present the drafts for acceptance, and having, in fact, presented them,

through the Newark bank, to Conger, the secretary of the company, was bound not to take the acceptances it did, but to treat the drafts as dishonored. The plaintiff was, at least, entitled to an acceptance in the terms of the address on the drafts. *Walker* v. *Bank of the State of New York*, 5 Selden, 582. The defendant had notice, from the description of the drafts by the words "Newark Tea Tray Co.," in the letters sending them for collection, that the plaintiff regarded the drafts as drawn on the company; and the defendant recognized its knowledge of the fact that the drafts were drawn on the company, by describing them by the words "Newark Tea Tray Co.," in its letters to the Newark bank, in every instance but two. If, on the face of the drafts, the address was ambiguous, it was not for the defendant to determine the question, as against the plaintiff, by taking an acceptance which purported to be the acceptance of Conger individually, especially in view of the information it had by the words "Newark Tea Tray Co.," in the letters sending the drafts to it for collection. It appears that the drafts were discounted by the plaintiff as drafts on the company, and, if it could have had an acceptance in the terms of the address, it would, in a suit against the company, have been in a condition to show who was the real acceptor. But, with the information given to the Newark bank by Conger, while that bank had in its hands for acceptance drafts drawn in the same form as those here in question, that he would not accept such drafts in his official capacity as secretary, the Newark bank chose to take acceptances individual in form. This was negligence, for which the defendant is liable to the plaintiff in damages, no notice of dishonor having been given. The defendant was bound to give such notice to the plaintiff. *Walker* v. *Bank of the State of New York*, 5 Selden, 582.

The question as to whether the company would have been liable on the drafts, if they had been accepted in the terms of the address, is not one on the determination of which this suit depends; nor do we find it necessary to discuss the question as to whether, on the face of the drafts, the company or Conger individually is the drawee. The very existence of the ambigu-

ity in the address, and of the question as to whether the company would be liable on an acceptance in the terms of the address, is a cogent reason why the defendant should not be allowed, without further communication with the holder, to do acts which may vary the rights of the holder, without responding in damages therefor. The risk is on the defendant and not on the plaintiff.

It is, therefore, plain that the judgment must be reversed. But judgment cannot be now rendered for the plaintiff for damages. There must be a new trial. Although there is a special finding of facts, it does not cover the issue as to damages. No damages are found. The action is one for negligence, sounding in damages. Although the complaint alleges that the drawers and the indorser are discharged for want of notice of non-acceptance, and though it is found that the drawers were in good credit when the drafts were discounted, and that the drawers and indorser had become insolvent by the 13th and 19th of October, 1875, there is nothing in the finding of facts on which to base a judgment for any specific amount of damages. On the new trial, that question will be open, and we do not intend to intimate any opinion on the subject.

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

Tradesman's National Bank of Pittsburgh v. *Third National Bank of New York.* In error to the Circuit Court of the United States for the District of New Jersey. This suit presents, in all material respects, the same facts and questions as the case of the Exchange National Bank against the same defendant, No. 86, just decided. The only points of difference, as to the facts found, are these: The drafts are seven in number, and bear different dates, from June 21, 1875, to August 10, 1875. The letters from the plaintiff to the defendant, transmitting them for collection, described them by their numbers and amounts, and one of the letters from the defendant to the Newark bank described the enclosed draft as "Conger, Tr." There is no finding that when the acceptances of Conger were taken by the Newark bank, the time of payment of the drafts was so far distant that there was sufficient time to communicate to the plaintiff the form of ac-

Statement of Facts.

ceptance, and for the plaintiff thereafter, if such communication had been made, to give further instructions as to the form of acceptance. The plaintiff was not advised of the form of the acceptance until the first draft was protested for non-payment and returned to it, at which time the drawers and indorser were insolvent. There is no finding as to the taking by the Newark Bank of any acceptances from Conger individually, of drafts drawn on the Newark Tea Tray Company, and there is a finding that when the drafts were presented to Conger by the Newark bank he declined to accept them in his official capacity. These differences are immaterial, under the views held in No. 86.

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

HEIDRITTER *v.* ELIZABETH OIL-CLOTH COMPANY.

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

Argued November 7, 8, 1884.—Decided November 24, 1884.

Where proceedings *in rem* are commenced in a State court and analogous proceedings *in rem* in a court of the United States, against the same property, exclusive jurisdiction for the purposes of its own suit is acquired by the court which first takes possession of the *res;* and while acts of the other court thereafter, necessary to preserve the existence of a statutory right, may be supported, its other acts in assuming to proceed to judgment and to dispose of the property convey no title.

A derived title to the premises in suit through a seizure by officers of the United States for violation of the internal revenue laws, and condemnation and sale of the same in the Circuit Court of the United States: B derived title to the same premises under judgment and decree in a State court to enforce a mechanic's lien. The proceedings in the State court were commenced and prosecuted to judgment after the marshal had taken the premises into his possession and custody under the proceedings in the Circuit Court: *Held*, That B did not hold the legal title of the premises as against A claiming under the marshal's sale and the decree of the District Court.

This was an action of ejectment for the recovery of certain real estate and the improvements thereon, situated in the City

of Elizabeth, in New Jersey, brought by the plaintiff in error against the defendant in error in the Supreme Court of that State and removed thence into the Circuit Court of the United States on the ground that the case was one arising under the Constitution and laws of the United States. The cause was submitted to the court, the intervention of a jury having been waived. The facts appeared by special findings of the court. So far as material they were as follows:

Both parties claimed title under Charles L. Sicher, who, being the owner of the premises, commenced the erection thereon of a building which he subsequently used as a distillery.

The plaintiff claimed under a deed from the sheriff of Union County, in which the premises are situated, dated September 24, 1873, made to him as a purchaser at a sale under two special writs of *fieri facias*, issued upon two judgments against Sicher, one in favor of August Heidritter for $1,711.22, signed June 14, 1873, the other in favor of Ferdinand Blancke for $272.95, signed June 18, 1873.

The actions in which these judgments were severally rendered were commenced, one on February 21, 1873, the other on March 15, 1873. They were in form actions of *assumpsit*, the declaration in each, however, containing additional averments, showing that they were brought to enforce mechanics' liens upon the building and lot constituting the premises in controversy, according to the provisions of an act of the legislature of New Jersey of March 11, 1853, and the supplements thereto, the premises being specifically described and the accounts for labor and materials on which the actions were founded being set out, in the one case beginning June 21, 1872, in the other September 7, 1872. The respective claims for these liens had been filed, pursuant to the statute, in the office of the clerk of the county, one on February 21, 1873, the other on March 13, 1873.

This statute of New Jersey, Nixon's Digest (4th ed.), 571, Revision of New Jersey, 668, provided for the enforcement of the claim filed, agreeably to its provisions, upon any lien created thereby by suit in a court of the county where such building is situated, to be commenced by summons, in a prescribed form, against the builder and owner of the land and building, con-

taining a statement that the plaintiff claimed a building lien, for the amount set forth, on the building and lands of the defendant, described as in the claim on file.

Two modes of service of this summons were specifically described in the act: one was called actual service, meaning thereby personal service on the defendant, or, if he cannot be found in the State, by affixing a copy thereof on such building, "and also by serving a copy on such defendant personally or by leaving it at his residence ten days before its return." The other was styled legal service, which was, in case the defendant resided out of the State, by affixing a copy on such building and sending a copy by mail, directed to him at the post office nearest his residence, or, in case his residence was not known to the plaintiff, then by affixing a copy to such building and publishing it for four weeks in a newspaper circulating in the county.

The judgment in the action, if for the plaintiff, in case the defendant had been actually served with the summons, was to be general, with costs, as in other cases; but when only legal service of the summons had been made, judgment against the owner and also against the builder "shall be specially for the debt and costs to be made of the building and lands in the declaration described; and, in case no general judgment is given against the builder, such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery." When the builder and owner were distinct persons, they might make separate defences, the former that he did not owe the money, the latter, that the building and land were not liable to the debt; "and, in such case, it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with."

"When judgment is entered generally against the builder, a writ of *fieri facias* may issue thereon as in other cases; and when judgment shall be against the building and lands, a special writ of *fieri facias* may issue to make the amount recovered by sale of the building and lands; and when both a general and

special judgment shall be given, both writs may be issued, either separately, or combined in one writ." It was further provided that, under such special *fieri facias*, the sheriff should advertise, sell, and convey said building and lot in the same manner as directed by law in case of lands levied upon for debt, and that the sheriff's deed should convey to the purchaser the estate of the owner in the lands and in the buildings which he had at any time after the commencement of the building, subject to all mortgages and other encumbrances created and recorded or registered prior thereto. The building upon the premises in controversy was commenced June 25, 1872, from which time, it is conceded, the mechanics' liens dated, to enforce which the judgments were rendered.

It appears that the summons in the two cases were legally, but not actually, served upon Sicher, his residence not being known to the plaintiff, by affixing a copy thereof to the building, and by a publication for four weeks of a copy.

At the times when these claims for mechanics' liens were filed in the office of the county clerk, and when the actions were commenced to enforce them, the premises in controversy were in the actual custody and possession of the United States marshal for the District of New Jersey under the following circumstances.

The buildings erected by Sicher on the premises in controversy were intended for and were used by him as a distillery, when, on January 24, 1873, they, with the contents of the buildings, were seized by the collector of internal revenue for the Third Collection District of New Jersey, for a forfeiture incurred under the laws of the United States. On February 4, 1873, an information to enforce that forfeiture was filed in the District Court of the United States for the District of New Jersey, and on February 5, 1873, process of attachment was issued to the marshal, who made return of the same on February 19, 1873, that he had taken possession of the property therein named, including the premises in controversy. On February 25, 1873, a sentence of condemnation and forfeiture to the United States was passed, and a writ of execution ordered to issue to sell the same. On March 10th following

that writ was issued, and was returned June 9, 1873, by the marshal, with the indorsement thereon that he had sold the premises to one Edward G. Brown. The proceeds of the sale, after payment of costs, were ordered to be paid to the collector of internal revenue for the use of the United States, and the marshal, on May 29, 1873, executed and delivered a deed to the purchaser, conveying the lands and tenements in fee simple. The sale took place on May 22, 1873. The defendants in error, by mesne conveyances, acquired the title of the purchaser at this sale.

Bills of exceptions were duly taken to the rulings of the court, and judgment was rendered for the defendant below. See 6 Fed. Rep. 138. The plaintiff below sued out this writ of error to reverse that judgment.

Mr. John R. Emery and *Mr. Edward A. Day* for plaintiff in error contended that the title acquired by a purchaser under an execution issued on a judgment secured under a mechanics' lien, general as against the owner and special as against the land, is as to the estate which the owner had when the building was begun (*i. e.*, when the excavations were commenced), paramount as to subsequent transfers and encumbrances; and cited *Tompkins* v. *Horton*, 10 C. E. Greene (25 N. J. Eq.) 284; *In re Dey*, 9 Blatchford, 285; *Mutual Benefit Life Ins. Co.* v. *Rowand*, 11 C. E. Greene (26 N.J. Eq.) 389; *Jacobus* v. *Mutual Benefit Life Ins. Co.*, 12 C. E. Greene (27 N.J. Eq.) 604. Under the New Jersey proceeding the United States could not be made party defendant, because the title of the United States was not complete until a judicial determination, although it was true that it then reverted to the commission of the offence. Burroughs on Taxation, 579; Cooley on Taxation, 318; *Bennett* v. *Hunter*, 9 Wall. 326. The internal revenue laws of the United States forfeit only (1) all right, title and interest therein of the offending person; and (2) all right, title and interest therein of every person who, having the right or power to control the use of the property, has knowingly suffered or permitted the land to be used for a distillery. While they forfeit personal property without regard to ownership, they qualify

the forfeiture imposed upon real estate. *United States* v. *Distillery at Spring Valley*, 11 Blatchford, 255; *United States* v. *One Copper Still*, 8 Bissell, 270. A forfeiture can only be applied to those cases in which the means which the statute provides for preventing the forfeiture can be employed by the person whose property or interest in it would otherwise be forfeited. *Peisch* v. *Ware*, 4 Cranch, 347; *United States* v. 33 *Barrels of Spirits*, 1 Lowell, 239. If, for the fault of the distillers, the interest of other innocent persons in the property may be forfeited, the law is open to the objection of unconstitutionality, in that such interest is taken away without hearing, without trial, and without due process of law. *Confiscation Cases*, 20 Wall. 92, 114. *The Mary*, 9 Cranch, 126; *People* v. *Soper*, 7 N. Y. (3 Selden), 428. Statutes will not be understood to forfeit property except for fault of the owner or his agent, unless such construction is unavoidable. Potter's Dwarris, 251; *Peisch* v. *Ware*, 4 Cranch, 347. See also for the construction contended for, *United States* v. *Emhalt*, 105 U. S. 414; *United States* v. *Mackoy*, 2 Dillon, 299. An interest under a mechanic's lien was not the subject of forfeiture. *Confiscation Cases*, 20 Wall. 92, note on claims of Marcuard, page 114. See also *Mc Veigh* v. *United States*, 11 Wall. 259; *Miller* v. *United States*, Ib. 268, 292; *Tyler* v. *Defrees*, Ib. 331; *Brown* v. *Kennedy*, 15 Wall. 591; *Confiscation Cases*, 20 Wall. 92, 117; *Semmes* v. *United States*, 91 U. S. 21; *Osborn* v. *United States*, Id. 474; *Wallach* v. *Van Riswick*, 92 U. S. 202; *Windsor* v. *Mc Veigh*, 93 U. S. 274; *Pike* v. *Wassell*, 94 U. S. 711; *Burbank* v. *Conrad*, 96 U. S. 291; *Burbank* v. *Semmes*, 99 U. S. 138; *French* v. *Wade*, 102 U. S. 132; *Waples* v. *Hays*, 108 U. S. 6; *Waples* v. *United States*, 110 U. S. 630. Counsel further contended that the proceedings in the United States courts did not aim to reach the mechanics' liens; that under the pleadings a valid judgment could not be rendered for forfeiture of the estate on which the distillery stood; and that the plaintiff in error was not concluded by the decree.

Mr. John F. Dillon and *Mr. J. T. Richards* for defendant in error.

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

The information alleged violations of numerous sections of the internal revenue laws, which it is not necessary to mention further than to say, that on its face it disclosed a case for a forfeiture under those laws of the property described in it, clearly within the jurisdiction of the court.

The precise question thus arising, is, whether the plaintiff in error acquired the legal title to the premises in controversy, by virtue of the deed from the sheriff of Union County, and the judgments and proceedings on which it was based.

These proceedings, so far as against the owner of the property they undertook to enforce the plaintiff's claim as a lien upon his interest in it, were in the nature of proceedings *in rem*, though not so, perhaps, in technical strictness, for they did not profess to conclude all the world. Such, particularly, was their nature in the cases under consideration, where the owner and builder were one person, and he was served with process only constructively, not actually, being presumably without the jurisdiction of the court. It was declared so to be in *Gordon* v. *Torrey*, 2 McCarter (15 N. J. Eq.) 112.

"The proceeding in such cases," said Mr. Justice Field, delivering the opinion of the court in *Pennoyer* v. *Neff*, 95 U. S. 714, 730, "though in the form of a personal action, has been uniformly treated, where service was not obtained and the party did not voluntarily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

That jurisdiction is called into exercise judicially and attaches, as elsewhere stated in the same opinion (p. 727), "where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property

is always in the possession of its owner in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*."

In *Cooper* v. *Reynolds*, 10 Wall. 308, 318, it is said by Mr. Justice Miller, delivering the opinion of the court, that, in such cases, where there is no appearance of the defendant and no service of process on him, "the case becomes, in its essential nature, a proceeding *in rem*," and that (p. 317), "while the general rule in regard to jurisdiction *in rem* requires an actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing and in effect subject it to the control of the court."

This may be by the levy of a writ, or the mere bringing of a suit. "It is immaterial," said this court by Mr. Justice McLean, in *Boswell's Lessee* v. *Otis*, 9 How. 336, "whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

Indeed, so far as the proceedings in question sought to bind the land by enforcing the plaintiff's claim as a specific lien thereon, and to dispose of the premises in satisfaction thereof by a sale, they were substantially *in rem*, whether there was personal or merely constructive service of process upon the defendant owner. The kind of process and mode of service could be material only with reference to the nature of the judgment. He could be bound personally only by his coming or being brought personally within the jurisdiction of the court. But the land might be bound, without actual service of process

upon the owner, in cases where the only object of the proceeding was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.

When, however, the proceedings were begun for the enforcement of the mechanics' liens against the premises in controversy, by the issuing of the summons and the filing of the declaration, the property over which the State court sought to exert its jurisdiction was in the actual custody and possession of the District Court of the United States for the District of New Jersey. It had been seized by an officer of the United States for an alleged offence against its laws. It was proceeded against as forfeited to the United States, and to declare and enforce that forfeiture judicially, it had been taken possession of by the court. This proceeding was undoubtedly *in rem*, and it is quite immaterial whether the law authorized an absolute forfeiture of the *res*, including all interests and estates in it, so as to overreach antecedent liens and adverse claims, or only of the actual interest of the owner charged with the violations of law at the time of the alleged offences. In either view, and for either purpose, the court had taken possession of the property itself, and that possession was necessarily exclusive. The *res* was thereby drawn into the exclusive jurisdiction and dominion of the United States; and, for the purposes of that suit, it was, at the same time, withdrawn from the jurisdiction of the courts of New Jersey. Any proceeding against it, involving the control and disposition of it, in the latter, while in that condition, was as if it were a proceeding against property in another State. It was vain, nugatory, and void, and as against the proceedings and judgment of the District Court of the United States, and those claiming under them, was without effect.

In this aspect, the case is directly within the rule of decision

established in *Wiswall* v. *Sampson*, 14 How. 52. That was a controversy as to the title to real estate, one party claiming under a sale upon execution, issued on judgments rendered in the Circuit Court of the United States, the property being at the time of this sale in the possession of a receiver of a State court, under whose subsequent decree and sale the defendant claimed title. It is a significant fact, in that case, that, at the time of the appointment of the receiver by the State court, the executions upon the judgments had been issued and levied, and were a subsisting lien upon the premises. It was said in that case by Mr. Justice Nelson, delivering the opinion of the court: "It has been argued that a sale of the premises on execution, and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the event of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless." And the conclusion was: "It is sufficient to say that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate, without the leave of the court, was illegal and void."

And the same conclusion must prevail here, for although the sale under the judgments in the State court was not made until after the property had passed from the possession of the District Court by delivery to the purchaser at the sale under the decree, yet, the initial step on which the sheriff's sale depended —the commencement of the proceedings to enforce the mechanic's lien, asserting the jurisdiction and control of the State

court over the property sold—took place when that property was in the exclusive custody and control of the District Court: and, by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact, that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result, in our opinion, would have followed, if no such notice had been required or given. The substantial violation of the jurisdiction of the District Court consisted, in the control over the property in its possession, assumed and asserted, in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale. The principle applied in *Wiswall* v. *Sampson*, *ubi supra*, must be regarded as firmly established in the decisions of this court. It has been often approved and confirmed. *Peale* v. *Phipps*, 14 How. 368; *Hagan* v. *Lucas*, 10 Pet. 400; *Williams* v. *Benedict*, 8 How. 107; *Pulliam* v. *Osborne*, 17 How. 471; *Taylor* v. *Carryl*, 20 How. 583; *Yonley* v. *Lavender*, 21 Wall. 276; *People's Bank* v. *Calhoun*, 102 U. S. 256; *Barton* v. *Barbour*, 104 U. S. 126; *Covell* v. *Heyman*, 111 U. S. 176.

But it is to be understood, as a qualification of what has been said, that we do not mean to decide that the plaintiffs in the actions in the State court might not, without prejudice to the jurisdiction of the District Court, commence their actions, so far as that was a step required by the mechanics' lien law of New Jersey, for the mere purpose of fixing and preserving their rights to a lien, provided, always, they did not prosecute their actions to a sale and disposition of the property, which, by relation, would have the effect of avoiding the jurisdiction of the District Court under its seizure. That was the course, under similar circumstances, adopted and sanctioned by the Supreme Judicial Court of Massachusetts in *Clifton* v. *Foster*, 103 Mass. 233, where a petition to enforce a mechanic's lien, which, by statute, it was necessary to file within a fixed time in order to

preserve it, was permitted to be filed after the property, by the bankruptcy of the owner, had passed into the custody of the District Court, but all further proceedings thereon were stayed to await the action of that court in the bankruptcy proceedings, on the ground that such seasonable filing was necessary to keep the lien alive, and that, without further proceedings it could not be construed as an encroachment upon the jurisdiction of the bankruptcy court. The distinction seems to us reasonable and just, and is supported by the decisions in *Williams* v. *Benedict*, 8 How. 107, and *Yonley* v. *Lavender*, 21 Wall. 276. In conformity with it, we refrain from pronouncing the proceeding in the State court of New Jersey invalid, so far as they do not affect the legal title of the purchaser at the marshal's sale to the premises in controversy. We decide, not that they are invalid for the purpose of declaring and establishing the lien, but that they are not good for the purpose of enforcing it, as was attempted, by a sale and conveyance of the premises in controversy.

This view, though decisive of the case and resulting in the affirmance of the judgment of the Circuit Court, proceeds upon assumptions the most favorable which can be indulged to the plaintiff in error. It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where, as is the case here, it concerns those of a State and of the United States, constituted by the authority of distinct governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction. It was in accordance with this principle that in *Pulliam* v. *Osborne*, 17 How. 471, this court confirmed the legal title of land to a purchaser under an execution upon a judg-

ment rendered in a State court, because first actually levied as against one claiming under an execution out of the District Court of the United States, which had a priority of lien by reason of having been first issued.

We, therefore, now determine that the plaintiff in error does not hold the legal title of the premises in controversy, as against the defendant in error, claiming under the marshal's sale and the decree of the District Court; and we decide nothing beyond that. The other questions, argued at the bar—whether the forfeiture decreed by the District Court operated to transfer the whole title of the premises against all claimants; whether, if it operated only upon the interest of the owner at the time the alleged offences were committed, subject to all valid liens then existing, nevertheless, those liens were transferred to the proceeds of the sale, and the claimants were bound at their peril to intervene in their own behalf in that proceeding; or, whether the sale, as made, passed the legal title, subject to all existing liens, including those sought ineffectually to be enforced by the proceedings under which the plaintiff in error claims; and whether, in that event, these may be enforced against the land or present owners, and if so, in what mode—we have passed by without considering, as not necessary to the decision of the case.

The judgment of the Circuit Court is affirmed.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD CO. *v.* SOUTHERN TELEGRAPH COMPANY.

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

Submitted November 10, 1884.—Decided November 24, 1884.

Hilton v. *Dickinson*, 108 U. S. 165, again affirmed.

The Circuit Courts of the United States, taking jurisdiction of a proceeding to enforce a remedy given by a State statute, can act only in accordance with the statute creating the remedy, and are possessed only of the powers con-

ferred by it on the State courts: and this court will modify a supersedeas granted by a Circuit Court of the United States in such a proceeding, in order to make it conform to the powers conferred upon State courts in that respect.

This was a motion to dismiss a writ of error for want of jurisdiction; or, if that should be denied, to modify the supersedeas.

Sections 1930, 1931, 1932 of the Code of Alabama give telegraph companies incorporated by other States a "right of way over the lands, franchises and easements of other persons and corporations, and the right to erect poles and establish offices, upon making just compensation as now provided by law." Sections 3580 to 3600, inclusive, prescribe the mode in which such a company may appropriate private property within the State for its uses. Application must be made therefor by petition to the Probate Court or to the Circuit Court of the proper county, both of which courts are invested with jurisdiction for that purpose. The proceedings in the court after the filing of the petition are to be *in rem*, and must "conform as nearly as may be, except as herein otherwise provided, to the proceedings *in rem* in the admiralty courts, and be conducted according to the rules of such courts so far as practicable." Sec. 3581. Provision is then made for notice of the filing of the petition to the owner of the property (sec. 3583) and for the empanelling of a jury, "who, under the direction of the judge, shall well inquire, and true assessment make, of the damages and compensation which the owner . . . shall be entitled to have for the appropriation, . . . ; and the assessment of compensation for any right of way shall be made irrespective of any benefit from any improvement proposed by the petitioner." Sec. 3586. "The owner . . . may intervene in the cause for his interest therein, and evidence may be offered on either side; but no delay in the assessment to be made by the jury shall be caused by any controversy or evidence in respect to the title or ownership of the land, or of any part thereof." Sec. 3587. "The verdict . . . shall be immediately entered in proper form upon the minutes of the court, to be kept for such

causes, and the amount thereof for each parcel shall constitute the compensation to be paid therefor, as hereinafter directed, before the appropriation thereof shall be made by the petitioner." Sec. 3589. It is specially made the duty of the court to speed the cause. Sec. 3590. "An appeal to correct errors of law only may be had, if applied for within three months after the assessment, to either the Circuit Court of the same county or the Supreme Court; . . . but no appeal shall, during the pendency of it, prevent or hinder the petitioner from occupying the land involved therein, and proceeding to work thereon; but the petitioner, before doing so, shall pay into the court, for the person or persons entitled thereto, the amount of damages and compensation by the jury therefor assessed." Sec. 3593. The amount assessed may be paid to the person entitled thereto or to the clerk of the court. Sec. 3594.

The Southern Telegraph Company, a New York corporation, being desirous of erecting a line of telegraph from Montgomery, Alabama, by way of Selma to Meridian, in the State of Mississippi, filed in the Probate Court of Montgomery County, Alabama, an application for the proper proceedings under the Code to enable it to acquire the right of way for that purpose along a line of railroad in Alabama operated by the East Tennessee, Virginia and Georgia Railroad Company from Selma to the Mississippi State line. Upon this application being made the necessary notices were served on the railroad company to appear on the 10th of April, 1884, and a jury was summoned for an inquiry into the amount of compensation to be paid the company for the appropriation sought. On the day named the railroad company intervened for its interest and showed cause against the appropriation, and averred in its intervention that the value of the property to be appropriated was $12,000, and that this was the proper measure of the compensation and damages it was entitled to if the prayer of the petition should be allowed. On the same day the railroad company filed in the Probate Court a petition for the removal of the cause to the Circuit Court of the United States for the Middle District of Alabama,

on the ground that the value of the matter in dispute exceeded the sum of $500, and the telegraph company was a citizen of New York and the railroad company a citizen of Tennessee. Under this petition a removal was effected and a jury empanelled in the Circuit Court of the United States "to inquire, and true assessment make, of the damages and compensation" the railroad company was entitled to have for the appropriation. The compensation was assessed by the jury at $500, and this amount, as well as the costs, was paid to the clerk of the court. Thereupon a judgment was entered that the telegraph company have and enjoy "the rights, ways and easements claimed in the petition."

From that judgment this writ of error was brought. The telegraph company moved, 1, to dismiss the writ because the value of the matter in dispute did not exceed $5,000, and, if that motion was not granted, then, 2, that the supersedeas herein might be modified so as to allow it to occupy the right of way involved in the proceedings, and to work thereon pending this writ of error.

Mr. W. A. Gunter and *Mr. H. C. Semple* for the motion.

Mr. Gaylord B. Clark opposing.

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

The value of the matter in dispute in this court is the difference between the amount of compensation claimed by the railroad company on its intervention and the amount assessed by the jury. *Hilton* v. *Dickinson*, 108 U. S. 165. There is nothing in the record to show that the alleged value of the property is not the true measure of the compensation to be assessed. As this amount is $12,000, and the jury allowed only $500, it follows that the value of the matter in dispute is sufficient to give us jurisdiction.

This is a proceeding under the statute of Alabama to ascertain the amount of compensation to be paid the railroad company for the appropriation of its property to the uses of the

telegraph company. That is the single question to be settled. The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act. It must be assumed for all the purposes of the proceeding that the telegraph company has the right to make the appropriation, and that as soon as just compensation is made it may enter on the property and put up and work its lines. It is a proper exercise of legislative power to provide a way in which the amount of compensation shall be ascertained where the parties are themselves unable to agree. In Alabama this is to be done by a jury empanelled in a Probate Court or in a Circuit Court. The legislature might have made the action in these courts final, and not subject to review on appeal or writ of error. If that had been done, the assessment of the jury, when recorded in the proper court, would settle finally the amount of compensation to be paid for the appropriation, unless the assessment should be set aside for fraud or other sufficient cause in some appropriate independent proceeding instituted for that purpose. But it has been provided that an appeal may be taken "to correct errors of law only," the effect of which shall not be, however, to prevent the appropriating company from taking immediate possession and proceeding with its works on payment into court of the sum allowed by the jury.

The courts of the United States, on the removal of the proceeding from the Probate Court, were clothed with no greater power in the premises than the courts of the State would have possessed if their jurisdiction had been preserved. It follows that, as an appeal from the Probate Court to the State Circuit Court, or to the Supreme Court, would not have operated to prevent the telegraph company from taking possession of the property appropriated, and erecting its wires pending the appeal, the supersedeas on a writ of error from this court to the Circuit Court of the United States should be limited in the same way. This provision of the statute is by no means an unusual one, and was intended to prevent delays in the progress of a public work while the parties were litigating in the higher courts as to the correctness of a preliminary assessment of com-

pensation to be paid an owner of property taken for the public use according to the forms of law.

The motion to dismiss because the value of the matter in dispute does not exceed $5,000 *is denied; but it is ordered that the supersedeas upon the writ of error from this court shall not, during the pendency of the writ, prevent or hinder the telegraph company from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon, after it has paid into the Circuit Court, for the person or corporation entitled thereto, the amount of damages and compensation assessed by the jury empanelled in the Circuit Court.*

OGDENSBURGH & LAKE CHAMPLAIN RAILROAD COMPANY *v.* NASHUA & LOWELL RAILROAD COMPANY.

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

Submitted October 29, 1884.—Decided November 24, 1884.

Four parties made an agreement respecting transportation of freight. The parties of the first part were carriers by water to Ogdensburgh. The parties of the second part were made by the agreement trustees to hold and apply certain moneys raised for the purpose. The parties of the third part were owners in severalty of lines over which it was proposed that the freight brought by party 1 to Ogdensburgh should pass in transit to Boston. The parties of the fourth part were owners of a line of railway between Ogdensburgh & Lake Champlain over which the freight would pass to reach the roads of party 3. The agreement, among other things, provided that party 3 should pay to party 2 in semi-annual payments a part of the gross receipts derived from the transportation of this freight, and further that "the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from Ogdensburgh, when called upon by parties of the second part, advance from time to time sums not exceeding in all $600,000, to be used by said parties of the second part for the same purposes as said semi-annual payments, and to be pro tanto in lieu thereof, and to be repaid out of said semi-annual reservation as hereinafter

provided, it being understood and agreed that each of said parties of the third part shall only be liable to reserve and advance or pay to the parties of the second part or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said parties bear to the entire amount of said gross receipts between Ogdensburgh and points eastward upon roads owned, leased, or operated by any of said third parties:" *Held*, That this agreement raised no promise by implication on the part of any of the parties of the third part to repay to the party of the fourth part any advances which it might make under the agreement to the parties of the second part in excess of the semi-annual payments which the parties of the third part were bound to make.

This was a suit in equity to enforce the payment by defendant in this court, who was also defendant below, of its proportionate share of advances alleged to have been made under an agreement to maintain a joint freight line on the lakes for the benefit of several lines of railway, comprising the line between Ogdensburgh and Boston. The facts which make the case are stated in the opinion of the court.

Mr. Sidney Bartlett for plaintiff in error.

Mr. F. A. Brooks for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the District of New Hampshire, dismissing the bill of appellant, who was complainant below.

The plaintiff is the owner of a railroad commencing at Ogdensburgh on Lake Ontario, and terminating at Plattsburgh on Lake Champlain. The defendant owns a road between Nashua and Lowell. The Vermont and Canada R. R. Co., the Vermont Central R. R. Co., the Northern R. R. Co. of New Hampshire, the Concord R. R. Co. of New Hampshire, the Nashua & Lowell of New Hampshire, and the Boston & Lowell of Massachusetts, were all largely interested in the freight and passenger business which came over the Ogdensburgh road from the great lakes for points in New England and Canada, and which went from the latter to the lakes.

Opinion of the Court.

The Vermont Central and the Vermont and Canada companies were in the hands of receivers, or trustees, appointed by courts under whose control they were, and these trustees had a lease of the Ogdensburgh road for twenty years from March 1, 1870. In this condition of the affairs of these companies a contract was made between them all except the Concord company, the object of which was to secure an increased traffic over all these roads by obtaining control of the Northern Transportation Company of Ohio, which was also a party to the contract, and which was engaged in steamboat transportation on the Western lakes. One of the items of this agreement was that the Ogdensburgh company should advance a sum not exceeding $600,000 to secure this control, which it did, and the only question on the present appeal is whether by virtue of the contract the several railroad companies which were parties to it, were bound to repay to the appellant this money at all events, or were only bound to pay out of receipts from the traffic which came to them severally from this transportation company over the Ogdensburgh road. This requires a careful examination of the contract, and a consideration of the circumstances under which it was made. The agreement is as follows:

"Articles of agreement between the Northern Transportation Company of Ohio, a corporation established under the laws of Ohio, party of the first part; J. Gregory Smith, of St. Albans, Vermont, and George Stark, of Nashua, New Hampshire, parties of the second part; and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, the Northern Railroad of New Hampshire (the Concord Railroad Corporation of New Hampshire, provided they execute this agreement), the Nashua and Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, parties of the third part; and the Ogdensburgh and Lake Champlain Railroad Company, the party of the fourth part.

"Whereas the above-named railroad companies and trustees and managers which have become parties to agreements

hereto annexed, bearing date the twenty-fourth day of February, A.D. 1870, and whose tracks forms a large part of the connecting line between Boston, in Massachusetts, and Ogdensburgh, in New York, depend largely for their business upon the regular transportation by steamers of freight and passengers between said Ogdensburgh and the Western cities and towns upon the great lakes; and whereas the party of the first part was chartered to carry on the business of such transportation, but by reason of financial embarrassments is unable to carry it on efficiently, and it is feared that its steamers may be taken from this line; and whereas the parties of the third part and the party of the fourth part believe it to be for their and the public interest to advance or lend to the parties of the second part some portion of the gross receipts for the transportation of freight and passengers to be brought to and from their line by the steamers of the party of the first part, in order to secure the most regular, efficient, and permanent service by steamers between Ogdensburgh and said Western cities and towns for the term of nineteen years from the first day of March, A.D. 1871; and whereas the parties of the second part have agreed to use all sums advanced or lent to them to secure the ownership or the control of the stock of said party of the first part, and otherwise to secure the most efficient management of its business to carry out the purposes of this agreement, and for no other purposes, and to hold all said stock which they may hold or control, and all other property or rights which they may purchase or otherwise acquire with said funds, except debts due from said party of the first part, in trust to secure the repayment of all sums which may be so advanced or lent as aforesaid, with interest as hereinafter provided.

"Now, therefore, in consideration of the premises, it is covenanted and agreed between said parties as follows:

"*Article First.*—That the party of the first part shall, during said term, continue to hold and own as many and as serviceable steamers as it now has, and will keep them properly equipped, seaworthy, and in good running order, and will make such addition to the number of said boats as the business shall require, and will run them for the transportation of freight and pas-

sengers between said Ogdensburgh and said Western cities and towns, at such time, and in such manner, and at such rate of freight and fare as shall be satisfactory to the executive committee of the parties of the third part for the time being, or if there be no such executive committee, or there is any legal impediment to their action, to the satisfaction of the presidents, for the time being, of the third and fourth parties, or a majority of them. And that the party of the first part will keep all other property owned by it in good repair and in serviceable condition, and that so far as may be practicable during said term, it will send all freight and passengers for points east of Ogdensburgh over the lines of the roads of the parties of the third and fourth parts.

"A schedule of said steamers and other property is hereto annexed.

"*Article Second.*—That the parties of the third part will, during said term, semi-annually reserve out of the gross receipts, either upon said line or upon any road now leased or operated, or which may hereafter be leased or operated by the parties of the third part, or either of them, for the transportation of freight and passengers brought to said line at Ogdensburgh by the steamers of the party of the first part, the sum of one hundred and fifty thousand dollars, or so much thereof as shall be adequate for the purposes herein set forth, and pay over the same to the parties of the second part to be used for the purpose of securing regular, efficient, and adequate service to and from said Ogdensburgh as aforesaid, and the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from said Ogdensburgh, when called upon by parties of the second part, advance, from time to time, sums not in all exceeding six hundred thousand dollars, to be used by said parties of the second part for the same purposes as said semi-annual payments, and to be *pro tanto* in lieu thereof, and to be repaid out of said semi-annual reservation, as hereinafter provided, it being understood and agreed that each of said parties of the third part shall only be liable to reserve and advance or pay to the parties of the second part, or to the party of the fourth

part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said parties bear to the entire amount of said gross receipts between Ogdensburgh and points eastward, upon the roads owned, leased, or operated by any of said third parties.

"*Article Third.*—That the parties of the second part shall hold all stock and rights to control stock of the party of the first part which they now have or shall purchase or acquire, and all other property or rights that may be purchased or otherwise acquired under this agreement, except debts due from the party of the first part as aforesaid, in trust, to secure the repayment of all sums which the parties of the third and fourth parts, either or any of them, lend or advance under this agreement, and interest thereon at the rate of ten per cent. per annum, payable semi-annually, and shall apply all dividends which they shall receive on said stock and income from other property to repay the same, and in case said sums shall not all have been repaid with interest as aforesaid, on or before the expiration of said term, or at any time, in case of failure of the third parties, or either of them, to perform the stipulations of this agreement, then said parties of the second part shall, in case the parties hereto of the third and fourth parts shall not otherwise agree, sell said stock and other property at public auction in said Ogdensburgh, after advertising the same for at least thirty days in some newspaper published in said Ogdensburgh, and a newspaper published in said Boston, and divide the net proceeds among the parties entitled thereto, but any change may at any time, and from time to time, be made in said trust funds by sale, purchase, or otherwise by said parties of the second part, with the written consent of the presidents for the time being of the parties of the third and fourth parts.

"That while the parties of the third part continue to pay the semi-annual interest to the party of the fourth part, and the semi-annual payments to the trustees of the sinking fund as herein provided, the parties of the second part shall pay any dividends or income which they may receive to the parties of the third part, but in case of any default on the part of the

parties of the third part said dividends and income shall be paid directly to said Ogdensburgh & Lake Champlain Railroad Company and to said trustees of said sinking fund in proportion to the amount of the semi-annual payments to them herein provided, and to be received by them *pro tanto* in place of said semi-annual payments.

"*Article Fourth.*—That in case of vacancy in the number of the parties of the second part, or their successors, by death, resignation, or otherwise, the party of the second part or his successors continuing in the trust may fill the vacancy, subject, however, to the approval of the parties of the third and fourth parts, and that the parties of the second part or their successors are to assume no personal liability to repay the money advanced by the parties of the third and fourth parts, but to apply the same according to the terms of this agreement, and to hold said stock, rights, and other property in trust and apply the same and the dividends thereon and income thereof as aforesaid.

"*Article Fifth.*—That in case the party of the fourth part shall advance any sum or sums amounting to six hundred thousand dollars, or any part thereof, under this agreement, then the parties of the third part are to pay to the party of the fourth part so much of said semi-annual payments reserved from gross receipts as aforesaid as will pay the semi-annual interest on said sum or sums so advanced by the party of the fourth part at the rate of eight per cent. per annum, and shall pay to the persons who may for the time being hold the offices of president and treasurer of the Boston & Lowell Railroad Corporation, and of the Ogdensburgh & Lake Champlain Railroad Company, as trustees, such sums semi-annually as will, in the judgment from time to time of said two presidents and treasurers for the time being, when invested as a sinking fund, pay all excess of the advances of the party of the fourth part over five hundred thousand dollars within two years from the date hereof, and the remainder of the principal of said advances on or before the expiration of said term of nineteen years, and also such further sum semi-annually as will, when invested as a sinking fund, in the judgment of said two

presidents and treasurers as aforesaid, purchase the existing mortgage bonds of the party of the first part, amounting to four hundred thousand dollars, within ten years from the date hereof, which bonds so purchased shall be held by said trustees of the sinking fund for the security of the parties hereto, as if held under article seventh of this agreement, and that said semi-annual payments are to be made to the party of the fourth part and to said trustees of said sinking fund in place of advances to the same amounts to the parties of the second part, as hereinbefore provided, and are to be ultimately repaid to the parties of the third part out of the dividends, income, and securities purchased or otherwise acquired by the parties of the second part, as herein provided, whether the same shall be held by them or transferred to the trustees of said sinking fund. In no case shall payments to a sinking fund be less than amounts which invested at six per cent. per annum will produce the sum to be paid out of such sinking fund.

"*Article Sixth.*—That if at the end of said term the sums advanced to the parties of the second part under this agreement shall not have been repaid to the parties of the third part, with interest, as hereinbefore provided, from the dividends of the stock of the party of the first part, or otherwise, the party of the fourth part shall have the right, for six months after the expiration of said term, to purchase at the actual cost thereof from the parties of the third part one hundred and twenty-four hundred and fourth parts of the claim for said advances, and in any event shall have a like proportionate interest on the same terms under any new arrangement which may be made, and a like proportionate interest in the securities for said claim, or in securities, property, or rights acquired under this agreement, on paying a like proportion of the cost thereof.

"*Article Seventh.*—That it shall be the duty of the parties of the second part, if practicable, to procure an extension of the time of payment of the mortgage bonds of the party of the first part, which shall not have been purchased for the sinking fund for five years from the date of maturity; but if it shall be necessary in order to secure the running of said steamers as aforesaid for the parties of the second part to use any of the

funds advanced to them as aforesaid to purchase or otherwise acquire any debts due from said party of the first part, whether secured by mortgage or not, said parties of the second part shall forthwith assign and transfer all said debts and all evidences thereof and all securities therefor to the persons who may for the time being be trustees of said sinking fund to be held by them in trust; first, to secure the repayment of all advances or loans made under this agreement by the party of the fourth part, and after the full payment of said advances or loans with interest as aforesaid to the party of the fourth part, to secure the repayment of all sums paid, advanced, or lent under this agreement by the parties of the third part, with interest as aforesaid, and that as long as the semi-annual payments of interest shall be duly made by the parties of the third part to the party of the fourth part, and the semi-annual payment to the sinking fund, as provided in the fifth article of this agreement, said trustees may extend by renewals or otherwise the payment of both the principal and interest of said debts of said party of the first part at their discretion for a period not exceeding ten years from the date thereof, but in case of default by the parties of the third part, to make said payments of interest and to the sinking fund, as provided in article fifth, said trustees of said sinking fund shall forthwith, if requested, in writing, by the party of the fourth part, proceed to collect said debts, and out of the sums collected pay from time to time said semi-annual interest, as provided in article fifth, to the party of the fourth part, and hold the balance, if any, as a part of said sinking fund, and that all of said sinking fund shall finally, at the end of said term, be applied to pay all advances made by the party of the fourth part, and if any balance shall remain the same shall be divided among the parties of the third part in such proportions as they shall be entitled to, and if said sinking fund shall prove insufficient the parties of the third part shall make up the deficiency out of gross receipts from said business brought by steamers as aforesaid.

"*Article Eighth.*—That the parties of the third part, in order to secure the payment to the party of the fourth part, and to the trustees of the sinking fund, of the amount agreed upon

semi-annually as hereinbefore provided, will deposit with the manager of the Boston & Lowell Railroad Corporation at Boston, or the person for the time being performing the duties now performed by said manager, before the last day of June and the last day of December of each year of said term, from funds in their hands received from freights and passengers brought to or carried from the line aforesaid by the party of the first part, the amount of the semi-annual payments to be made to the party of the fourth part and to the trustees of said sinking fund; and the party of the fourth part and said trustees are hereby authorized to draw the same, on the first days of each of the following months, on the manager or other person as aforesaid, who is hereby authorized to, and it is hereby agreed, shall make the payments in this article provided for out of sums so deposited, or in case of failure to make such deposits out of and to the extent of any funds in the hands of said Boston & Lowell Railroad Corporation, collected in behalf of each of the parties of the third part from joint freight and passengers brought to and from the steamers of the party of the first part.

"*Article Ninth.*—The trustees of said sinking fund shall invest the same, so far as shall be found to be reasonably practicable, in any mortgage bonds of the party of the first part, and in the bonds of the party of the fourth part which shall be issued after the date hereof, which last-mentioned bonds, when so purchased, shall be cancelled by said trustees of said sinking fund, and when so cancelled be delivered to the party of the fourth part, and the party of the fourth part shall give a receipt for the amount of the bonds so cancelled, and said receipt, filed with the trustees of said sinking fund, shall represent said sinking fund to the amount of the said cancelled bonds; and if any other investment of said sinking fund shall be made by said trustees special regard shall be had to the absolute safety of such investment.

"The compensation of said trustees shall be fixed and paid by the parties of the third part, and said trustees shall annually make a written or printed report of their investments and doings to the parties of the third part and party of the fourth

part, and such further special reports of said investments and doings as said parties of the third part and party of the fourth part, or either of them, may require.

"In witness whereof the said corporations, parties to this agreement, have respectively caused their corporate seals to be hereto affixed, and their corporate presents to be signed.

"Signed, executed, and delivered by their respective presidents hereunto duly authorized, and the said trustees and managers of the Vermont Central and Vermont & Canada Railroad companies, and the said J. Gregory Smith and George Stark have hereunto set their hands and seals at Boston, in the Commonwealth of Massachusetts, this twenty-fourth day of February, A. D. eighteen hundred and seventy-one."

The Ogdensburgh road advanced the $600,000, and it was used for the purpose mentioned in the agreement. The transportation company became bankrupt in the year 1874, the business was broken up, and has never been resumed under the contract.

A part of the money advanced by the Ogdensburgh company has been paid to it. It made settlements with some of the companies, or their trustees, in regard to its claim, and it brought this suit against the Nashua & Lowell company for what it alleges to be its proportion of the sum unpaid.

It is not asserted by the plaintiff that the parties who are described in the agreement as the parties of the third part are jointly liable for this deficiency. If so, no suit could be maintained against the defendant here without joining the others.

It is not asserted that there are any words of express promise to pay by either of those companies the whole or any definite part of this $600,000. The argument of counsel is that there arises an implied promise out of the nature of the transaction. We have looked in vain for anything in the language of the agreement which requires or justifies such an implication.

If there were in the agreement any words which showed that the party of the third part had borrowed this money from the party of the fourth part, or that the latter had loaned it to the former, the argument would be of weight. But the language of article second, which relates to this part of the trans-

action, is that "the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from said Ogdensburgh, when called upon by the parties of the *second part*, advance, from time to time, sums not in all exceeding six hundred thousand dollars, to be used by said parties of the *second part* for the same purposes as said semi-annual payments, and to be *pro tanto in lieu* thereof, and to be repaid out of said semi-annual reservation as hereinafter provided, it being understood and agreed that each of said parties of the third part shall *only* be liable to reserve and advance or pay to the parties of the second part or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment to be ascertained by the proportion which said gross receipts of each of said parties bear to the entire amount of said gross receipts between Ogdensburgh and points eastward, upon the roads owned, leased, or operated by any of said third parties."

It is to be observed, in the first place, that the transaction is here called an *advance*, and not a loan, and, secondly, that the advance is made to the party of the *second* part and not to the party of the *third* part.

This party of the second part was J. Gregory Smith and George Stark, who were made trustees to receive this money, and see to its investment in securing the service of the transportation company, and who were to receive and refund to the Ogdensburgh company, for this advance, a certain proportion of the gross receipts of the railroad companies constituting the party of the third part, which was relied on to repay that company in full. This same article, in the very sentence in which the Ogdensburgh company agrees to advance the money to Smith and Stark, declares that each of the parties of the third party shall *only* be liable to reserve and advance or *pay* to the parties of the second part, or to the parties of the fourth part, its share of such reservation to be ascertained by its proportion of said gross receipts. It is here also said that this advance is to be repaid out of said semi-annual reservation as hereinafter provided.

We thus see, in this single article, that the money is to be

advanced to the trustees, what use is to be made of it, that it is to be repaid out of a fund called the semi-annual reservation to be afterwards provided, and that neither to the trustees nor to the Ogdensburgh company are the parties comprising the third party to become liable beyond its share of this reservation.

This reservation is described in the same article of the agreement, as a semi-annual sum not exceeding $150,000, or so much as may be adequate for the purposes herein set forth, "out of the gross receipts either upon said line or upon any roads now leased or operated by the parties of the third part, or either of them, for transportation of freight and passengers brought to said line at Ogdensburgh by the steamers of the party of the first part."

By article four these trustees are required to hold all the stock of the transportation company which they now have or may acquire, and all other property or rights which they may acquire under this agreement, to secure the repayment of the sums advanced by the Ogdensburgh company and by the parties of the third part, with interest thereon at ten per cent. per annum. Article five makes a further provision for payment, out of this reservation from the gross receipts, of the semi-annual interest of this advance by the Ogdensburgh company, and for a sinking fund to pay all in excess of the loan over $500,000, within two years, and the remainder within the nineteen years the contract had to run. It will be observed that this agreement was intended to expire at the same time that the lease of the Ogdensburgh road expired.

In all this it will be perceived that, while the mode of the repayment of the advance of $600,000 is carefully and repeatedly stated, and the security provided, it is nowhere hinted that the railroad companies of the third part are to be liable for it if these sources of payment fail. Indeed, the third article provides for security for advances which they may make in the same terms that it provides for the party of the fourth part, which is the Ogdensburgh company; and the language we have cited from article second, that each of the parties of the third part is liable *only* on this account for its proportion-

ate reservation from the proceeds of traffic derived from the Ogdensburgh road, leaves little room for further doubt that these resources were alone bound for the repayment of this advance.

The learned counsel for appellants makes a forcible argument against this view, based on the assumption that the Ogdensburgh company had no interest in the traffic of the roads embraced in this agreement, because its road being leased for a period coincident with that of this contract, the lessees received all its benefits and the company none.

It must be confessed that if the Ogdensburgh company had no other interest in the transaction than to secure the repayment of a loan of money and the interest on it, as if made by any other capitalist, the suggestion would be entitled to much weight; but in this assumption counsel is in error.

The preamble recites as one of the main inducements to making the agreement, that by reason of financial embarrassments the transportation company will be unable to continue its business, and its steamers will be withdrawn; and whereas parties of the third part and the party of the fourth part (the Ogdensburgh company) *believe it to be for their interest* and the public interest to advance, &c. The interest of the Ogdensburgh company is here clearly stated as the cause of its advance of the money, though at the time the agreement was executed its road had already been leased a year, and the fact of the lease is recited in the agreement.

Though this lease was for a fixed annual rent, the lessees were the trustees of two other railroad companies which were insolvent, and these trustees could only rely on the profits or receipts arising from this road to enable them to pay the rent. Indeed so well-founded was the apprehension of failure of rent arising from this fact, that in a few weeks after the withdrawal of the boats of the Northern Transportation Company the lease was rescinded, the road restored to the company, and the trustees of the two Vermont railroad companies released from any further liability on the contract we are now trying to construe. It is reasonably certain that the Ogdensburgh Railroad Corporation had a deep interest in the success of the enterprise

inaugurated by this contract, and probably a larger interest than any other party to the agreement, and clearly saw that it must make this advance, the only thing it did in the matter, at the risk of the success of the adventure, with such security for obtaining a return out of the proceeds of it as the contract gave.

A stipulation of the parties was made on submitting the case to the court below, that, if that court held that no liability under the contract attached beyond that for a proportion of the gross receipts, there were no such receipts in defendant's hands, and the bill should be dismissed without requiring an accounting.

The Circuit Court construed the contract as we do, and its decree dismissing the bill is therefore

Affirmed.

MR. JUSTICE BLATCHFORD took no part in the decision of this case.

BATES COUNTY *v.* WINTERS & Another.

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

Argued November 12, 1884.—Decided November 24, 1884.

A vote by a County Court in Missouri subscribing to the capital stock of a railroad company on certain conditions named in the vote, and directing a designated agent to make the subscription on the stock books of the company, and to copy the conditions in full thereon; and a presentation of the subscription and of the conditions in writing by the agent in person to the directors at a directors' meeting; and the acceptance of them by the board with a direction that the same be spread upon the record books of the company, constituted a subscription to the stock, although no actual subscription was made by the agent personally on the stock books.

In Missouri the consolidation of two or more railroad companies organized under the general law does not avoid subscriptions made to the stock of either, or invalidate the delivery of municipal bonds to the consolidated company in payment of such subscriptions.

This was a suit to recover on bonds issued by the plain-

tiff in error in payment of a subscription to the stock of a railroad company. The facts are stated in the opinion.

Mr. G. G. Vest, *Mr. John R. Shepley* and *Mr. John M. Glover* for plaintiff in error submitted on their briefs.

Mr. T. J. Skinker and *Mr. John B. Henderson* for defendants in error.

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

This case was before this court at the October Term, 1877, and is reported as *County of Bates* v. *Winters*, 97 U. S. 83. It came up then on a special finding of facts, and the judgment below was reversed because it did not appear that the County Court had actually subscribed to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company before the consolidation. Instead, however, of directing a judgment to be entered in favor of the county on those findings, as would have been the proper practice in the absence of any showing to the contrary, *Fort Scott* v. *Hickman*, *ante*, 150, a new trial, "according to the views expressed in the opinion," was ordered. We must presume that this was done for sufficient reasons. In the findings then presented the order of the County Court for the subscription, and the appointment of Betz to make the subscription on the books of the company, are set forth substantially as in those which are now before us. The same is true of what was done by Betz, at the meeting of the directors of the company, when he presented the copy of the record of the proceedings of the County Court, and the directors refused to allow him to withdraw his papers. His presence at the later meeting was also stated, as well as his final report to the County Court, and the action of the court thereon. The ground of the reversal is apparent from the following extract from the opinion of the court (p. 90), which was delivered by Mr. Justice Hunt:

"The County Court did not intend their action in June, 1870, to be final, and did not understand that a subscription was thereby completed. Their vote was a declaration that

the power to subscribe should be exercised, and was an authority to their agent to perfect a contract with the railroad company on the conditions set forth. No acceptance was made by the railroad company, no notice of acceptance was given, nor was there any act or fact which afforded a pretext for saying that the railroad company was bound by the contract of subscription. While it refused to allow the agent to withdraw his evidence of authority, it said nothing and did nothing to indicate that the minds of the parties had met upon the terms of a subscription. The County Court was precise and particular in requiring those conditions to be copied in full on the books of the company, as the conditions on which the subscriptions were made; and there could be no mutual contract until the railroad company assented, on its part, to those conditions."

In considering what was necessary to complete a valid subscription, the cases of *Nugent* v. *The Supervisors*, 19 Wall. 241, and *County of Moultrie* v. *Rockingham Savings Bank*, 92 U. S. 631, were cited, and the rule upon that subject as recognized in those cases was in all respects approved. That rule may be stated thus: An actual manual subscription on the books of a railroad company is not indispensably necessary to bind a municipality as a subscriber to the capital stock. If the body or agency having authority to make such a subscription passes an ordinance or resolution to the effect that it does thereby, in the name and on behalf of the municipality, subscribe a specified amount of stock, and presents a copy of that ordinance or resolution to the company for acceptance as a subscription, and the company does, in fact, accept, and notifies the municipality, or its proper agent, to that effect, the contract of subscription is complete, and binds the parties according to its terms.

From the findings in this case on the new trial it appears that the County Court passed an order "that the sum of ninety thousand dollars be, and the same is hereby, subscribed to the capital stock of the Lexington, Chillicothe & Gulf R. R. Company in the name and in behalf of Mount Pleasant Township, . . . subject to and in pursuance of all the terms, restrictions, conditions, and limitations of the petition of the tax-pay-

ers and residents;" and it at the same time authorized and directed Betz, who was the agent of the county to represent its interest in the company, to make the subscription on the stock books of the company, and in making the subscription to have copied in full the orders of the court of the 5th of April, 1870, as the conditions on which the same was made. As was very properly said when the case was here before, this order "was not intended to be final and self-executing." It needed an acceptance by the company to make it complete and binding as a subscription. On the new trial such an acceptance was shown, and in the findings then made it appears that Betz was present, for the purpose of making the subscription, at a meeting of the directors of the company on the 17th of June, 1870; that he presented to the board *for acceptance* a copy of the record of the proceedings of the County Court at the meeting on the 5th of April, and at the meeting when the subscription was ordered and he was directed to make it on the books of the company. Upon the presentation of these orders of the County Court they were read, and, after the reading, "were ordered by the board to be spread upon the record books of this company, and, on motion, the subscriptions made and specified in the . . . orders to the capital stock of the Lexington, Chillicothe & Gulf R. R. Co. were accepted by the board of directors of the said company." At the same time, by order of the directors, the secretary indorsed on the back of the papers "Filed and accepted June 17, 1870." It is difficult to see what more was necessary to bind the parties. Undoubtedly, if there had been at that time any book prepared in which subscriptions were to be made, Betz would have entered the subscription of the County Court in that book in proper form. But what he did was in its legal effect the same. He presented the action of the County Court in respect to the subscription for acceptance. That action was in the form of a present subscription upon certain conditions, and in his presence it was, when presented, formally accepted by a resolution of the directors as and for a subscription to the capital stock of the company. We say it was done in the presence of the agent. That is the fair inference from the record. The finding is that Betz went

on the 14th of June to make the subscription. The meeting of the directors was held on the 17th of that month, and the minutes show that he presented the papers from the County Court at that meeting. He was also appointed at that time to act as the agent of the company in obtaining municipal subscriptions. According to the minutes the orders of the County Court were read on their presentation, and at once, on motion, accepted as a subscription made. It also appears from the findings that another meeting of the directors was held on the 25th of August, at which Betz was present. At this meeting the minutes of the preceding meeting, which was presumably that of the 17th of June, were read and approved. Those minutes contained at length the orders of the County Court which had been presented by Betz, and the acceptance thereof by the board.

If the minutes of the board are correct, and it does not appear that any attempt was made to impeach them, "the minds of the parties met" on the 17th of June, and the county subscribed $90,000 to the capital stock of the Lexington, Chillicothe & Gulf Company, before the consolidation, on certain conditions, and the subscription received the formal acceptance of the company. It is undoubtedly true that Betz, as well as the county, supposed that an actual subscription on the books was necessary, and that he afterwards went to the office of the company to make it, and while there, for reasons satisfactory to himself, concluded not to do so. All these facts, save, perhaps, the action of the directors on the 17th of June, he reported to the County Court, and the court approved what he had done; but supposing something more was necessary to complete the subscription, another agent was appointed for that purpose, who finally made a formal subscription to the stock of the consolidated company. That, however, did not avoid the subscription which had actually been made before. This court decided in *Harshman* v. *Bates County*, 92 U. S. 569, and *County of Bates* v. *Winters*, supra, that this last subscription was invalid, but never until the last trial of this case has it been shown that another and a valid subscription had been made at the earlier date which rendered another unnecessary. The

former decisions have all been upon the assumption that the last was the only subscription ever made, and as it was made to the consolidated company, when the vote only authorized a subscription to the Lexington, Chillicothe & Gulf Company, it was held to be inoperative and not binding on the township for which the court was acting as agent.

As Betz, the agent of the County Court, was present at the meeting when the subscription was made and accepted, no other notice of the acceptance of the subscription was necessary. He was present as the agent of the County Court, and notice to him was notice to the court. The case stands in this particular precisely as it would if Betz had in form subscribed to the stock on the books of the company, and in making such subscription had copied in full, as he was instructed to do, the orders of the County Court. The acceptance of such a subscription from him by the company would certainly be enough. No further notice of acceptance was required. As Betz was authorized to make the subscription, he was authorized to receive notice of its acceptance. What was in fact done amounted in law to the making of a valid subscription by him for the County Court and its acceptance in his presence by the company.

As the Lexington, Chillicothe and Gulf Company was organized under the general railroad law of Missouri, which authorized consolidations, the subsequent consolidation of that company with another organized under the same law did not avoid the subscription which was made to its stock on the 17th of June, and the bonds in payment of the subscription were properly delivered to the consolidated company. That has been many times decided. *New Buffalo* v. *Iron Co.*, 105 U. S. 73, and the cases there cited.

The judgment is affirmed.

HART *v.* PENNSYLVANIA RAILROAD COMPANY.

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

Argued November 13, 1884.—Decided November 24, 1884.

Where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

H. shipped five horses, and other property, by a railroad, in one car, under a bill of lading, signed by him, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable. First. To pay freight thereon" at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load. But no carrier shall be liable for the acts of the animals themselves, . . . nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner and the carrier released therefrom." By the negligence of the railroad company or its servants, one of the horses was killed and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race-horses, and the plaintiff offered to show damages, based on their value, amounting to over $25,000. The testimony was excluded and he had a verdict for $1,200. On a writ of error, brought by him: *Held*, (1) The evidence was not admissible, and the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; (2) The terms of the limitation covered a loss through negligence.

Lawrence Hart brought this suit in a State court in Missouri, against the Pennsylvania Railroad Company, to recover damages from it, as a common carrier, for the breach of a contract to transport, from Jersey City to St. Louis, five horses and other property. The petition alleges that, by the negligence of the defendant, one of the horses was killed and the others were injured, and the other property was destroyed, and claims dam-

ages to the amount of $19,800. After an answer and a reply, the plaintiff removed the suit into the Circuit Court of the United States for the Eastern District of Missouri, where it was tried by a jury.

It appeared that the property was transported under a bill of lading issued by the defendant to the plaintiff, and signed by him, and reading as follows:

"*Bill of Lading.*

Form No. 39, N. J.

Limited Liability Live-Stock Contract for United Railroads of New Jersey Division. No. 206.

Jersey City Station, P. R. R., ————, 187–.

Lawrence Hart delivered into safe and suitable cars of the Pennsylvania Railroad Company, numbered M. L. 224, for transportation from Jersey City to St. Louis, Mo., live stock, of the kind, as follows: one (1) car, five horses, shipper's count, which has been received by said company for themselves and on behalf of connecting carriers, for transportation, upon the following terms and conditions, which are admitted and accepted by me as just and reasonable:

First. To pay freight thereon to said company at the rate of ninety-four (94) cents per one hundred pounds (company's weight), and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation:

If horses or mules, not exceeding two hundred dollars each.

If cattle or cows, not exceeding seventy-five dollars each.

If fat hogs or fat calves, not exceeding fifteen dollars each.

If sheep, lambs, stock hogs, or stock calves, not exceeding five dollars each.

If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load.

But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, and smothering, nor for loss or damage arising from con-

dition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom.

Second. Upon the arrival of the cars or boats containing said stock at point of destination, the shipper, owner or consignee shall forthwith pay said freights and charges, and receive said stock therein, and unload the same therefrom; and if, from any cause, he or they shall fail or refuse to pay, receive, or unload, as aforesaid, then said company or other carrier, as the agent of such shipper, owner or consignee, may thereupon have them put and provided for in some suitable place, at the cost and risk of such shipper, owner or consignee, and at any time or times thereafter may sell the same, or any number of them, at public or private sale, with or without notice, as said agent may deem necessary or expedient, and apply the proceeds arising there from, or so much thereof as may be needed, to the payment of such freight and charges and other necessary and proper costs and expenses.

Third. When necessary for said stock to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of the said stock may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept; provided that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another.

Fourth. All live stock transported under this contract shall be subject to a lien, and may be retained and sold for all freight or charges due for transportation on other live stock or property transported for the same owner, shipper or consignee.

Fifth. This company's liability is limited to the transportation of said animals, and shall not begin until they shall be loaded on board the boats or cars of the company. The owner of said animals, or some person appointed by him, shall go with and take all requisite care of the said animals during their transportation and delivery, and any omission to comply herewith

shall be at the owner's risk. Witness my hand and seal, this 20th day of October, 1879.

LAWRENCE HART, *Shipper.* [L. S.]"

Attest:

E. BUTTER.

W. J. CHARMERS,

Company's Agent."

At the trial the plaintiff put in evidence the bill of lading, and gave testimony to prove the alleged negligence and how the loss and injury occurred. He then offered to show that the actual value of the horse killed was $15,000; that the other horses were worth from $3,000 to $3,500 each; and that they were rendered comparatively worthless in consequence of their injuries. The defendant objected to this testimony, on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The court sustained the objection and the plaintiff excepted. It appeared, on the trial, that the horses were race-horses, and that they and the other property were all in one car.

It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed in the bill of lading. The court charged the jury as follows: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. This is the plain agreement, that the recovery shall not exceed the sum of two hundred dollars each for the horses, or twelve hundred dollars for a car-load. It is admitted here, by counsel for the defendant, under this charge, that the plaintiff is entitled to recover a verdict for twelve hundred dollars, and, also, under the charge of the court, the plaintiff agrees that that is all. It is simply your duty to find a verdict for that amount." The plaintiff excepted to this charge. The jury found a verdict of $1,200 for the plaintiff (see 2 McCrary, 333); and after a judgment accordingly the plaintiff brought this writ of error.

The errors assigned are, that the court erred in refusing to permit the plaintiff to show the actual damages he had sus-

tained, and in so charging the jury as to restrict their verdict to $1,200.

Mr. George M. Stewart for plaintiff in error.—The following facts are clear: (1) that the property shipped was of much greater value than that named in the printed form of contract; (2) that the carrier knew this before it received the stock for shipment; (3) that the plaintiff was not asked the value of the property when he signed the contract, and no valuation had been agreed upon or attempted by the parties at that time; (4) that the injury was the direct result of gross negligence of the carrier.—I. The defendant could not relieve itself by a bill of lading so procured from the common law liability for injuries resulting from its own negligence or the negligence of its servants. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Express Co.* v. *Caldwell*, 21 Wall. 264; *Farnham* v. *Camden Railway Co.*, 55 Penn. St. 53; *American Express Co.* v. *Sand*, 55 Penn. St. 140; *Railway Co.* v. *Henlein*, 52 Ala. 606–615; *Railway Co.* v. *Abels*, 60 Mississippi, 1017; *Southern Express Co.* v. *Moon*, 39 Mississippi, 832; *Moulton* v. *Railway Co.*, 31 Minn. 85.—II. Being unable to relieve itself from such liability *in toto*, it could not fix the limit for its liability at less than the total damage sustained by its negligence. We do not deny that a shipper may be called upon to state value in order that proper freight rates may be charged for transportation, and that in such case he will be bound—that was the case in *Graves* v. *Railway Co.* 137 Mass. 33, and in *Harvey* v. *Railroad Co.*, 74 Missouri, 538. But in this case no representation of value was required; no misleading statement of value was made; and the shipper knew that the value of the property was greatly in excess of the sum named in the bill of lading. A shipper is not bound to disclose the value of property shipped unless the carrier demands it. *Jones* v. *Voorhis*, 10 Ohio, 145. A common carrier may undoubtedly limit his liability by agreement. *Farnham* v. *Railway Co.*, 55 Penn. St. 53. *Navigation Co.* v. *Bank*, 6 How. 344; but such exemptions must be clearly stated in the contract. *Maginn* v. *Dinsmore*, 56 N. Y. 168; and in the absence of such an agreement a carrier can-

not escape liability for his negligence. *Sager* v. *Portsmouth Railway Co.*, 31 Maine, 228; *Southern Express Co.* v. *Moon*, 39 Mississippi, 822; *Chicago, &c., Railway* v. *Abels*, 60 Mississippi, 1017; *Railway Co.* v. *Simpson*, 30 Kansas, 645; *City of Norwich*, 4 Benedict, 271; *Black* v. *Transportation Co.*, 55 Wis. 319; *Levenig* v. *Union, &c., Co.*, 42 Missouri, 88; *Newburger* v. *Howard*, 6 Philadelphia Rep. 174; *Railway Co.* v. *Henlein*, 52 Ala. 606. Such an agreement fixing the extent of the liability so extremely disproportionate to the value of the property is unjust and will not be upheld. *Express Co.* v. *Caldwell*, 21 Wall. 264; *Railway Co.* v. *Henlein*, 52 Ala. 606–615; *Railway* v. *Simpson*, 30 Kansas, 645. That the loss was occasioned by the negligence of defendants' agents does not admit of serious discussion.

Mr. E. W. Pattison 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 that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. . . . If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load." Then follow in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier

released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on re-

quirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344; *York Co.* v. *Central R. R. Co.*, 3 Wall. 107; *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Express Co.* v. *Caldwell*, 21 Wall. 264; *Railroad Co.* v. *Pratt*, 22 Wall. 123; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174; *Railway Co.* v. *Stevens*, 95 U. S. 655.

In *York Co.* v. *Central Railroad*, 3 Wall. 107, a contract was upheld exempting a carrier from liability for loss by fire, the fire not having occurred through any want of due care on his part. The court said, that a common carrier may "prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter."

In *Railroad Co.* v. *Lockwood*, 17 Wall. 357, the following propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable, in the eye of the law; (2) It is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (3) These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The

basis of the decision was, that the exemption was to have applied to it the test of its justness and reasonable character. It was said, that the contracts of the carrier "must rest upon their fairness and reasonableness;" and that it was just and reasonable that carriers should not be responsible for losses happening by sheer accident, or chargeable for valuable articles liable to be damaged, unless apprised of their character or value. That case was one of a drover travelling on a stock train on a railroad, to look after his cattle, and having a free pass for that purpose, who had signed an agreement taking all risk of injury to his cattle and of personal injury to himself, and who was injured by the negligence of the railroad company or its servants.

In *Express Co.* v. *Caldwell*, 21 Wall. 264, this court held, that an agreement made by an express company, a common carrier in the habit of carrying small packages, that it should not be held liable for any loss or damage to a package delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, was an agreement which the company could rightfully make. The court said: "It is now the settled law, that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." It was held that the stipulation as to the time of making a claim was reasonable and intrinsically just, and could not be regarded as a stipulation for exemption from responsibility for negligence, because it did not relieve the carrier from any obligation to exercise diligence, fidelity and care.

On the other hand, in *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, it was held that a stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability for loss by fire occurring through the negligence of a railroad company which it had employed as a carrier.

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question

now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; *Relf* v. *Rapp*, 3 Watts & Sergeant, 21; *Dunlap* v. *International Steamboat Co.*, 98 Mass. 371; *Railroad Co.* v. *Fraloff*, 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for

negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

This principle is not a new one. In *Gibbon* v. *Paynton*, 4 Burrow, 2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive runs the risque of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is *Batson* v. *Donovan*, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear

that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in *Newburger* v. *Howard*, 6 Philadelphia Rep. 174; *Squire* v. *New York Central R. R. Co.*, 98 Mass. 239; *Hopkins* v. *Westcott*, 6 Blatchford, 64; *Belger* v. *Dinsmore*, 51 N. Y. 166; *Oppenheimer* v. *United States Express Co.*, 69 Ill. 62; *Magnin* v. *Dinsmore*, 56 N. Y. 168, and 62 Id. 35, and 70 Id. 410; *Earnest* v. *Express Co.*, 1 Woods, 573; *Elkins* v. *Empire Transportation Co.*, 81* Penn. St. 315; *South & North Ala. R. R. Co.* v. *Henlein*, 52 Ala. 606; *Same* v. *Same*, 56 Id. 368; *Muser* v. *Holland*, 17 Blatchford, 412; *Harvey* v. *Terre Haute R. R. Co.*, 74 Missouri, 538; and *Graves* v. *Lake Shore Ry. Co.*, 137 Mass. 33. The contrary rule is sustained in *Southern Express Co.* v. *Moon*, 39 Miss. 822; *The City of Norwich*, 4 Ben. 271; *United States Express Co.* v. *Backman*, 28 Ohio St. 144; *Black* v. *Goodrich Transportation Co.*, 55 Wis. 319; *Chicago, St. Louis & N. O. R. R. Co.* v. *Abels*, 60 Miss. 1017; *Kansas City, &c., Railroad Co.* v. *Simpson*, 30 Kansas, 645; and *Moulton* v. *St. Paul, &c., R. R. Co.*, 31 Minn. 85. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving

the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire* v. *New York Central R. R. Co.*, 98 Mass. 239, 245, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is *Affirmed.*

Statement of Facts.

BRANDIES & Others *v.* COCHRANE & Others.

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

Argued November 17, 18, 1884.—Decided December 1, 1884.

F conveyed to W, as trustee, real estate in Illinois on trust to permit F's wife to use and occupy and receive the rents and profits during her lifetime and to her own use, and at any time to convey on the written request of F and the wife, to the person designated, and in case of the wife's death in the husband's lifetime to convey to the husband for life with remainder to their children: *Held*, That, under the laws of Illinois in force when the rights of the parties became fixed, a judgment creditor of F had no lien at law upon his interest in the property, and could acquire one only by filing a bill in equity.

At the common law (in force in Illinois when the rights of the parties became fixed), the lien of a judgment against one having a power of appointment, with the estate vested in him until, and in default of, appointment, was liable to be defeated by execution of the power, even though the purchaser had actual notice of the judgment.

The general doctrine in equity that where a person has a general power of appointment, and executes this power, the property appointed is deemed, in equity, part of his assets, cannot be invoked to support a claim of a judgment lien at law upon the antecedent estate, which the exercise of the power had displaced.

This was a bill in equity, filed by the appellants, the object and prayer of which was to quiet their title to the real estate described, situated in Chicago, as against the adverse claims of the appellees. The question in the case was whether the appellants had the legal title to the premises in controversy. The facts necessary to its determination were as follows:

In March, 1866, the complainants below, now the appellants, recovered a judgment in the Circuit Court of the United States for the Northern District of Illinois against Robert Forsythe, one of the appellees, and George T. Braun, for $9,665.49 and costs, on which execution was issued during the year, and returned not levied, because no property was found on which to levy.

Prior thereto, in 1861, Robert Forsythe had purchased the real estate described in the bill, with his own means, from Horatio G. Loomis, and, according to his directions, a deed

was made by Loomis conveying the property to William R. Arthur, as trustee, and to his heirs and assigns, upon the following trusts therein expressed: "To permit Mary E. Forsythe, wife of Robert Forsythe, of Chicago, to use and occupy, enjoy and receive the rents and profits of said lands and premises, for her life and to her own use, and at any and all times, upon the order or request in writing of said Mary E. Forsythe and the said Robert Forsythe jointly, to convey said lots, or either or any part of them, to such person or persons as they may designate; and in case said Mary E. shall die without issue in the lifetime of her said husband, then to convey said lands to said Robert Forsythe for life, immediately after the decease of said Mary E., to hold to him and his use for life, and to his child or children, if any lawfully begotten, in fee simple and remainder, to their use and to them equally as tenants in common. But if said Robert shall die without lawful issue, then to the children of his brother, Leonard E. Forsythe, and the children of Lydia T. Warrack who may be in being at the time of said Robert's decease, in fee simple and remainder, to their use and to them equally as tenants in common. And in case said Robert shall die without lawful issue in the lifetime of said Mary E., then to convey said lands and premises to her for life immediately after the death of said Robert, to hold to her and her own use for life, and to the children of said Leonard E. Forsythe, and the children of said Lydia T. Warrack, who may be in being at the time of said Mary's decease, in fee simple and remainder as aforesaid, to their use and to them equally as tenants in common. But if hereafter said Robert shall have child or children born of his said wife or of any future wife, then instead of the conveyance aforesaid to the children of said Leonard E. Forsythe and Lydia T. Warrack, said trustee is to convey said lands to said Mary E. or to said Robert (as the one may chance to survive the other), to her or his use for life as aforesaid, and to the child or children who may be so born to them or him, in fee simple and remainder, to their use and to them equally as tenants in common."

Subsequently, upon proper proceedings for that purpose, this

deed was reformed and corrected by a decree in chancery, whereby it was provided that the conveyance of said Arthur, the trustee, to be made on the request of the said Robert and Mary E. Forsythe, when made, should be in fee simple absolute, and should operate to cut off the several trusts thereafter specified in said original conveyance to Arthur.

This property was improved by Robert Forsythe by the erection thereon of a dwelling-house, and was occupied by himself and wife as a residence at the date of the recovery of the appellants' judgment and subsequently during the life of Mrs. Forsythe.

Robert Forsythe, on March 26, 1868, was, on his own petition, adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, and on July 21, 1868, obtained his discharge.

On November 3, 1869, Robert Forsythe and Mary E. Forsythe joined in a written request to Arthur, the trustee, directing him to convey the premises in controversy to Nathan Corwith, in fee simple. Mrs. Forsythe died on January 1, 1870, leaving no issue, and on January 4, 1870, Arthur, in pursuance of the appointment previously made, conveyed the property to Corwith, as directed. This conveyance was in form absolute, but it is claimed that it was intended merely as security for an indebtedness due to Corwith from Forsythe. At any rate, Corwith conveyed the property to Robert Forsythe by a deed dated March 12, 1870, and the latter, by a deed of trust dated March 10, 1870, in anticipation of the conveyance to himself, conveyed it to George Scoville, as trustee, to secure to John Cochrane $15,000 which the latter had lent to Forsythe, and out of which Corwith had received the amount due him.

On May 9, 1870, the appellants caused an alias execution to be issued on their judgment and levied on the premises as the property of Robert Forsythe; on June 7, 1870, it was sold under this execution to them, on a bid of the amount due on their judgment, and on September 9, 1871, the time for redemption having elapsed, they received a deed from the marshal conveying the title to them.

Robert Forsythe being in default for non-payment of interest

on the debt to Cochrane, Scoville executed the power of sale under the deed of trust to him, by a sale to James D. Wallace on April 17, 1872. The latter had, just prior thereto, on March 8, 1872, acquired whatever title to the premises, if any, had vested in the assignee in bankruptcy, by a sale and conveyance thereof from him. Thereupon Wallace re-conveyed the premises, with some additional property, to George Scoville, as trustee, to secure the whole amount of principal and interest due to Cochrane, amounting, with the expenses of the transaction, to $17,000, the amount specified in the deed of trust. This arrangement was made for the better security of the debt due to Cochrane, John Forsythe having become, in consideration thereof, a guarantor of the notes given therefor.

On May 27, 1872, the complainants, having taken possession under their claim of title, filed the present bill of complaint, to which Wallace and Robert Forsythe were made defendants, praying to have their title quieted as against them.

On May 1, 1876, Scoville executed the power of sale under the deed of trust to him, and sold the property embraced therein, including the premises in controversy, to Cochrane, who, on July 13, 1876, was admitted as a party defendant, and filed his answer and cross-bill, claiming title in himself, and praying for a decree for relief. On final hearing, the original bill was dismissed and a decree rendered upon the cross-bill of Cochrane as prayed for. An appeal was taken from that decree.

Mr. John S. Monk for appellants.—I. On the face of the trust conveyance, an interest was given to Robert Forsythe, on which the lien of appellants' judgment attached. The words used being insufficient to raise a trust for the separate use of the wife, the deed, in effect, gives the first life estate to Robert, with remainder to Mary for life. *Bowen* v. *Sebree & Wife*, 2 Bush, 112; *Wade* v. *Fisher et al.*, 9 Richardson Eq. 362; *Chipchase* v. *Simpson*, 16 Sim. 485; *Wills* v. *Sayer*, 4 Madd. 409; *Kensington* v. *Dolland*, 2 Myl. & K. 184; *Austin* v. *Austin*, 4 Ch. D. 236; *Tyler* v. *Lake*, 2 Russ. & Myl. 183; *Hartly* v. *Hurle*, 5 Ves. 540. Conceding the trust to be for her separate use, Robert took a vested remainder for life. *Jull* v. *Jacobs*,

3 Ch. D. 707; *Lainson* v. *Lainson*, 18 Beav. 1; *Weston* v. *Weston*, 125 Mass. 268; *Darling* v. *Blanchard*, 109 Mass. 176; *Wight* v. *Shaw*, 5 Cush. 56; *White* v. *Curtis*, 12 Gray, 54; *Blanchard* v. *Blanchard*, 1 Allen, 223. The lien of the judgment attached to Robert's interest, whether vested or contingent. *White* v. *McPheeters*, 75 Mo. 286; *Williams* v. *Amory*, 14 Mass. 20; *Kelly* v. *Morgan*, 3 Yerg. 437; *Lockwood* v. *Nye*, 2 Swan, 515; *Wiley* v. *Bridgman*, 1 Head, 68; *Burton* v. *Smith*, 13 Pet. 464; *Tyndale* v. *Ware*, Jacobs, 212; *Smith* v. *Angell*, 2 Ld. Raym. 783.—II. Was the lien divested by the exercise of the alleged power of appointment? (1.) Forsythe's interest having passed to the assignee in bankruptcy, subject to the lien of the judgment, could not be defeated, nor the lien displaced by a subsequent exercise of the power. *Doe* v. *Britain*, 2 B. & A. 93. (2.) The power was extinguished *pro tanto* by the judgment. *Carr* v. *Holford*, 3 Ves. 650; *Cox* v. *Chamberlain*, 4 Ves. 631; *Maundrell* v. *Maundrell*, 7 Ves. 567; *Ray* v. *Pung*, 5 B. & A. 561; *Doe* v. *Jones*, 10 B. & C. 459; *Skeeles* v. *Shearley*, 8 Sim. 153; 3 Myl. & Craig, 112; *Taylor* v. *Stibbert*, 2 Ves. 437; *White* v. *McPheeters*, 75 Mo. 286. (3.) The alleged appointment to Corwith, being by way of mortgage, could, as against creditors, operate only *pro tanto*, if at all. *Skeeles* v. *Shearley*, 3 Myl. & Craig, 112; *White* v. *McPheeters*, 75 Mo. 286; *Jones* v. *Clifton*, 101 U. S. 225.—III. The power reserved to Forsythe gave him the equitable fee on which a lien was created by the judgment. The Illinois statute, in force now, and at the date of the deed in trust to Arthur, and also at time of the rendition of judgment, regarding the force and effect of English common law and statutes, is as follows: Sec. 1. "The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the first, excepting the second section of the sixth chapter of the forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and ninth chapter of thirty-seventh Henry Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force

until repealed by legislative authority." *Johnson* v. *Cushing*, 15 N. H. 298; *Lassells* v. *Cornwallis*, 2 Vern. 465; *Holmes* v. *Coghill*, 12 Ves. 265; *Tarbuck* v. *Marbury*, 2 Vern. 510; *Smith* v. *Hurst*, 10 Hare, 30.—IV. The judgment was a lien on Forsythe's estate in reversion, which, on the revocation of the trusts declared in the deed to Arthur, became absolute. *Williams* v. *Amory*, 14 Mass. 20; *Kelley* v. *Morgan*, 3 Yerg. 437; *Lockwood* v. *Nye*, 2 Swan, 515; *Wiley* v. *Bridgman*, 1 Head, 68; *Rickey* v. *Hilman*, 2 Halst. 180; *Burton* v. *Smith*, 13 Pet. 464; *Jacobs* v. *Ware*, 3 Jacobs, 212; *Smith* v. *Angell*, 2 Ld. Raym. 783; *Barlow* v. *Salter*, 17 Ves. 479; *Conklin* v. *Conklin*, 3 Sandf. Ch. 64; *Anderson* v. *Jackson*, 16 Johns. 382.—V. Cochrane was not entitled to protection as a bona fide purchaser. *Gibson* v. *Jones*, 5 Leigh, 370; *Peck* v. *Peck*, 9 Yerg. 301; *Boone* v. *Childs et al.*, 10 Pet. 177.

Mr. George W. Smith (*Mr. Edwin F. Bayley* was with him) for appellees.

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

It is manifest that it is vital to the appellants' case, that they should maintain and establish a judgment lien upon the estate of Robert Forsythe, in the premises in controversy, at the date of the recovery of the judgment in 1866; because the discharge in bankruptcy of Forsythe, in 1868, released him from all personal liability on account of the judgment, so that the subsequent levy of an execution in 1870 could have no effect except to enforce a lien subsisting at the time of the adjudication in bankruptcy.

It is accordingly contended on behalf of the complainants, that their judgment took effect at its rendition as a lien upon an equitable estate for life, reserved to Robert Forsythe by the terms of the deed of trust to Arthur, which was not and could not be displaced by the appointment by virtue of which the conveyance was made by Arthur, the trustee, to Corwith; that the power of appointment secured to Forsythe and wife operated to subject the entire estate, which could be disposed

of under that power, and which was the fee simple, to the claims of creditors reduced to judgment; and that Robert Forsythe had an equitable reversion in fee in the trust estate by reason of the failure of the ultimate limitations alleged to be void for remoteness, as they were to take effect, according to the terms of the trust, only after an indefinite failure of issue, which reversion in fee was subject to the lien of judgments against him.

The statute of Illinois in force at the time and governing the case was Rev. Stat. 1845, ch. 57, § 1, which, after providing that judgments should be a lien on the real estate of the judgment debtor, provided as follows: "The term 'real estate' in this section shall be construed to include all interest of the defendant or any person to his use, held or claimed by virtue of any deed, bond, covenant or otherwise, for a conveyance or as mortgagee or mortgagor of lands in fee, for life or for years."

Except so far as modified by this act, the common law on the same subject was in force in Illinois by express adoption. Rev. Stat. 1845, ch. 62, § 1.

In *Spindle* v. *Shreve*, 111 U. S. 542–548, it was stated to be the law in Illinois that where the legal title to lands is in trustees, for the purpose of serving the requirements of an active trust, the judgment creditor had no lien and could acquire none at law, but could obtain one only by filing a bill in equity for that purpose, according to the provisions of § 49 of the Chancery Practice Act of that State. Rev. Stat. 1845, p. 97. It was otherwise if the trust was merely passive, such as those described in the section defining real estate as subject to the lien of judgments, already quoted. *Miller* v. *Davidson*, 8 Ill. 518; *Baker* v. *Copenbarger*, 15 Ill. 103; *Thomas* v. *Eckard*, 88 Ill. 593.

The rule at common law and the corresponding jurisdiction of chancery as to equitable estates are fully explained in *Morsell* v. *First National Bank*, 91 U. S. 357; *Lessee of Smith* v. *McCann*, 24 How. 398; *Freedman's Savings and Trust Co.* v. *Earle*, 110 U. S. 710.

In the present instance the trust was an active one, not

merely passive. At no time during the lifetime of his wife could Robert Forsythe call for, or compel from the trustee, a conveyance of the legal title. On the contrary, the trustee was required by the terms of the trust, subject to the power of appointment, to retain the legal title in himself, and to permit Mrs. Forsythe to use and occupy the property, and to enjoy and receive the rents and profits thereof during her life and to her own use; language which, if it cannot be properly construed to devote it to her separate use, all the more required the protection secured to her actual right by the legal title being vested in a trustee. The estate of Robert Forsythe, therefore, under the trust, whether for life or in fee, whether vested or contingent, was equitable merely, and of that nature which could not be subjected to sale for payment of his debts except by the aid of a court of equity. In such cases no lien arises by operation of law from the judgment, but only on the filing of the bill.

On the contrary supposition, that the estate of Robert Forsythe, under the deed of trust to Arthur, was subject at law to the lien of the appellants' judgment, their title still must fail. Prior to the enactment of 1 and 2 Vic., ch. 110, it was settled in England that at law a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favor of a mortgagee. *Doe* v. *Jones*, 10 B. & C. 459; *Tunstall* v. *Trappes*, 3 Sim. 286, 300. And it was held to be immaterial that the purchaser had notice of the judgment, *Eaton* v. *Sanxter*, 6 Sim. 517; or that a portion of the purchase money was set aside as an indemnity against it, *Skeeles* v. *Shearly*, 8 Sim. 153; *S. C.* on appeal, 3 Myl. & Cr. 112. In that case, Sir John Leach, the vice-chancellor, decided that the effect of the transmission of the estate by appointment was, that the appointee takes it in the same manner as if it had been limited to him by the deed under which the appointor takes in default of appointment, and, consequently, free and disconnected from any interest that the appointor had in the tenements in default of appointment; that, as the appointee is in no sense the assignee of the appointor,

he cannot be affected by judgments which affect only the estate and interest of the appointor, and, that being so, the circumstance of his having notice of such judgments is immaterial.

The statute of 1 and 2 Vict., c. 110, altered the law in this respect, by making judgments an actual charge on the debtor's property, where he has, at the time the judgment is entered up or at any time afterwards, any disposing power over it, which he might, without the assent of any other person, exercise for his own benefit; so that it would continue to bind the property, notwithstanding any appointment. 2 Sugden on Powers, 7th Lond. Ed. 33; Burton on Real Property, 8th Lond. Ed. 283; *Hotham* v. *Somerville*, 9 Beav. 63.

In Illinois the definition of that real estate which is made subject at law to the lien of judgments, was enlarged by the act of July 1, 1872, Hurd's Rev. Stat. 1882, p. 676, so as to include "all legal and equitable rights and interests therein and thereto;" but the rights of the parties in this suit are not affected by it, and must be governed by the principles of the common law in force when they became fixed.

It is indeed a rule well established in England, and recognized in this country, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. This rule is stated by Mr. Justice Gray in *Clapp* v. *Ingraham*, 126 Mass. 200, to have had its origin, perhaps, in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had, in effect, reserved the power to himself in granting away the estate. *Thompson* v. *Towne*, Prec. Ch. 52; *S. C.* 2 Vern. 319. But it was frequently afterwards applied to cases of the execution of a general power of appointment by will, of property of which the donee had never any ownership or control during his life. *In re Harvey's Estate*, L. R. 13 Ch. Div. 216. That doctrine, however, has no application in the present case for several reasons. The appellants did not seek such relief in equity as against the

estate created by the exercise of the power of appointment by Robert Forsythe, but claimed a lien at law upon the antecedent estate, which that exercise of the power had displaced and defeated. At the time when that might have been done, their judgment had ceased to be a debt against him by reason of his discharge in bankruptcy, and the appointees, Corwith and Cochrane, were not volunteers but purchasers for value.

It is further said, however, that the bankruptcy itself cut off the power of appointment in Forsythe. If so, it passed to the assignee in bankruptcy for the benefit of the estate and its general creditors; was exercised by the sale at which Wallace became the purchaser, and vested in him a complete title by virtue of the appointment, displacing and defeating the limitations under the original deed of trust to Arthur; and then passed to the appellees by virtue of the conveyance from Wallace to Scoville. But it was held in *Jones* v. *Clifton*, 101 U. S. 225, that such a power of appointment does not pass to an assignee in bankruptcy of the person in whom the power resides.

The case of *White* v. *McPheeters*, 75 Missouri, 286, cited and relied on by counsel for appellants, does not decide the only question involved here. That case arose under the Missouri statute, which appears to be broader than that of Illinois in its definition of real estate subject to seizure and sale on executions at law; and was, in fact, a proceeding in equity by a creditor's bill to subject the estate, which was subject to the power of appointment and had been conveyed to a volunteer in pursuance thereof, to the satisfaction of judgments.

On the whole case, we are of opinion that the decree of the Circuit Court was correct, and it is accordingly *Affirmed.*

Syllabus.

MAHN *v.* HARWOOD & Others.

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

Submitted October 16, 1884.—Decided November 3, 1884.

A patent for ball-covers issued to James H. Osgood May 21, 1872, reissued April 11, 1876, held invalid as to the new and enlarged claims, because there was unreasonable delay in applying for it, the only object of the reissue being to enlarge the claims.

The principles announced in the case of *Miller* v. *The Brass Company*, 104 U. S. 350, in reference to reissuing patents for the purpose of enlarging the claims, reiterated and explained.

It was not intended in that case to question the conclusiveness, in suits for infringement, of the decisions of the Commissioner of Patents on matters of fact necessary to be decided before issuing the patent, except as the statute gives specific defences; but those defences are not the only ones that may be made; if it appears that the Commissioner has granted or reissued a patent without authority of law, this will be a good defence; as, where the thing patented is not a patentable invention, or where a reissue is for a different invention from that described in the original patent, &c.

A patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake inadvertently committed in the wording of the claim, and the application for reissue is made within a reasonably short time. Whether there has been such an inadvertent mistake is, in general, a matter of fact for the Commissioner to decide; but whether the application is made in reasonable time is matter of law, which the court may determine by comparing the reissued patent with the original, and, if necessary, with the records in the Patent Office when presented by the record.

The application for a reissue in such cases must be made within a reasonable time, because the rights of the public, conceded by the original patent, are directly affected and violated by an enlargement of the claim; and the patentee's continued acquiescence in the public enjoyment of such right, for an unreasonable time, justly deprives him of all right to a reissue, and the Commissioner of lawful authority to grant it.

No invariable rule can be laid down as to what is a reasonable time within which the patentee must seek for the correction of a claim which he considers too narrow. It is for the court to judge in each case, and it will exercise proper liberality towards the patentee. But as the law charges him with notice of what his patent contains, he will be held to reasonable diligence. By analogy to the rule as to the effect of public use before an application for a patent, a delay of more than two years would, in general, require special circumstances for its excuse.

As, in the present case, there was a delay of nearly four years, and the original patent was plain, simple, and free from obscurity, it was held that the delay in seeking a correction by reissue was unreasonable, and that the Commissioner had, therefore, no authority to grant it; and the patent was held invalid so far as the claims were broader than those in the original patent.

This was a suit in equity for alleged infringement of a patent praying for an accounting, for damages, and a perpetual injunction. Decree below for defendants, dismissing the bill, and appeal to this court by plaintiff. The facts are stated in the opinion of the court.

Mr. Thomas William Clarke for appellant.

Mr. J. E. Maynadier for appellees.

Mr. Justice Bradley delivered the opinion of the court.

This suit was brought on a patent relating to leather covers of "base-balls and other similar articles." The patent was originally issued to one James H. Osgood, of Boston, under date of May 21, 1872. The bill states that Osgood afterwards assigned this patent to Louis H. Mahn, the complainant below, appellant here. On the 11th of April, 1876, it was reissued, and the suit is brought on the reissue against the Harwoods, charging infringement. Except in stating the nature of the invention, and the claims, the specifications of the original and reissued patents are precisely alike. The description and accompanying drawings are not changed.

Briefly stated, the specification describes a leather ball-cover composed of two hemispherical parts, each being moulded into form when in a wet state, and, after being dried, sewed together on to the ball by a peculiar stitch, called a double herring-bone stitch; then a second cover made in precisely the same manner, and sewed on to the ball, outside of the first cover, in such manner that the stitches of the two covers may cross each other at right angles.

In the original patent it is stated that the nature of the invention consists, first, in the employment of a new stitch, called the double herring-bone secured stitch, whereby only one stitch can be broken at a time; second, in the employment of a binder

of leather next the yarn of a base-ball, or as a first cover to other round articles, so stitched and put on that the outer covering when applied shall have its seams at right angles, or breaking joints, with the seams of the first cover; third, in making the leather covers of a hemispherical shape, by compression and crimping in properly shaped moulds with plungers, while wet, after which they are dried in shape and then softened by moisture, stretched on and sewed. The claims of the original patent are the two following, namely:

"1. A ball exterior, composed of two crimped hemispherical covers, *A* and *B*, having their respective seams *x* and *y* break joints, substantially as set forth.

"2. In combination with a ball whose exterior is composed of two hemispherical covers *A* and *B*, with their respective seams *x* and *y* breaking joints, I claim the double herring-bone stitch formed of two threads, in the manner herein set forth."

The letters *A* and *B*, in the drawing, designate the two covers, one outside of the other; and the letters *x* and *y* designate the respective stitches of those covers.

The whole invention claimed, therefore, in the original patent, was, first, the two leather covers (an outside one and an inside one), with their respective seams crossing at right angles; and second, the double herring-bone stitch in combination with the two covers.

In the reissue it is stated that "the nature of the invention consists, first, in the cover of a base-ball formed of two pieces of leather suitably secured to each other; second, the seams of a base-ball united by the double herring-bone knotted lock-stitch; third, a base-ball covering consisting of an outer and an inner covering applied to the ball independently of each other; fourth, a base-ball covering consisting of independent outer and inner coverings made of hemispherical sections, the seams of the inner and outer covers arranged relatively to each other to break joints:" and this reissue has the four following claims, namely:

"1. A base-ball cover formed of two pieces of leather, secured to each other by a single seam, substantially as and for the purpose specified.

"2. A base-ball cover having its seam united by the double herring-bone knotted lock-stitch, substantially as and for the purpose specified.

"3. The covering of a base-ball consisting of an outer and an inner covering, each of which is composed of two pieces of leather, and applied to the ball independently of each other, substantially as and for the purpose specified.

"4. A base-ball covering composed of independent inner and outer coverings, made up of hemispherical sections, the seams of the inner and outer covers arranged relatively to each other, to break joints, substantially as and for the purpose specified."

It is apparent that, in the reissue, the claim of invention is greatly enlarged. The patentee claims therein, first, any and every single base-ball cover formed of two pieces of leather, fastened together by a single seam, substantially as and for the purpose described; secondly, any and every base-ball cover having its seam united by the double herring-bone stitch, substantially, &c.; thirdly, every and any use of two covers on a base-ball, each made of two pieces of leather, and applied to the ball independently of each other, substantially, &c. The fourth claim is nearly equivalent to the first claim of the original patent. The others are all new.

It is clear, therefore, on the face of the patents, that the only object of the reissue was to enlarge the claims. The description was not altered in the least. The claims in the original patent were clear and explicit, one of them being substantially retained in the reissue. Nothing was altered, nothing was changed, but to multiply the claims and to make them broader. And this was done, not for the benefit of the original patentee, but for that of his assignee; and was done after the lapse of nearly four years from the granting of the original patent. The case seems to come clearly within the principles laid down in *Miller* v. *The Brass Company*, 104 U. S. 350, and if we were right in the conclusions arrived at in that case, we do not see how we can sustain the patent sued on in this. The counsel for the appellant seems to be aware of this, and, in his argument directs his efforts mainly to attack the principles there ex-

pressed, although they have been frequently reiterated in subsequent cases. We deem it proper, therefore, to say, once for all, that the views announced in *Miller* v. *The Brass Company* on the subject of reissuing patents for the purpose of expanding and enlarging the claim, were deliberately expressed and are still adhered to. As the reasons for those views were quite fully gone into at that time, it is unnecessary to repeat them at large. A few additional observations will suffice.

It was not intended then, and is not now, to question the conclusiveness, in suits for infringements of patents, of the decisions of the Commissioner on questions of fact necessary to be decided before issuing such patents, except as the statute gives specific defences in that regard. But the statutory defences are not the only defences which may be made against a patent. Where it is evident that the Commissioner, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is no sound principle to prevent a party sued for its infringement from availing himself of the illegality, independently of any statutory permission so to do.

This is constantly done in land cases where patents have been issued which the land officers had no authority to issue, as, where the lands have been previously granted, reserved from sale, or appropriated to other uses. *Stoddard* v. *Chambers*, 2 How. 284, 318; *Easton* v. *Salisbury*, 21 How. 426; *Reichart* v. *Felps*, 6 Wall. 160; *Silver* v. *Ladd*, 7 Wall. 219; *Meader* v. *Norton*, 11 Wall. 442; *Best* v. *Polk*, 18 Wall. 112; *Morton* v. *Nebraska*, 21 Wall. 660; *Leavenworth, &c., Railroad* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *Sherman* v. *Buick*, 93 U. S. 209.

In cases of patents for inventions, a valid defence not given by the statute often arises where the question is, whether the thing patented amounts to a patentable invention. This being a question of law, the courts are not bound by the decision of the commissioner, although he must necessarily pass upon it. See *Brown* v. *Piper*, 91 U. S. 37; *Glue Co.* v. *Upton*, 97 U. S. 3; *Dunbar* v. *Myers*, 94 U. S. 187, 197–199; *Atlantic Works* v. *Brady*, 107 U. S. 192, 199; *Slawson* v. *Grand St.*

Railroad Co., 107 U. S. 649, 652; *King* v. *Gallun*, 109 U. S. 99, 101.

In this very matter of reissued patents it has also been frequently decided that it is a good defence in a suit on such a patent to show that the Commissioner exceeded his authority in granting it. Such a defence is established by showing that the reissued patent is for a different invention from that described in the original; inasmuch as the statute declares that it must be for the same invention. *Burr* v. *Duryee*, 1 Wall. 531, 574; *Gill* v. *Wells*, 22 Wall. 1; *Collar Co.* v. *Van Dusen*, 23 Wall. 530, 560; *Wood Paper Patent*, 23 Wall. 566; and many other subsequent cases. The same defence may be established by showing from the record that there was no inadvertence, accident or mistake in drawing up the specification of the original patent; for the statute only gives a reissue when the original is defective by inadvertence, accident or mistake. Thus, in *Leggett* v. *Avery*, 101 U. S. 256, 259, the reissued patent embraced a claim which had been presented on the application for the original patent and rejected. It was apparent, therefore, that the omission of that claim in the original was not, and could not have been, the result of inadvertence, accident or mistake, but was the result of design on the part of the Commissioner and acquiescence on the part of the patentee; and so far as that claim was concerned, the reissued patent was properly held to be void. See also *James* v. *Campbell*, 104 U. S. 356, 368. The proper remedy of the patentee when a claim applied for is rejected, is an appeal, and not an application for a reissue.

Such are some of the instances in which a patent issued contrary to law is held to be void. And it is no doubt a general rule that where the Commissioner has exceeded his authority in granting or reissuing a patent, such fact furnishes a good defence to a suit brought for its infringement. There are stronger reasons for this defence against patents for inventions, which directly affect the citizen, than exist in the case of patents for land, which directly affect the government, and only indirectly the citizen.

Now, in our judgment, a patent for an invention cannot

lawfully be reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake inadvertently committed in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted. The granting of such reissues after the lapse of long periods of time is an abuse of the power, and is founded on a total misconception of the law. The Commissioner of Patents has evidently proceeded, in these cases, on the view that a patent may be reissued after any lapse of time, for the purpose of making a broader claim, by merely showing that the claim might have been broader than it was, and that it was inadvertently made too narrow at the time. In this we think he has been entirely in error. Lapse of time may be of small consequence on an application for the reissue of a patent on account of a defective specification or description, or where the original claim is too broad. But there are substantial reasons, not applicable to these cases, why a claim cannot be enlarged and made broader after an undue lapse of time. The rights of the public here intervene, which are totally inconsistent with such tardy reissues; and the great opportunity and temptation to commit fraud after any considerable lapse of time, when the circumstances of the original application have passed out of mind, and the monopoly has proved to be of great value, make it imperative on the courts, as a dictate of justice and public policy, to hold the patentees strictly to the rule of reasonable diligence in making applications for this kind of reissues.

Conceding that it is for the Commissioner of Patents to determine whether the insertion of too narrow a claim arose from inadvertence, accident or mistake (unless where the matter is manifest from the record), the question whether the application for correction and reissue is or is not made within reasonable time is, in most if not all of such cases, a question which the court can determine as a question of law, by comparing the patent itself with the original patent, and, if necessary, with the record of its inception. The reason for this was fully explained in the case of *Miller* v. *The Brass Company*. The taking out of a patent which has (as the law requires it to have)

a specific claim, is notice to all the world, of the most public and solemn kind, that all those parts of the art, machine or manufacture set out and described in the specification and not embraced in such specific claim, are not claimed by the patentee,—at least not claimed in and by that patent. If he has a distinct patent for other parts, or has made application therefor, or has reserved the right to make such application, that is another matter, not affecting the patent in question. But so far as that patent is concerned, the claim actually made operates in law as a disclaimer of what is not claimed; and of all this the law charges the patentee with the fullest notice.

Then, what is the situation? The public is notified and informed by the most solemn act on the part of the patentee, that his claim to invention is for such and such an element or combination, and for nothing more. Of course, what is not claimed is public property. The presumption is, and such is generally the fact, that what is not claimed was not invented by the patentee, but was known and used before he made his invention. But, whether so or not, his own act has made it public property if it was not so before. The patent itself, as soon as it is issued, is the evidence of this. The public has the undoubted right to use, and it is to be presumed does use, what is not specifically claimed in the patent. Every day that passes after the issue of the patent adds to the strength of this right, and increases the barrier against subsequent expansion of the claim by reissue under a pretence of inadvertence and mistake. If any such inadvertence or mistake has really occurred, it is generally easily discernible by an inspection of the patent itself; and any unreasonable delay in applying to have it corrected by a surrender and reissue is a just bar to such correction. If the specification is complicated and the claim is ambiguous or involved, the patentee may be entitled to greater indulgence; and of this the court can rightfully judge in each case. No precise limit of time can be fixed and laid down for all cases. The courts will always exercise a proper liberality in favor of the patentee. But in any case, by such delay as the court may deem unnecessary and unreasonable, the right to a reissue will be regarded as having been abandoned and

lost, and the Commissioner will be held to have exceeded his authority in granting it. Whenever it is manifest from the patent itself, compared with the original patent and cognate documents of record, or from the facts developed in the case, that the Commissioner must have disregarded the rules of law by which his authority to grant a reissue in such cases is governed, the patent will be considered as void to the extent of such illegality. It is then a question of law, not a question of fact. As before stated, the case is entirely different from that of a reissue by reason of a defective specification or description, or on account of the claim being too broad. In these cases, the public interest is promoted by the change; whilst a reissue for the purpose of making a claim more broad and comprehensive is injurious to the public, since it takes from the public the use of that which it previously enjoyed, and which the original patent acknowledged its right to enjoy. We repeat then, if a patentee has not claimed as much as he is entitled to claim, he is bound to discover the defect in reasonable time, or he loses all right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue for the purpose of correcting the supposed mistake, he exceeds his power, and acts under a mistaken view of the law; and the court, seeing this, has a right, and it is its duty, to declare the reissue *pro tanto* void in any suit founded upon it.

The truth is (as was shown in *Miller* v. *The Brass Company*), that this class of cases, namely, reissues for the purpose of enlarging and expanding the claim of a patent, was not comprised within the literal terms of the law which created the power to reissue patents. But since the purpose of the statute undoubtedly was to provide that kind of relief which courts of equity have always given in cases of clear accident and mistake in the drawing up of written instruments, it may fairly be inferred that a mistake in a patent whereby the claim is made too narrow, is within the equity, if not within the words, of the statute. Yet no court of equity, considering all the interests involved, would ever grant relief in such a case without due diligence and promptness on the part of the pat-

entee in seeking to have the error corrected. It is just one of those cases in which laches and unnecessary delay would be held to be a bar to such relief. And in extending the equity of the statute so as to embrace the case, the courts should not overlook or disregard the conditions on which alone courts of equity would take any action, and also on which alone the Commissioner of Patents has any power to grant a reissue.

As we have already stated, no invariable rule can be laid down as to what is reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow. In *Miller* v. *The Brass Company*, by analogy to the law of public use before an application for a patent, we suggested that a delay of two years in applying for such correction should be construed equally favorable to the public. But this was a mere suggestion by the way, and was not intended to lay down any general rule. Nevertheless, the analogy is an apposite one, and we think that excuse for any longer delay than that should be made manifest by the special circumstances of the case.

In the present case there was a delay of nearly four years. The application for a reissue, though made in the name of the patentee and signed by him, was not made for his benefit, but for the benefit and apparently at the instance of his assignee, the present appellant. The specification is very plain and free from complexity, and as we have already stated, the claims in the original patent were clear and explicit. There was no ambiguity, and nothing to prevent the patentee from seeing at once, on inspecting his patent, whether his whole invention was claimed or not. We can see no possible excuse, and none has been attempted to be shown, for allowing the patent to stand the length of time it did without any attempt to have it amended. The reissue was made against law apparent on its face, and nothing is shown in the record to remove this illegality. The case is clearly within the principle laid down in *Miller* v. *The Brass Company*, and the patent must be regarded as void so far as the new and expanded claims are concerned. As this leaves only the fourth claim to be considered, and as it is clear

from the evidence in the case that the appellants did not infringe that claim, the decree of the Circuit Court must be

Affirmed.

Mr. Justice Miller, dissenting.

In this case I avail myself of the first occasion which has fairly required it to give expression to my views in opposition to those expressed by the court in several cases in which reissues of patents have been held invalid.

The principle on which the present case is decided, and which, if not the only ground of that decision, is emphasized in the opinion as the controlling ground, is that of laches in the application for the reissue. It is quite clear from the opinion, that, if in all other respects the patentee had been entitled to the reissue of the patent on which he relies in this case, it would give him no protection, because this court is of opinion that, under the circumstances, the application for it came too late.

This proposition of the court does not grow out of any statute of limitation governing such applications, nor because the original patent, and, of course, the reissue, does not have a considerable time to run before it expires by law, but because the court, applying to the transaction as it came before the Commissioner of Patents, the equitable doctrine of laches—of improper delay—holds that, on that principle, the party came too late and the reissue is invalid. The distinction between the instrument being void and merely voidable is so well known that it can hardly be supposed to have escaped the attention of the court, and since the judgment in this case can bind no one but the parties to it, the patentee in another suit on the same patent against another party, by showing reasonable excuse for his delay, may prove his patent to be valid, and in that suit he must recover, though he fails in this.

Thus every infringer will have the right to retry, when he is sued, the question of whether the Commissioner of Patents exercised a sound discretion in allowing the surrender and reissue of the patent. Such a doctrine renders the labors of the

Patent Office, with its Commissioner and corps of trained examiners, of very little value, and subjects the final decision in favor of a patentee to the re-examination of any number of juries on the very facts which were passed upon by the officers appointed by law for the purpose of deciding the questions necessary to the validity of the patent.

The doctrine is well established that a grant by the government, within its lawful authority, evidenced by a patent under its seal and the signature of the executive, cannot be impeached collaterally. It must be recognized as valid in all courts when it is introduced as evidence of the right which it confers, and can only be avoided by a direct proceeding by way of *scire facias*, or bill in chancery to set aside the grant for some of the reasons which made its original issue a wrongful act. In such case the government which issued the patent, by its attorney-general or other proper officer, in a court of competent jurisdiction, obtains a decree setting the patent aside, whereby it is rendered of no avail against all persons interested in the matter, as well as the government.

For decisions which establish this doctrine, if there could be any doubt about it, I refer to the following cases: *United States* v. *Stone*, 2 Wall. 525; *United States* v. *Throckmorton*, 98 U. S. 61, 70; *Mowry* v. *Whitney*, 14 Wall. 434, which is the case of a patent for invention, and where the whole subject is fully discussed.

Undoubtedly there are cases of patents, with all the solemn formalities attesting their validity, which are properly rejected by the courts when offered in evidence, because they show, upon their face, that no authority existed for their issue. The power to grant the rights, which they profess to confer, did not exist. Either it did not exist at all, or it did not exist in the officers or tribunal which issued the patent. In such cases the court can see, from the face of the instrument, the nature of the grant, and the power which the law confers on the officer who issued it, that it is wholly void, and that no evidence to be now produced, or which could have been produced before that officer could authorize the grant or make it valid. Such

an instrument is void *ab initio*, is void always and everywhere, for want of power in those who made it.

Can the present case come under this exception?

Clearly not. The question of laches, of undue delay in making application to correct "*a mistake, accident, or inadvertence*," by reason of which the patentee does not get the full benefit of his invention, must depend on many circumstances which cannot appear on the face of the reissued patent. No mistake can be corrected until it is discovered. The period of this discovery is always a matter of proof, which may be of the most varied character. If the discovery of the mistake was soon after the issue of the patent, and the delay defeated the right to the reissue, this was a matter into which the Patent Office should inquire. The duty to do so devolved on it, and the right to decide it necessarily followed. While the dates of the original patent and of the application for a reissue might seem to show an unreasonable delay, this appearance might have been removed by evidence which afforded a full justification for it. Very long delays have been justified by the decisions of this court when set up as objections to patents. See *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

That patents for inventions were intended by Congress to have this conclusive and unimpeachable character, is manifest from the legislation on this very point. § 4920 of the Revised Statutes, which was originally enacted in 1836, sets forth five distinct defences which may be pleaded to an action for infringement of a patent right. They are as follows:

"1. That, for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

"2. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting or perfecting the same; or,

"3. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or,

"4. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

"5. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

The statute also requires the defendant in such cases to give the patentee notice with great particularity of the persons who are prior inventors or have knowledge of prior use of the invention, and when and by whom it has been used.

It will be observed that, while these defences go to the validity of the patent, they all resolve themselves into want of novelty, or of priority of invention or discovery, except the first and the last.

Neither laches nor fraud is here mentioned as a defence to the patent.

Why were these five points made matter of defence by statute? And why were no others mentioned? The answers to these two questions are obvious, and they are conclusive of the question before us.

The answer to the first question is that these defences go to impeach the patent, and destroy its value as evidence in that case; and by the law as it stood then and as it stands now this cannot be done without a special statute to authorize it.

And the reason why no other grounds for impeaching the patent were allowed to be set up in defence was that Congress intended that all other causes for impeaching the patent should be prosecuted in the usual mode of *scire facias*, or bill in chancery, brought by the proper law officers of the government to set it aside and annul it.

If Congress had intended that the patent issued with all the necessary formalities should be assailed collaterally for every reason that might have been urged against its issue originally, it would have said so in short terms, and not have enumerated particular or special reasons for which it may be so attacked.

That laches is not one of these reasons is clear, and affords an unanswerable argument that it was not intended that it should be a ground of defence for its infringement in such actions.

The careful and studied enumeration of matters going to impeach the patent, where a suit is brought to enforce rights granted by it, is the strongest affirmation that no others are admissible for that purpose in that kind of suit.

In *United States* v. *Throckmorton* the court said, that "in so important a matter as impeaching the grants of the government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit."

In *Mowry* v. *Whitney*, 14 Wall. 441, it is said that a suit by an individual could only be conclusive in result as between the parties, and would leave the instrument valid as to all others, and the patentee might be subjected to innumerable vexatious suits to set aside his patent. "It would seriously impair the value of the title which the government grants after regular proceedings before officers appointed for the purpose, if the validity of the instrument by which the grant is made can be impeached by any one whose interest may be affected by it, and would tend to discredit the authority of the government in such matters."

If the principles of the opinion in the present case are sound, then in every case where an action at law is brought, the jury must sit in judgment on the action of the Commissioner of Patents, as to the existence of laches where that is alleged, and as there may be a dozen jury trials in suits against as many different parties for infringing the same patent, each jury deciding on its own impression of the evidence before it, the question of the validity of the reissue can never be settled, nor the patentee or the public know whether his patent is valid or worthless.

Such a departure from the settled rules of law as applicable to these instruments cannot be justified in a court until authorized by legislative power.

In several cases which have preceded this one, especially *Miller* v. *Brass Company*, 104 U. S. 350, where this doctrine has been stated in the opinion, other grounds were also given as the foundation of the judgment. I had hoped, when we came to a case where the question *must* be decided, my brethren would

not adopt it on full consideration. This must be my apology for any apparent acquiescence in it heretofore. I am of opinion that reissued patents are entitled to the same consideration as other patents issued by the government.

MACKALL *v.* RICHARDS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 10, 1884.—Decided November 24, 1884.

When a mandate of this court, made after hearing and deciding an appeal in equity, directed such further proceedings to be had in the court below as would be consistent with right and justice, and that court thereafter made a decree which prejudiced the substantial rights of a party to the suit, in respect of matters not concluded by the mandate or by the original decree, its action touching such matters is subject to review, upon a second appeal.

This suit involved the title to that part of square 223, in the City of Washington, designated as lot 7, at the southwest corner of New York Avenue and Fourteenth Street. Its building line on the avenue was about 152 feet and 9 inches in length, and on Fourteenth Street a little less; while the south line, which was at right angles with Fourteenth Street, was about 100 feet, and the west line, which was at right angles with the avenue, was about 97 feet 5 inches, in length. In June or July, 1864, the lot was subdivided by Brooke Mackall, Jr., under whose control it then was, into five smaller lots, each fronting on New York Avenue. This subdivision was not recorded in any public office, but a rough plat of it, exhibited in the record, appears upon the books of Mr. Forsythe, a surveyor and civil engineer, who made it at the instance of Mackall.

In the same year, shortly after this subdivision, Mackall commenced the erection of a building at the southwest corner of the Avenue and Fourteenth Street, known as Palace Market. That building, he testified, was "to cover two of the sub-lots on New York Avenue." In 1867, Plant and Emory, having furnished materials and performed labor on the building, com-

menced suits at law, in the Supreme Court of this District, to enforce liens for the amount of their claims, and each obtained judgment therefor against Mackall. The part of lot 7, upon which Plant asserted a lien, was thus described in his declaration: "Beginning for the same at the northeast corner of the said square, running thence south 44 feet; thence west to the west line of the said lot; thence, in a northerly direction with the west line thereof, to the north line of the said lot; and thence, in a northeasterly direction with the said north line, to the place of beginning." The description in Emory's suit was this: "Part of lot 7, in square No. 223, beginning for the same at the northeast corner of said lot, and running thence south 44 feet; thence west to the west line of said lot; thence, with a line at right angles to New York Avenue, to the north line of said lot; and thence, in a northeasterly direction, with the said north line, to the place of beginning."

Subsequently A. & T. A. Richards obtained judgment in the same court against Mackall for $897.42, with interest and costs, execution upon which was levied on the same property on which Plant and Emory claimed to have liens. Under executions in favor of these several creditors the property was sold by the marshal. Alfred Richards became the purchaser at $2,500, and received a conveyance. The proceeds of the sale were sufficient to discharge in full the claims of Plant and Emory and $646.89 of the judgment obtained by A. & T. A. Richards.

This suit was brought in 1871 by A. & T. A. Richards (a part of whose judgment remained unpaid) and other judgment creditors of Mackall, for the purpose of subjecting to the claims of themselves and other creditors who might become parties and share the expenses of the litigation, such part of lot 7 as remained "after taking or carving out therefrom the aforesaid piece or part thereof so as aforesaid taken, sold, and conveyed by the marshal of the District of Columbia to Alfred Richards," &c. The bill set forth that the title to the lot was really in Mackall, but that, for the purpose of hindering and defrauding his creditors, he withheld all evidence of it from the public records of the District. The prayer was that he be

required to discover and place on record all conveyances or other evidences of his title, and that the remainder of lot 7, not sold by the marshal to Richards, be sold, and the proceeds applied, first to the discharge of existing encumbrances, and then to the judgments of complainants.

Such proceedings were had that, by final decree in special term, on the 1st day of May, 1873, it was adjudged that the title "to all of lot numbered 7, in square numbered 223, in the city of Washington, not heretofore sold by the marshal of the District of Columbia, to the complainant Alfred Richards, is vested in the defendant Brooke Mackall, Jr., and that the same be sold," &c. Trustees were designated by whom the sale should be conducted. That decree was affirmed in general term. Upon appeal to this court the decree in general term was itself affirmed without modification, and the cause remanded for such proceedings as would be consistent with right and justice. In this court, the only dispute was as to the sufficiency of the evidence to show title in Mackall, and no question was made as to the indefiniteness of the description of the interest or property decreed to be sold, or as to the validity of the marshal's sale.

Subsequently, the trustees named in the original decree executed the order of sale and made report of their acts; but, upon exceptions filed, the sale was, on July 24, 1877, set aside, the order providing that before sale can be made "the amount to be sold must be definitely ascertained by some proper legal procedure." The sale was set aside partly because it appeared, upon the hearing of the exceptions, that the trustees announced at the biddings that they did not know, and did not undertake to state, what were the precise lines or boundaries of the ground to be sold, and would not undertake to do more than sell such part of lot 7 as was outside of that embraced by the marshal's deed to Alfred Richards, leaving purchasers to find out as best they could the extent of their purchase. Bidders were informed that "whether the south line of Richards' purchase runs southwesterly from the front or southeast corner of the building along the line of the fence, . . . parallel to and 44 feet from New York Avenue, or whether it runs due

west along the south side of the building to its rear end, and from thence westerly to the rear end of the lot, is a legal question which the trustees do not undertake to determine."

By an order entered July 13, 1878, the cause was referred to a special auditor to report "the proper metes and bounds of that portion of lot No. 7, in square 223, which was sold by the marshal of the District of Columbia to Alfred Richards, and also that other portion of said lot not so sold, and which is directed by the decree in this case to be sold by the present trustees." He reported that, upon examining the testimony, the proceedings in the mechanics' lien suits, the returns upon the executions under which Richards had purchased, the advertisement of sale and the marshal's deed of conveyance, he could not reach a conclusion as to how much ground was intended to be sold or conveyed to Richards.

Exceptions by the complainants to this report were sustained, and the court, "proceeding to determine the said boundaries in accordance with the said order of July 24, 1877," directed the trustees to sell, in accordance with the terms and provisions thereof, all that portion of lot seven lying south of a line drawn from a point on Fourteenth Street 44 feet south of the northeast corner of said lot, and running thence parallel with New York Avenue to the west line of lot seven. This order was made "without passing upon the validity of the said marshal's sale." A similar decree was passed in general term, accompanied by a recital that it should be construed "as not determining any question of title to any portion of said lot 7 lying north of said line." 1 Mackey, 444. The present appeal was from the latter decree.

Mr. W. Willoughby, for appellant.

Mr. W. B. Webb and *Mr. Enoch Totten*, for appellee, argued several questions presented by the record. On the point as to the extent of the questions open on appeal from the execution of a mandate of this court they said: This being a second appeal, nothing is brought for re-examination except proceedings subsequent to the mandate. *The Lady Pike*, 96

U. S. 461; *Himeley* v. *Rose*, 5 Cranch, 313; *Roberts* v. *Cooper*, 20 How. 467; *Noonan* v. *Bradley*, 12 Wall. 121. There can be no question, that after a case has been heard and determined in this court, and its mandate sent to the court from whence the case came, the only duty of the court below is to carry the decree and mandate into execution. From the earliest days of the court this doctrine has been asserted. *Skillern's Ex'r* v. *May's Ex'r*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 339, 342; *Sibbald* v. *United States*, Ib. 488, 492; *Noonan* v. *Bradley*, *supra*; *The Lady Pike*, *supra*.

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

The action of the court below directing the sale of only so much of lot 7 as lies south of a line running from a point 44 feet south of its northeast corner parallel with New York Avenue to the west line of the lot, leaving undetermined the question of the title to that part of the lot lying north of that parallel line, is subject to review, upon this second appeal, if, as appellant contends, the proceedings subsequent to the decision here are erroneous and prejudical to his substantial rights in respect of matters not concluded by the original decree. His claim is that the natural and established front of lot 7 is on New York Avenue, and that the sale of the piece south of the said parallel line, separately from the ground north of it, will materially, as well as needlessly, impair the value of both, especially the former. We are of opinion that this claim is, in all respects, well grounded; and that the appellant is entitled to a reversal, unless it appears from the record that the ground north of the said line running from Fourteenth Street parallel with New York Avenue—which ground was, in effect, withdrawn from the operation of the original decree—was embraced by the sale of the marshal to Richards. Unless sold heretofore by the marshal, it is covered by the original decree, which this court affirmed.

The question as to what part of lot 7 was not sold by the marshal to Richards is attended with difficulty and embarrass-

ment. But it is one which the court below was bound, under the issues, to determine, in order that its decree of sale might be properly executed. Upon examination of the marshal's advertisement of the sale at which Richards purchased, and of the deed which the latter received, we find no such description of the property sold and conveyed as will certainly embrace that part of lot 7 which lies west and westerly of the building erected at the corner of New York Avenue and Fourteenth Street, and north of the line described in the final order as commencing from a point on Fourteenth Street 44 feet south of the northeast corner of said lot, and running thence parallel to the line of New York Avenue to the west line of said lot. The advertisement of sale thus describes that part of lot 7 then proposed to be sold: "Beginning at the northeast corner of said square [223] and running thence south 44 feet; thence west to the west end of the lot; thence, in a northerly direction with the west line thereof, to the north line of said lot; thence with said north line to the place of beginning." The description in the marshal's deed to Richards is the same as that in the advertisement of sale, except that, instead of the words "thence west to the west end of the lot," the call in the deed is "thence westerly to the west end of the lot." The line running south from the northeast corner of the lot along Fourteenth Street is aptly described. But what is meant by the words "west to the west end of the lot" in the advertisement of sale? If by "west end of the lot" is meant its northwest corner, where its west line meets New York Avenue, and if by "west" is meant due west, then a line running due west from Fourteenth Street will not strike the west end of the lot, but will intersect New York avenue some distance northeast of the northwest corner of the lot. Further: If "west to the west end of the lot," means "*westerly* to the northwest corner of the lot," then there would be left outside of the ground upon which the building stands, and north of the line thus drawn, a narrow, irregular slip of ground, diminishing in width as the line runs westerly, and which it cannot be supposed it was within the contemplation of the marshal or of any of the parties interested to sell.

But we do not suppose that by "west end of the lot" was meant its northwest corner, where its west line meets New York Avenue; because, the next call which appears in the levies, in the advertisement of sale, and in the marshal's deed—"thence in a northerly direction *with the* west *line* thereof to the north line of said lot"—would then be meaningless. We incline to think that by "west end of the lot" was meant "west line of the lot." Such, as we have seen, is the call in the mechanic's lien suits. This would make intelligible the succeeding call, "thence in a northerly direction with the west line thereof." But even this interpretation does not dissipate the confusion which arises from these inconsistent descriptions of the property; for, if the line starting from Fourteenth Street is run due west, it will not strike any point in the west line of the lot. And if it be run westerly, which may mean north of west or south of west, to what point on the west line of the lot must it be run? The appellee contends that it should be run parallel with New York Avenue. The answer to that suggestion is that the descriptions in the lien suits, in the levies, and in the marshal's advertisement and conveyance will be satisfied by running north or south of that parallel line to any one of numerous points on the west side or line of the lot.

We are here met with the suggestion that the sale was made in discharge of certain mechanics' liens, and that the description of the property in the marshal's advertisement and deed should be held to include all the ground which could have been included under the laws in force in this District on the subject of such liens. That law provides, in respect of a building in the city of Washington or Georgetown, that "the ground on which the same is erected, and a space of ground equal to the front of the building and extending to the depth of the lot on which it is erected, shall also be bound by the said lien," subject to the condition that the land, at the time of the erection or repair of the building, is the property of the person contracting for such erection or repairs. R. S. Dist. Col. § 704, 11 Stat. 377.

The argument implies that the statute gave a mechanic's lien

upon so much of the lot as would constitute a parallelogram bounded on the east by the line of 44 feet on Fourteenth Street, on the south by a line parallel with New York Avenue, on the west by the west line of the lot, and on the north by the line of New York Avenue. But the inherent difficulty in this view arises from the description in the marshal's advertisement and in his deed for the property actually sold and conveyed. That description will not cover the ground included in the supposed parallelogram. Further: if the front of the building is conceded to be on Fourteenth Street, the lot over which the statute extended the mechanic's lien would not be the ground between New York Avenue and a line running parallel with, and 44 feet from, it. In such case, the ground covered by the lien would rather be that which lies north of a line commencing 44 feet south of the northeast corner of the lot, and extended at right angles from Fourteenth Street until it strikes New York Avenue. But a conclusive answer to the suggestion based upon the mechanic's lien law, is that, so far as the record discloses, Plant and Emory did not, when enforcing their claims, assert a lien upon the ground within the before-mentioned parallelogram.

We are of opinion, upon the whole case, that the record fails to show that any part of lot 7, outside of the piece upon which the building at the northeast corner of the lot stands, was sold or conveyed by the marshal to Richards; consequently, for the purposes of this suit, and as between the parties thereto, all of lot 7, except the part actually covered by the building, must be deemed to be embraced by the original decree, and to be subject to sale, as therein adjudged, in satisfaction of the demands of complainants.

Whether that part of the lot upon which the building stands is still the property of Mackall, that is, whether the sale and conveyance of the marshal is valid in respect, at least, of that part of the lot, we do not determine. We forbear any expression of opinion upon that question, because it is evident that the complainants did not seek, nor the court below intend, by the original decree, to subject to sale the ground on which the building stands; and, also, because the validity of the marshal's

Statement of Facts.

sale is directly involved, as we are informed by counsel, in a distinct suit upon our docket, not yet reached.

The decree must be reversed, and the cause remanded, with directions to the court below to set aside the decree from which this appeal is prosecuted, and to order the sale, in satisfaction of the complainants' demands, and in such mode as may be consistent with the practice of the court and with law, of lot 7 outside of the part upon which the building known as the Palace Market stands.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* ROSS.

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

Argued April 14, 1884.—Decided December 8, 1884.

A railroad corporation is responsible to its train servants and employés for injuries received by them in consequence of neglect of duty by a train conductor in charge of the train, with the right to command its movements, and control the persons employed upon it.

A conductor of a railroad train, who has the right to command the movements of the train and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employés of the corporation on the train.

This was an action brought by a locomotive engineer, in the employ of the plaintiff in error, defendant below, to recover damages for injuries received in a collision which was caused by the negligence of the conductor of the train. The facts and circumstances connected with the injury are set forth in the opinion of the court. At the trial below, several questions arose whose determination by the court below was assigned as error and which were argued here. For the purposes of the opinion it is only necessary to notice the two following portions of the charge to the jury, each of which was excepted to:

Argument for Plaintiff in Error.

(1) "It is very clear, I think, that if the company sees fit to place one of its employés under the control and direction of another, that then the two are not fellow-servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking."

(2) "By this general order, gentlemen, as I understand and construe it, the company made the engineer, in an important sense, subordinate to the conductor."

The order referred to in the second clause was as follows: "Conductors must, in all cases, while running by telegraph or special orders, show the same to the engineers of their trains before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station."

Judgment for plaintiff, to reverse which the defendant, as plaintiff in error, sued out this writ.

Mr. John W. Cary for plaintiff in error.—The court erred in charging the jury that the plaintiff and the conductor were not fellow-servants or co-employés engaged in the same general business. This charge was prior to the decision of this court in *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, and is in direct conflict with it. That was an action by a brakeman for an injury received through the alleged negligence of the engineer of another train of the same company. The court say: "Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such a relation to one another as did this plaintiff and the engineman of the other train, are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts. . . They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of one in doing his work may injure the other in doing his work. Their separate

services have an immediate common object, the moving of trains." The rule now established in England, and generally in this country, is, that the term "fellow-servant" includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. *Wonder* v. *Baltimore & Ohio Railroad Co.*, 32 Maryland, 411; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; *Columbus & Indianapolis Railroad* v. *Arnold*, 31 Ind. 174; *Warner* v. *Erie Railway Co.*, 39 N. Y. 468; *Hard* v. *Vt. & Canada Railroad*, 32 Vt. 473, 480. The fact that the injured servant was subordinate to the negligent servant, and under his control, makes no difference. Wharton, Law of Negligence, § 229; Wood, Master and Servant, § 437; Cooley on Torts, 543–4; Sherman & Redfield on Negligence, § 100. It is true that the States of Ohio and Kentucky seem not to have followed this rule; but the general current of authorities, both in this country and in England, is as above stated. We cite the following from the great mass of authorities on the subject: *Laning* v. *N. Y. C. R. R. Co.*, 49 N. Y. 521, 528; *Malone* v. *Hathaway*, 64 N. Y. 5, 8; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Lawler* v. *Androscoggin R. R. Co.*, 62 Me. 463; *Blake* v. *Maine Central R. R. Co.*, 70 Me. 60; *Lehigh Valley Coal Co.* v. *Jones*, 86 Penn. St. 432; *Brown* v. *Winona & St. Peter R. R. Co.*, 27 Minn. 162; *Peterson* v. *Coal & Mining Co.*, 50 Iowa, 673; *Wilson* v. *Merry*, above cited. The cases of *Slater* v. *Jewell*, 85 N. Y. 61; *Robertson* v. *Terre Haute, &c., Railroad*, 78 Ind. 77; and *Chicago, St. L. & N. O. Railroad* v. *Doyle*, 8 Am. & Eng. R. R. Cases, 171, are especially in point. See also *Mich. Cent. R. R.* v. *Smithson*, 45 Mich. 212; *Clark* v. *St. Paul & Sioux City R. R.*, 28 Minn. 128; *Ladd* v. *New Bedford R. R.*, 119 Mass. 412; and *Naylor* v. *Chicago & N. W. Railroad*, 53 Wisc. 661. In the latter case the court say: "Hence, if the servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury, merely because he may be able to show that there was a

safer mode in which the business might have been conducted, and that had it been conducted in that mode he would not have been injured."

Mr. Enoch Totten for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The plaintiff in the court below is a citizen of Minnesota, and by occupation an engineer on a railway train. The defendant in the court below, the plaintiff in error here, is a railway corporation created under the laws of Wisconsin. This action is brought to recover damages for injuries which the plaintiff sustained whilst engineer of a freight train by a collision with a gravel train on the 6th of November, 1880. Both trains belonged to the company, and for some years he had been employed as such engineer on its roads. On that day he was in charge of the engine of a regular freight train which left Minneapolis at a quarter past one in the morning, its regular schedule time, and had the right of the road over gravel trains, except when otherwise ordered. At the time of the collision, one McClintock was the conductor of the train, and had the entire charge of running it. It was his duty under the regulations of the company to show to the engineer all orders which he received with respect to the movements of the train. The regulations in this respect were as follows: "Conductors must in all cases, when running by telegraph and special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

When the freight train left Minneapolis on the morning of November 6, 1880, there was coming toward that city from Fort Snelling, by order of the company, over the same road, a gravel train, termed in the complaint a wild train, that is, a

train not running on schedule time any regular trips. The conductor, McClintock, was informed by telegram from the train dispatcher of the coming of this gravel train, and ordered to hold the freight train at South Minneapolis until the gravel train arrived. South Minneapolis is between Minneapolis and the place where the collision occurred. The gravel train had been engaged for a week before in hauling in the night gravel to Minneapolis from a pit near Mendota, for the construction by the company of a new and separate line of railroad between St. Paul and Minneapolis, and the freight train had, during this time, been stopped by the conductor, on orders of the train dispatcher, upon side tracks between Minneapolis and St. Paul Junction, for the passage of the gravel train. But on the night of November 6, 1880, he neglected to deliver to the plaintiff the order he had received, and after the train started he went into the caboose and there fell asleep. The freight train of course did not stop at the station designated, but continuing at a speed of fifteen miles an hour, entered a deep and narrow cut 300 feet in length, through which the road passed at a considerable curve, and on a down grade, when the plaintiff saw on the bank a reflection of the light from the engine of the gravel train, which was approaching from the opposite direction at a speed of five or six miles an hour, and was then within about one hundred feet. He at once whistled for brakes and reversed his engine, but a collision almost immediately followed, destroying the engines, damaging the cars of the two trains, causing the death of one person, and inflicting upon the plaintiff severe and permanent injuries, for which he brings this action.

On the trial the conductor of the gravel train testified that at the time of the collision he was under orders to run to South Minneapolis regardless of the plaintiff's train; that having twelve cars loaded with gravel, his train stalled before reaching the cut where the collision happened; that he then separated his train in the middle, took six cars to Minnehaha Station, went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that the gravel train had run in the night about a week, and that when he could reach Minneapolis before the starting time

of plaintiff's train he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at the same place about every night during the week.

It is evident from this brief statement that the conductor on each train was guilty of gross negligence. The conductor of the freight train was not only required by the general duty devolving on him, as one controlling its movements, to give to its engineer such orders as would enable him to avoid collision with other cars, but as we have seen, he was expressly directed by the regulations of the company, when running by telegraph or special orders, to communicate them to him. Had these regulations been complied with, the collision would have been avoided. The conductor of the gravel train allowed it to be so overloaded that its engine was incapable of moving it at one portion of the road before reaching the cut; and when, in consequence, he was obliged to leave half of his cars on the track while he took the others to Minnehaha, he omitted to send forward information of the delay or to put out signals of danger. Having for the week previous, passed the freight train at nearly the same place on the road, he must have known that by the delay there was danger of collision. Ordinary prudence, therefore, would have dictated the sending forward of information of his position or the putting out of danger signals. Had he done either of these things the collision would not have occurred.

The collision having been caused by the gross negligence of the conductors, the question arises whether the company is responsible to the plaintiff for the injuries which that collision inflicted upon him.

The general liability of a railroad company for injuries, caused by the negligence of its servants, to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this

exemption is, that he has, or, in law, is supposed to have them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption—that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant.

But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence.

When the service to be rendered requires for its performance the employment of several persons, as in the movement of railway trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases, that he takes upon himself risks arising from the negligence of his fellow-servants, while in the same employment, provided always the

master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable. The doctrine was first announced in this country by the Supreme Court of South Carolina in 1841, in *Murray* v. *S. C. Railroad Co.*, 1 McMullan, 385, and was affirmed by the Supreme Court of Massachusetts the following year in *Farwell* v. *Boston and Worcester Railroad Co.*, 4 Met. 49. In the South Carolina case a fireman, whilst in the employ of the company, was injured by the negligence of an engineer also in its employ, and it was held that the company was not liable, the court observing that the engineer no more represented the company than the fireman; that each in his separate department represented his principal; that the regular movement of the train of cars to its destination was the result of the ordinary performance by each of his several duties; and that it seemed to be on the part of the several agents a joint undertaking where each one stipulated for the performance of his several part; that they were not liable to the company for the conduct of each other, nor was the company liable to one for the conduct of another, and that as a general rule, when there was no fault in the owner, he was only liable to his servants for wages.

In the Massachusetts case, an engineer employed by a railroad company to run a train on its road was injured by the negligence of a switch-tender also in its employ, and it was held that the company was not liable. The court placed the exemption of the company, not on the ground of the South Carolina decision, that there was a joint undertaking by the fellow-servants, but on the ground that the contract of the engineer implied that he would take upon himself the risks attending its performance, that those included the injuries which might befall him from the negligence of fellow-servants in the same employment, and that the switch-tender stood in that relation to him. And the court added, that the exemption of the master was supported by considerations of policy. "Where several persons," it said, "are employed in the conduct of one common enterprise or undertaking, and the safety of each depends on

the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." And to the argument, which was strongly pressed, that though the rule might apply where two or more servants are employed in the same department of duty, where each one can exert some influence over the conduct of the other, and thus, to some extent, provide for his own security, yet, that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another, it answered, that the objection was founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. "When the object to be accomplished," it said, "is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case." And it added, "that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." 4 Met. 59, 60.

The opinion in this case, which was delivered by Chief Jus-

tice Shaw, has exerted great influence in controlling the course of decisions in this country. In several States it has been followed, and the English courts have cited it with marked commendation.

The doctrine of the master's exemption from liability was first distinctly announced in England in 1850 by the Court of Exchequer in *Hutchinson* v. *York, Newcastle & Berwick Railway Co.*, 5 Exch. R. 343. *Priestley* v. *Foster*, 3 M. & W. 1, which was decided in 1837, and is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow-servant. In that case a van of the defendant in which the plaintiff was carried was out of repair and overloaded and consequently broke down, and caused the injury complained of; but it did not appear what produced the defect in the van or by whom it was overloaded. The court in giving its decision against the plaintiff observed that if the master was liable, the principle of that liability would "carry us to an alarming extent;" and in illustration of this statement said that if the owner of a carriage was responsible for its sufficiency to the servant, he was, under the principle, responsible for the negligence of his coach-maker or harness-maker or coachman, and mentioned other instances of such possible responsibility to a servant for the negligence of his fellows, concluding that the inconvenience of such consequences afforded a sufficient argument against the application of the principle to that case. The case, therefore, can only be considered as indirectly asserting the doctrine. At any rate, the Hutchinson case is the first one where the doctrine was applied to railway service. There it appeared that a servant of the company who, in the discharge of his duty, was riding on one of its trains, was injured by a collision with another train of the same company, from which his death ensued; and it was held that his representatives could not recover, as he was a fellow-servant with those who caused the injury; and the court said that whether the death resulted from the mismanagement of the one train or the other, or of both, did not affect the principle. The rule was applied at the same time by that court to exempt a master builder from lia-

bility for the death of a bricklayer in his employ caused by the defective construction of a scaffolding by his other workmen, by reason of which it broke and the bricklayer at work upon it was thrown to the ground and killed. *Wigmore* v. *Jay*, 5 Exch. 354.

The doctrine assumes that the servant causing the injury is in the same employment with the servant injured, that is, that both are engaged in a common employment. The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court.

In *Bartonshill Coal Co.* v. *Reid*, and the *Same Company* v. *McGuire*, reported in 3d Macqueen H. L. Cas. 266, 300, decided in 1858, the parties injured were miners employed to work in a coal pit, and the party, whose negligence caused the injury, was employed to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug; and it was held that they were engaged in a common work, that of getting coal from the pit. "The miners," said the court in the latter case, "could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth, and of course at the close of their day's labor the workmen must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person entrusted with the machinery might be occasionally negligent and fail in his duty." Lord Chancellor Chelmsford, who gave the principal opinion in the latter case, referred to previous cases in which the master's exemption from liability had been sustained, and said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them.

It is necessary, however, in each particular case to ascertain whether the servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servants stood in no such relation to him." The Lord Chancellor also commented upon some decisions of the Scotch courts, and among others that of *McNaughton* v. *The Caledonian Railway Co.*, 19 Court of Sess. Cases, 271, and said that it might be "sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was occasioned, were the engine driver and the persons who arranged the switches." And in the same case Lord Brougham, after mentioning the observations of a judge of the Scottish courts that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: "To bring the case within the exemption there must be this most material qualification, that the two servants must be men in the same common employment, and engaged in the same common work under that common employment."

Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two as fellow-servants. Thus, in *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326, decided by the House of Lords

in 1868 on appeal from the Court of Sessions of Scotland, the sub-manager of a coal pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, and led to an accumulation of fire-damp that exploded and injured a workman in the mine, was held to be a fellow-servant with the injured party. And the court laid down the rule that the master was not liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do, and if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. In this case, as in many others in the English courts, the foreman, manager or superintendent of the work, by whose negligence the injury was committed, was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employés of a corporation in departments separated from each other; and it must be admitted that the terms "common employment," under late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow-servants, however widely separated may be their labors. See *Holden* v. *Fitchburgh Railroad Co.*, 129 Mass. 268.

But notwithstanding the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction; and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay

down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so.

There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow-servant with the firemen, the brakemen, the porters and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable treatise on the Law of Negligence: "It has sometimes been said that a corporation is

obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true it would relieve corporations from all liability to servants. The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." § 232 *a*. The author, in a note, refers to *Brickner* v. *New York Central Railroad Co.*, 2 Lansing, 506, decided in the Supreme Court of New York, and afterwards confirmed in the Court of Appeals, 49 N. Y. 672; and to *Malone* v. *Hathaway*, 64 N. Y. 5, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment; but were rather expressed to distinguish the questions thus arising from those then before the court. They indicate, however, a disposition to engraft a limitation upon the general doctrine as to the master's exemption from liability to his servants for the negligence of their fellows, when a corporation is the principal, and acts through superintending agents. Thus, in the first case, the court said: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporations. *They are then* the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be, and is, a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employé, in the common acceptation of those terms, any more than is a director who exercises the same authority." Page 516.

And in *Malone* v. *Hathaway*, in the Court of Appeals, Judge Allen says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employés, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corporation, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 5, 12. See also *Corcoran* v. *Holbrook*, 59 N. Y. 517.

In *Little Miami Railroad Co.* v. *Stevens*, 20 Ohio, 415, the Supreme Court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start, and when to stop, it was liable for an injury received by him caused by the negligence of the conductor. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed on the ground that the engineer and conductor were fellow-servants, and that the engineer had in consequence taken, by his contract of service, the risk of the negligence of the conductor; and, also, that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed, that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. "If men are influenced," said

the court, "by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guarantee against mismanagement of any kind." In *Railway Co.* v. *Keary*, 3 Ohio St. 201, the same court affirmed the doctrine thus announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor in such case was the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion the court said that from the very nature of the contract of service between the company and the employés, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. "For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man, and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other."

In *Louisville & Nashville Railroad Co.* v. *Collins*, 2 Duvall, 114, the subject was elaborately considered by the Court of Appeals of Kentucky. And it held, that in all those operations which require care, vigilance and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively present through its agents who represent it, and whose acts within their representative spheres are its acts; that the rule of English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow-servant, was not adopted to its full extent in that State, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision in his Treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority. "The consequences of mistake or misapprehension upon this point," says the author, "have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employés and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption." Vol. 1, 554.

There are decisions in the courts of other States, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent

the company, then the train is operated without any representative of its owner.

If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism; but its purport touching the liability of the company is, that the conductor and engineer, though both employés, were not fellow-servants in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of the train, and that the latter was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial that the collision which caused the injury complained of was the result of the negligence of the conductor of the freight train, in failing to show to the engineer the order which he had received, to stop the train at South Minneapolis until the gravel train, coming on the same road from an opposite direction, had passed; and the court charged the jury, that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable, holding that the relation of superior and inferior was created by the company, as between the two in the operation of its train; and that they were not, within the reason of the law, fellow-servants engaged in the same common employment.

As this charge was, in our judgment, correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring, therefore, whether any error was committed in the charge on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict. *Brobst* v. *Brock*, 10 Wall. 519. And, with respect to the

negligence of the conductor of the gravel train, no instruction was given or requested.

Judgment affirmed.

MR. JUSTICE BRADLEY, dissenting.

Justices MATTHEWS, GRAY, BLATCHFORD and myself dissent from the judgment of the court. We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employés on the train. We think that to hold otherwise would be to break down the long established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants.

BATCHELOR *v.* BRERETON & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 14, 1884.—Decided December 1, 1884.

S, the wife of B, joined with him in a deed to H of land of B, in trust for the use of S, during her life, and, at any time, on the written request of S, and the written consent of B, to convey it to such person as S might request or direct in writing, with the written consent of B. Afterwards, B made a deed of the land to W, in which H did not join, and in which B was the only grantor, and S was not described as a party, but which was signed by S and bore her seal, and was acknowledged by her in the proper manner: *Held*, That the latter deed did not convey the legal title to the land, and was not made in execution of the power reserved to S.

The question in this case related to the proper distribution of the proceeds of the sale of a parcel of land in lot 9, in square 455, in the city of Washington, under a decree of the Supreme Court of the District of Columbia.

William H. Brereton and Samuel Brereton (also hereinafter called Samuel Brereton, Junior,) being tenants in common of the land, Samuel and Sarah A., his wife, executed to Peter Hannay a deed dated September 29, 1859, of the land in ques-

tion, with some other land in lot 9, which was duly recorded. The deed named Samuel and his wife as the parties of the first part. It recited that Samuel, being seized of the one-half undivided interest in the land, desired to assign and convey the same in such manner that the said one-half interest shall inure to the benefit of the said Sarah A. during her natural life, and that to that end he executed the deed. By it, he conveyed to Hannay, and to his heirs and assigns forever, all his title to one-half of the land, "to have and to hold the said undivided one-half interest in the said lands and premises, to him the said Peter Hannay, his heirs and assigns, in and upon the trusts hereinafter mentioned and declared, and for no other use, trust or purpose whatsoever, in trust for the sole use and benefit of Sarah A. Brereton, . . . the wife of the said Samuel Brereton, during her natural life, free from all ownership, control and obligation to and for her said husband, except so far as herein provided for; to permit the said Sarah A. Brereton to receive the rents, issues and profits of the said undivided one-half interest of said Samuel Brereton in and to said described lands and tenements, and the same to apply to and for her sole use and benefit; and upon this further trust, at any time hereafter, upon the written request of said Sarah A. Brereton, and the written consent of said Samuel Brereton, to sell, dispose of or convey the said undivided pieces or parcels of ground and premises, absolutely, in fee simple, in trust, or for such term or time, and for such uses and purposes, and to such person and persons, as the said Sarah A. Brereton, with the written consent of the said Samuel Brereton, may request or direct, in writing, as aforesaid." The deed further provided that if Samuel should survive Sarah A., the land should revert to him; and that, if she should survive him, the land, after her death, should go to his heirs, or according to his direction given by will or other instrument in writing. Neither in the granting clause nor in the habendum was there any mention of the grant of any interest except the interest of Samuel.

The particular question in this case depended on the effect of a subsequent deed dated June 1, 1874, and duly recorded. That deed began thus: "This indenture, made this first (1st)

day of June, in the year of our Lord one thousand eight hundred and seventy-four (1874), between Wm. H. and Sam. Brereton, of the city of Washington, District of Columbia, parties of the first part, and Wm. H. Ward, of same city and District, of the second part." It then recites, that William H. and Samuel owe to Charles Batchelor $3,500, on a promissory note made by them, payable to him three years after June 1, 1874, with interest at 10 per cent. per annum. It then proceeded: "Now, therefore, this indenture witnesseth, that said parties of the first part" have conveyed and do convey, to the party of the second part, his heirs and assigns, the land in question, with some land in lot 8, describing it, and all the title of the parties of the first part to it, to have and to hold in trust for the payment of said note, and with power, on default in its payment, to sell the land at auction, and convey it, and out of the proceeds of sale to pay the note. The deed concluded as follows: "In testimony whereof, the said parties of the first part have hereunto set their hands and seals;" and is signed thus: "Wm. H. Brereton, (L. S.) Sam. Brereton, (L. S.) S. A. Brereton, (Seal.)"

To this deed was appended the following certificate:

"DISTRICT OF COLUMBIA,
County of Washington, } ss:

I, B. W. Ferguson, a justice of the peace in and for the county aforesaid, do hereby certify, that W. H. Brereton, Samuel Brereton, and Sarah A. Brereton, parties to a certain deed, bearing date on the first (1st) day of June, A.D. 1874, and hereto annexed, personally appeared before me in the county aforesaid, the said W. H. Brereton, Samuel Brereton, and Sarah A. Brereton, his wife, being personally known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Sarah A. Brereton, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and seal, this 23d day of June, A.D. 1874.

B. W. FERGUSON, [SEAL]
Justice of the Peace."

On the 30th of May, 1876, Samuel Brereton died intestate, leaving him surviving his widow, the said Sarah A., and an infant son, James I., his only heir-at-law.

Subsequently, Ward, the trustee under the deed of trust of June 1, 1874, and under another and prior deed of trust to him in favor of the same Charles Batchelor, advertised the land for sale, at auction. Batchelor had died and Mary Ann Batchelor had been appointed his executrix. To prevent this sale, Sarah A. Brereton, on the 4th of February, 1879, filed the bill in this suit, making as defendants James I. Brereton, William H. Brereton, Peter Hannay, William H. Ward, Mary Ann Batchelor, as executrix, and some other parties who claimed an interest in or lien on the land. The bill, after setting forth the trust deed to Ward, of June 1, 1874, averred: "Your oratrix further shows unto this Honorable Court, that, although she sealed, signed, and acknowledged the conveyance" of June 1, 1874, "she did not otherwise join in it, nor is she mentioned therein as a party thereto; that said conveyance does not convey nor purport to convey any right, title, interest, or estate of your oratrix in and to said property, or the right, title, interest, or estate of any person or persons other than that of the said William and Samuel, whose alleged indebtedness said conveyance was designed to secure: and your oratrix is advised and believes, and so charges, that, except to renounce her dower interest in said property, to which your oratrix would have been entitled in case said deed from Samuel Brereton, Senior, to the defendants William Brereton and Samuel Brereton, Junior," (being the deed of February 2, 1854, hereafter mentioned), "under which deed said conveyance to said defendant Ward was made, had been operative and effective, the joinder of your oratrix in the execution and acknowledgment of said conveyance was wholly unnecessary and without effect."

The meaning of this last averment was this: On May 1, 1851, Samuel Brereton, Senior, the father of William H. and Samuel, Junior, conveyed the land in question, with some land in lot 8, to William H. and his heirs, in trust for the use and benefit of Mary Ann, the wife of the said Samuel, Senior, for her life, with remainder in fee for the use and benefit of said William H. and Samuel, Junior, as tenants in common. The said Mary Ann having died, Samuel Brereton, Senior, on the 2d of February, 1854, executed a deed to William H. and Samuel, Junior, in fee, as tenants in common, of the land covered by the deed of May 1, 1851. The bill averred, that, by reason of the deed of May 1, 1851, Samuel Brereton, Senior, no longer had any interest in the premises which the deed of February 2, 1854, purported to convey, and that that deed was inoperative. The meaning of the allegation, that the conveyance to Ward, of June 1, 1874, was made under the deed of February 2, 1854, was, that the only description in the conveyance to Ward of the land it covered said that it was parts of lots 8 and 9 "as the same is more particularly described by metes and bounds, in a deed from Sam. Brereton to Wm. H. and Sam. Brereton, Jr., dated the second day of February, 1854."

The bill averred that Ward was intending to sell the interest of the plaintiff in the land in question, claiming that it passed to him by reason of her having signed and acknowledged the deed of June 1, 1874, notwithstanding the before-mentioned circumstances of such signature and acknowledgment. The bill prayed for an injunction restraining Ward and Mrs. Batchelor from selling the property, and for a sale, under the direction of the court, of the interest in it of all the parties to the suit, and the proper distribution of the proceeds. A temporary injunction was granted.

The answer of Mrs. Batchelor set up that the entire title to the land was vested in Ward, as trustee, to secure the $3,500 note. The land was sold at auction under a decree of the court, by a trustee, a reference was made to an auditor to state the trustee's account, and "the legal distribution of the fund among the parties in interest," and the sale was confirmed.

In July, 1880, the auditor made his report. In it, speaking

of the deed to Ward of June 1, 1874, he said: "The signature of Sarah A. Brereton appears to the said deed, with her seal. She also united in the acknowledgment attached to the said deed, the said acknowledgment being made in the proper form prescribed by the statute regulating that matter in this District. It will be observed, that she is not a party named in any of the recitals of the said deed, and that the trustee, Hannay, is neither mentioned as a party, nor does he unite in any manner in the execution or acknowledgment of the conveyance. . . . It is asserted, upon the one hand, that this deed cannot be recognized here, inasmuch as the trustee is not in any manner a party to it, and inasmuch as it is left uncertain what might have been the intention of the complainant, Sarah A. Brereton, in affixing her signature and uniting in the acknowledgment of the same. Upon the other hand, it is argued that the paper is such an act of the said Sarah A. Brereton as will induce a court of equity to recognize it as the exercise upon her part of the power of appointment, or a direction to her trustee, and to enforce the same as such, and, this distribution being in a court of equity, and being the act of a court of equity, the instrument in question will be so treated and enforced. . . . I am constrained to look upon the paper as absolutely void so far as" Sarah A. Brereton "is concerned, for the purpose of this proceeding. . . . I have, therefore, . . . treated this conveyance as that of William H. Brereton alone, and as not conveying or affecting the interest or estate of the said Sarah A. Brereton, and the distribution to the indebtedness secured by this deed of trust is, therefore, made from the share of the said William H. Brereton, so far as the same is available."

Mrs. Batchelor filed exceptions to the report of the auditor, in which she claimed that the deed of trust to Ward, of June 1, 1874, "is a good and valid lien as well upon the moiety of, or interest in, the land described in the bill, held by Peter Hannay, trustee, as upon that of William H. Brereton," and she, therefore, excepted to the allowance of every item in the report which treated "the said deed of trust as invalid and not a lien upon the moiety or interest held by Hannay."

Opinion of the Court.

On a hearing by the court at special term, the exceptions filed by Mrs. Batchelor were sustained, so far as they related to the deed of June 1, 1874, and the court, in its decree, declared that deed to be a valid lien and charge on both moieties of the land sold, and the report was overruled, so far as it appropriated the proceeds of sale in favor of Sarah A. Brereton and James I. Brereton, as against the deed of June 1, 1874.

The court in general term, on an appeal by the plaintiff from the decree sustaining Mrs. Batchelor's exceptions, reversed the decree in special term, so far as it sustained the exceptions in regard to the effect of the plaintiff's signature to the deed of June 1, 1874, and her acknowledgment thereof, and overruled the exceptions and confirmed the report of the auditor. From the decree to that effect Mrs. Batchelor appealed to this court.

Mr. A. B. Duvall and *Mr. Joseph H. Bradley* for appellants.

Mr. A. S. Worthington and *Mr. Leigh Robinson* for appellees.

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

The only question involved is that stated by the auditor in his report, and it is easy of solution. Mrs. Brereton was not named in the deed of June 1, 1874. She was not a party to it. She granted nothing by it. Although she signed it, and although the magistrate certified that she was a party to it, and that she acknowledged it to be her act and deed, after having had it fully explained to her, and declared that she had willingly signed, sealed and delivered it, and that she wished not to retract it, it is apparent that she was regarded by the parties to it and the magistrate as having executed it only in respect of a dower interest of hers, as the wife of Samuel Brereton—a supposed interest, perhaps, as regarded lot 9, and an actual interest as regarded lot 8. In view of the deed of February 2, 1854, to William H. Brereton and Samuel Brereton, conveying the land in lots 8 and 9 to them in fee, as tenants in

common, and of the reference in the deed of June 1, 1874, to the deed of February 2, 1854, as the basis of the title which the grantors were conveying, it may have been supposed that there was sufficient scope for the signature and acknowledgment by Mrs. Brereton, as regarded lot 9, in the fact that, if her husband had an interest under that deed, in respect to lot 9, which was capable of conveyance, she, as his wife, had an inchoate right of dower in regard to it, which she had not conveyed by the deed of September 29, 1859, and which the parties to the deed of June 1, 1874, and the magistrate had a right to regard as the subject-matter to be affected by her signature and acknowledgment, although the deed of May 1, 1851, had, by the death of Mary Ann Brereton, become operative to vest in William H. and Samuel, Jr., a title in fee to the land in lot 9, prior to the execution of the deeds of February 1, 1854, and September 29, 1859. This may have been thought a sufficient reason for signing the deed, so far as the land in question, which is wholly in lot 9, is concerned, the deed of September 29, 1859, covering land wholly in lot 9. Then, again, the deeds of May 1, 1851, February 2, 1854, and June 1, 1874, cover land in lot 8, as well as land in lot 9; and, as to the land in lot 8, there was clearly a dower interest to be covered by the execution, by Mrs. Brereton, of the last named deed.

But, however all this may be (and it is referred to only as furnishing an explanation of her signature), her interest in the undivided half of the land in lot 9, for her life, free from the ownership of her husband, with the power to direct the conveyance of it by Hannay, was a distinct interest, the legal title to which was in Hannay, in trust, and could not be conveyed, except by Hannay, on her request or direction in writing, with the written consent of her husband. Under the deed of September 29, 1859, no interest in the undivided half of the land in lot 9 could revert to her husband prior to her death. Therefore, it was not any interest of his under that deed which her husband was conveying by the deed of June 1, 1874.

Nor was it her power of appointment created by the deed of September 29, 1859, which she was exercising by the deed of June 1, 1874, because that was to be made effective by a con-

veyance by Hannay, and there was no request or direction by her to Hannay to convey, and he never did convey. The debt of $3,500 to Batchelor, named in the latter deed, is described therein as a debt by William H. Brereton and Samuel Brereton to Batchelor, and Mrs. Brereton is not named as debtor. Therefore, all property which they were conveying by that deed, to secure that debt, was presumably their own property, and any interest of Mrs. Brereton in it, sufficient to call for her signature to that deed, was presumably an interest created by her being the wife of Samuel, and which was supposed to grow out of his title and her marital relation, and not to have been before conveyed, irrespective of any other interest which she had in the land, or any power of appointment in respect of it.

It needs not much argument or authority to support the conclusion at which we have arrived. In *Agricultural Bank* v. *Rice*, 4 How. 225, 241, it was held that, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and that merely signing, sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. In the present case, if Mrs. Brereton possessed the right, she was not the grantor, and used no words to convey her right. No intention on her part to execute the power she possessed appears in the deed. *Warner* v. *Conn. Mut. Life Ins. Co.*, 109 U. S. 357, and cases there cited; Story's Eq. Juris. § 1062 *a*.

Moreover, Hannay possessed the right, and was not the grantor, and was not requested or directed by Mrs. Brereton to convey. 2 Perry on Trusts, § 778.

The decree of the court in general term is *Affirmed.*

REYNOLDS v. CRAWFORDSVILLE FIRST NATIONAL BANK.

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

Submitted November 10, 1884.—Decided November 24, 1884.

After a cause in equity has been set down for hearing on bill and answer, it is too late to move to dismiss, under Equity Rule 66, for want of replication.

A bill in equity, in Indiana, which avers that a deed is void on its face, and an answer which does not deny the averment, will support the jurisdiction of the Circuit Court of the United States in that district to quiet the title of the complainant as against the deed. *Holland* v. *Challen*, 110 U. S. 15, affirmed.

The fact that a national bank, at a judgment sale of real estate mortgaged to it, purchases the mortgaged property and also other property not secured by the mortgage, does not invalidate the title to the mortgaged property which § 5137 Rev. Stat. authorizes the bank to acquire.

This was a bill in equity to quiet title and restrain waste, filed by the appellee, The First National Bank of Crawfordsville, Indiana, against the appellant, Harris Reynolds.

The bill alleged in substance that on August 18, 1875, Reynolds was indebted to the bank in the sum of $7,000, which was evidenced by his note of that date and amount, with Isaac M. Vance and James H. Watson as sureties; and that on the day just mentioned, in order to indemnify the sureties, Reynolds executed a mortgage on certain real estate; that on September 17, 1877, Reynolds executed to the bank another mortgage on the same lands to secure an additional sum of $3,000 which he at that date owed the bank; that on August 30, 1878, Reynolds was adjudged a bankrupt, and John W. Baird was appointed assignee of his estate; that on April 18, 1879, the assignee reported to the bankruptcy court that no assets of the bankrupt had come to his hands and no debts been proven against his estate, whereupon the estate was settled and both the assignee and the bankrupt discharged; that before the discharge of the assignee, to wit, on April 11, 1879, Reynolds stated to the bank that no claims had been proven against his estate, and that the register in bankruptcy

had given him a writing showing that fact, and also showing that the title to the real estate covered by the mortgage to the bank had re-vested in him; that relying upon this statement the bank agreed with Reynolds, Vance and Watson that it would release the two latter from their liability on the note for $7,000, in consideration of which Vance and Watson agreed to pay the bank a certain sum of money and assign to it the mortgage executed to them by Reynolds for their indemnity, and Reynolds agreed to convey the mortgaged property to the bank, but was to be allowed to retain possession thereof until March 1, 1880, and that these agreements were executed; that afterwards the bank purchased a certificate of purchase at sheriff's sale of a certain part of the mortgaged premises which had been sold upon a judgment senior to the mortgage to the bank, and at the expiration of the time for redemption took a sheriff's deed for the land described therein; that the bank was compelled to pay $1,286.60 in discharge of a school-fund mortgage upon the real estate mortgaged to it; that the bank purchased from Ann Smith a decree against said land, and took an assignment thereof to itself; that "said purchases and assignments were made upon the faith of the agreement and deed of Reynolds, and for the purpose of saving expense of foreclosing said liens, and that the amount of liens so held . . . was fully equal to the value of said real estate at the time of said agreement;" that Reynolds, for the purpose of annoying complainant and casting a cloud upon its title and delaying it in getting possession, claimed that after the execution of the deed to the bank, Baird, the assignee, executed to him a quit-claim deed for the same real estate, under which he claimed to be the owner; that this deed was wholly inoperative, null and void, because the interest which it purported to convey never had passed from Reynolds, and because it was made without any authority from the bankruptcy court, and because it was executed by a party out of possession, and as to whom there was an adverse possession.

It was averred, in an amendment to the bill, that the deed from Baird, the assignee, to Reynolds was executed after the latter had made his deed to the bank; that Reynolds had

caused the deed of the assignee to himself to be recorded, and that under it he was asserting a title paramount to that of the bank, and was threatening to commit waste, and was insolvent. The prayer of the bill was for a decree quieting the title of the bank and enjoining waste by Reynolds.

The answer of Reynolds was filed September 20, 1880. It admitted that he was indebted to the bank, as charged in the bill, in the sum of $7,000, for which Vance and Watson were his sureties, and that he had executed to them the indemnifying mortgage mentioned in the bill; it admitted the averments in respect to his bankruptcy, but denied that he had made to the bank the representations that the assignee in bankruptcy had given him a statement in writing showing that no debts had been proven against his estate in bankruptcy, and that the title to his real estate had become re-vested in him. The answer averred that prior to the execution of the deed by Reynolds to the bank, the latter proposed to him that it would pay off all his debts which were liens upon his real estate, and permit him to retain possession thereof until March 1, 1880, on condition that Reynolds would convey to the bank, by quit-claim deed, the mortgaged premises, and upon the further condition that Vance and Watson would convey to the bank, by deed of warranty, two hundred acres of land owned by them, and that this proposition was accepted; that the consideration for the said contract between Reynolds, Watson, Vance, and the bank, pursuant to which he executed the quit-claim deed to the bank, was this undertaking and agreement of the bank; that Vance and Watson complied on their part with the agreement, and conveyed, with covenants of warranty, to the bank two hundred acres of land owned by them; that it was upon the faith of this agreement, and none other, that the quit-claim deed was executed by Reynolds; that when this agreement was entered into the estate in bankruptcy of Reynolds was unsettled, as the bank knew, and that the purchase of the sheriff's certificates and other purchases made and assignments taken by the bank, were in violation of the agreement under which Reynolds made the deed to the bank.

The answer admitted the execution and delivery of the deed

from Baird, the assignee, to Reynolds, and that Reynolds was claiming whatever title the deed conferred on him, and denied that he had threatened to commit waste on the premises.

On May 3, 1881, the cause was set down for hearing on May 11th, on bill and answer by counsel for the bank, and of this the defendant had immediate notice. On the day fixed for the hearing the counsel for Reynolds moved the court to dismiss the bill for failure of the complainant to except to the answer or to file replication thereto.

The motion to dismiss the bill was overruled. The cause was then heard upon bill and answer, and the court found that the equity of the case was with the complainant; that the material averments of the bill, as amended, were true, except the averment as to waste and threatened waste; that the various instruments set forth in the bill had been executed as charged; that Baird, the assignee in bankruptcy, had executed the deed to Reynolds as charged; that this deed was "wholly inoperative, null and void," and that the assertion of title thereunder cast a cloud upon complainant's title; and that the complainant was the owner of and entitled to the possession of the real estate in controversy. A decree was entered on these findings quieting complainant's title and declaring the deed from Baird to Reynolds void. From that decree Reynolds appealed.

Mr. D. W. Voorhees and *Mr. T. F. Davidson* for appellant.

Mr. Joseph E. McDonald, *Mr. John M. Butler*, and *Mr. Augustus L. Mason* for appellee.

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

The first complaint of the appellant is that the court overruled his motion to dismiss the bill, the appellee having failed to file a replication to the answer within the time prescribed by the equity rules. The motion was properly denied. The sixty-sixth equity rule provides that "whenever the answer of the defendant shall not be excepted to, or shall be adjudged or

deemed insufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereof. . . . If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit, and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting, to speed the cause, and to such other terms as may be directed."

The rule thus places it in the defendant's power to compel the complainant to put the cause at issue or to go out of court. The complainant always has the option of setting the case down for hearing on bill and answer instead of filing a replication, and if the defendant neglects to enter the order for the dismissal of the suit for want of replication until after the cause has been set down for hearing on bill and answer, a motion by the defendant to dismiss the suit for want of replication is incongruous and untimely. On setting the cause down for hearing on bill and answer the case is put at issue, the answer becomes evidence (Equity Rule 41, clause 2), and the only evidence the defendant needs, for it must be taken as true in all respects. *Brinkerhoff* v. *Brown*, 7 Johns. Ch. 217; *Grosvenor* v. *Cartwright*, 2 Cas. Ch. 21; *Barker* v. *Wyld*, 1 Vern. 140; *Perkins* v. *Nichols*, 11 Allen, 542; *Dale* v. *McEvers*, 2 Cow. 118. There is, therefore, no necessity for a replication or for the taking of testimony. The setting the case down for hearing on bill and answer is in effect a submission of the cause to the court by the complainant, on the contention that he is entitled to the decree prayed for in his bill upon the admissions and notwithstanding the denials of the answer. It is plain, therefore, that after the cause had been so set down the motion of defendant to dismiss the suit for want of the timely filing of the replication came too late and was rightly overruled.

The appellant next complains of the decree rendered by the Circuit Court, and his first objection is, that the court had no jurisdiction to quiet the title of the appellee as against a deed

averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the legislature of a State cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. *Broderick's Will*, 21 Wall. 503, 520. And although a State law cannot give jurisdiction to any federal court, yet it may give a substantial right of such a character, that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty, or common law. *Ex parte McNeil*, 13 Wall. 236, 243.

While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove. This was expressly held in the case of *Clark* v. *Smith*, 13 Pet. 195, 203, where it was said by this court: "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature." . . .

The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it. § 1070 Rev. Stat. of Indiana, 1881, provides as follows: "An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be

in possession thereof, for the purpose of determining and quieting the question of title."

This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the courts.

Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is. *Marot* v. *The Germania Building Association*, 54 Ind. 37; *Jeffersonville, &c., Railroad Co.* v. *Oyler*, 60 Ind. 383.

The bill of complainant in this case complies with this rule by averring that "said Reynolds is, under his deed" (from Baird, the assignee), "claiming and asserting title paramount to the title of this complainant;" and the answer of the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

The question whether, under such a statute as that of Indiana and under the facts stated, the Circuit Court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this court in the case of *Holland* v. *Challen*, 110 U. S. 15.

In that case, a statute of Nebraska was under review, which provided that "an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title." The court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law or founded on undisputed evidence or long-continued possession.

If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and admin-

ister the rights conferred by this statute, it is not open to question that, in this case, the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appellee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face.

As the same statute authorizes the court to take cognizance of the case even when the title of defendant amounts to more than a mere cloud, and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support.

It is next objected to the decree of the Circuit Court that the appellee's title was itself doubtful, and the bill should for that reason have been dismissed. But it is apparent that the appellant was entitled in equity to all of his estate in bankruptcy not required for the payment of his debts. This estate, as appears by the averments of the bill not denied by the answer, was subject to mortgage and other liens held by the appellee equal in amount to its full value. When, therefore, no debts having been proven against his estate, the appellant was discharged, and his assignee in bankruptcy had fully settled the estate, the quit-claim deed executed by the former to the appellee vested in the latter a clear equitable title to the premises in controversy, and this was sufficient under the Indiana statute to justify the relief prayed for in the bill.

The appellant next insists that the appellee, being a national bank, had no power under the act establishing national banks, to take a conveyance of the two hundred acre tract of land from Vance and Watson, and that, as such a conveyance formed a part of the agreement by which the appellee acquired title to the land conveyed to it by the appellant, the title to the latter tract is void.

The national banking law, Revised Statutes, § 5137, provides that a national banking association may purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted. The power to purchase the real estate in dispute, was, therefore, clearly conferred

by the statute. The fact that, in order to secure the same debt, it purchased other real estate not mortgaged to it, cannot affect the title to the land which it was authorized to purchase. But if there was any force in this objection to the title, it could not be raised by the debtor, for where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *National Bank* v. *Matthews*, 98 U. S. 621, 628; *National Bank* v. *Whitney*, 103 U. S. 99; *Swope* v. *Leffingwell*, 105 U. S. 3.

The appellant insists, further, that the appellee did not perform that part of his contract by which he agreed to pay off the debts of appellant, which were a lien upon the property in question: that the purchase of the sheriff's certificate and the purchase and transfer to himself of the decree in favor of Ann Smith, were not payment of the debts. This is an objection to the form rather than the substance of the transaction. The debts, so far as the original creditors are concerned, were satisfied, and this, together with their assignment to the appellee, who was under a contract with the appellant to pay them, was in substance and effect a payment. There is no averment that the appellee had any purpose to attempt their enforcement against the appellant, and if such attempt should be made it could not, in the face of the contract, succeed.

We think that the decree of the Circuit Court is sustained by the admissions of the answer, and that there is no error in the record.

Decree affirmed.

KANSAS PACIFIC RAILROAD COMPANY *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

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

Argued November 4, 5, 1884.—Decided December 8, 1884.

Under the act of March 3, 1863, 12 Stat. 772, granting lands to Kansas to aid in the construction of railroads, no title could be acquired in any specific tracts as indemnity lands until actual selection; and no selection could be made of lands appropriated by Congress to other purposes prior to the date of the selection.

Upon the admission of a Territory into the Union, corporations created under laws of the Territory become corporations of the State.

In judicial proceedings in courts of the United States to enforce contracts or rights of property, a corporation is regarded as a citizen of the State creating it.

This was a suit in equity brought up on appeal from an adverse decree of the Circuit Court in Kansas (see 2 McCrary, 550). The objects of the suit and the facts which make the case are set forth in the opinion of the court.

Mr. J. P. Usher for appellant.

Mr. James Hagerman and *Mr. J. H. McGowan* for appellee.

Mr. Justice Field delivered the opinion of the court.

The plaintiff and the defendant were incorporated by the Territorial Legislature of Kansas; and the question in controversy relates to land which they respectively claim under grants from the United States. The plaintiff's original name was the Leavenworth, Pawnee and Western Railroad Company, and it is thus termed in the act of Congress of 1862 creating the Union Pacific Railroad Company. After the Territory became a State that name was changed to the Union Pacific Railroad Company, Eastern Division, and the corpora-

tion was so called in subsequent legislation of Congress until some time in 1869, when it received its present designation.

The admission of Kansas as a State into the Union, and the consequent change of its form of government, in no respect affected the essential character of the corporations or their powers or rights. They must after that change be considered as corporations of the State, as much so as if they had derived their existence from its legislation. As its corporations they are to be treated, so far as may be necessary to enforce contracts or rights of property by or against them, as citizens within the clause of the Constitution declaring the extent of the judicial power of the United States. It has been expressly held that they are to be so considered when they have controversies with citizens of other States. And the same course of reasoning which led to this decision must also lead to the conclusion that in all cases where a federal court can take jurisdiction of controversies between citizens, whether of different States or of the same State, it will take jurisdiction of like controversies between corporations, and treat them as citizens of the State under whose laws they were created or continue to exist.

The Constitution declares that the judicial power of the United States shall extend to all cases in law and equity arising under it, the laws of the United States, and treaties made under their authority. The act of March 3, 1875, 18 Stat. 470, invests the Circuit Court with original cognizance, concurrent with the courts of the several States, "of all suits of a civil nature at common law or in equity" thus arising, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500. The reasons for granting this jurisdiction, and for investing it in the Circuit Courts, are as applicable where the controversies are between citizens united under a corporate name, as where they are between citizens in their individual capacity. A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution. As said by Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, at p. 562:

"The grant of incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

The controversy in this case arises upon laws of the United States. As far back as *Cohens* v. *Virginia*, 6 Wheat. 264, 379, decided more than sixty years ago, it was said that a case may be considered to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either. The same thing is expressed by the statement that a case arises under the Constitution or laws of the United States whenever the rights set up by a party may be defeated by one construction or sustained by the opposite construction. *Osborne* v. *Bank of the United States*, 9 Wheat. 738. Here both corporations claim title to the same land in Kansas under different acts of Congress, and the decision depends upon the construction given to those acts. It is, therefore, clear that the court below had jurisdiction of the subject of the suit and of the parties.

The plaintiff claims under the act of July 1, 1862, 12 Stat. 489, to aid the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and acts amending or supplementing it. That act granted to the company formed under its provisions, for every mile of the road, five sections of public land designated by odd numbers on each side of the line of the road within the limit of ten miles, which were not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line was definitely fixed. It also provided that whenever the company had completed forty consecutive miles of any portion of the road and telegraph line, and supplied all necessary equipments and appurtenances of a first-class road, the President of the United States should appoint three commissioners to examine the same, and if they reported that the road and telegraph line had been constructed and equipped in all respects as required, patents were to issue for the adjacent lands. An examination was to be had, as each successive section of forty miles was completed, and, upon a favorable report of the commissioners, other similar patents were to

issue. Within one year after its passage the company was required to file in the Department of the Interior its assent to the act, and within two years afterwards to designate the general route of its road as near as might be, and to file a map of the same in that department. The Secretary of the Interior was then to withdraw the lands within fifteen miles of the designated route from pre-emption, private entry, and sale, and when any portion of the road was finally located he was to cause the lands granted to be surveyed and set off as fast as necessary for the purposes mentioned.

On the 2d of July, 1864, an amendatory act was passed doubling the grant, and extending the limits within which the lands were to be withdrawn to twenty-five miles, but declaring that neither act should defeat or impair any pre-emption, homestead, swamp-land or other lawful claim, nor include any government reservation or mineral lands. 13 Stat. 356. It contained no express words of new and additional grant, but provided that the numbers in the act of 1862 should be stricken out and larger numbers inserted in lieu thereof. Thenceforth the act of 1862 is to be read as against the United States and all parties not having acquired in the mean time paramount rights, as though the substituted numbers were originally inserted therein. *Missouri, Kansas & Texas Railroad Co.* v. *Kansas Pacific Railroad Co.*, 97 U. S. 491, 497; *United States* v. *Burlington, &c., Railroad Co.*, 98 U. S. 334. The title to the increased quantity of land must, with the exceptions mentioned, therefore, be deemed to have passed to the grantee at the date of the original act.

That act contemplated the connection of several branch roads with the main line, one of which the plaintiff was to construct. It directed the President to designate the initial point of that line in Nebraska, on the 100th meridian west from Greenwich, at which the eastern branches were to unite, and authorized the plaintiff to construct a railroad and telegraph line from the Missouri River at the mouth of the Kansas River at the south side thereof, so as to connect with the Pacific road of Missouri at that point. In case the general route of the main line was located so as to require a departure northerly

from the proposed Kansas road before it reached that meridian, the location of that road was to conform to it. The route in Kansas west of the meridian of Fort Riley to the initial point mentioned was to be subject to the approval of the President after actual survey.

The amendatory act of 1864 enlarged the grants made to all the branches of the main road. As was said by this court, in *United States* v. *Burlington, &c., Railroad Co.* 98 U. S. 341: "All the reasons which led to the enlargement of the original grant led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory act, to place the Union Pacific Company, and all its branch companies, upon the same footing as to lands, privileges, and duties, to the extent of their respective roads, except when it was otherwise especially stated. Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question."

On the 3d of July, 1866, Congress passed an act enabling the plaintiff to designate the general route of its road, and to file a map thereof at any time before the 1st of December, 1866, and providing that after the filing of the map the lands along its entire line, so far as it was designated, should be reserved from sale by the Secretary of the Interior. It also provided that the company should connect its line of road and telegraph with the Union Pacific road at a point not more than fifty miles westerly from the meridian of Denver, in Colorado.

It is conceded that the plaintiff in due time filed in the Department of the Interior its acceptance of the acts of 1862 and 1864, commenced the construction of its road under them, completed it within the required time, and complied with the terms and conditions essential to entitle it to the lands granted; that on the 10th of January, 1866, it filed with the Secretary of the Interior a map of the definite location of its road, showing the dates of the actual location of its various parts in com-

pliance with his instructions; that the road was located along and contiguous to the lands in controversy before February 4, 1865; that upon that location the road was afterwards duly constructed; that on February 6, 1866, the location was approved by the Commissioner of the General Land Office; that by instructions soon afterwards given the odd-numbered sections of land within twenty miles of the road were withdrawn from sale and reserved for its use; that the railroad along and adjacent to the lands in controversy was completed and accepted by the President before December 14, 1866, and by his order the Secretary of the Interior was directed to issue patents to the plaintiff for the adjacent lands under the grant; that the lands in controversy in this case are odd sections within twenty miles of the line of the railroad as thus constructed and accepted, and were public lands July 1, 1862, and have not since been entered under any pre-emption or homestead law or otherwise reserved or disposed of by the United States, unless they are embraced in a grant to the State of Kansas by virtue of an act of Congress of March 3, 1863, 12 Stat. 772, under which the defendant claims. If not thus embraced the title of the plaintiff to them is clear.

By that act Congress granted lands to the State of Kansas for the purpose of aiding in the construction of various railroads, one of which was to extend from the city of Atchison via Topeka, the capital of that State, to its western line in the direction of Fort Union and Santa Fé, New Mexico, with a branch down the Neosho Valley to a point where the Leavenworth and Lawrence road entered it. The lands were the alternate sections designated by odd numbers for ten sections in width on each side of the proposed road. The grant was accompanied with a proviso that in case it should appear when the lines or routes of the road should be definitely fixed that the United States had sold any section granted or any part thereof, or that the right of pre-emption or homestead settlement had attached to it, or that it had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to select from the public lands, nearest to the tiers of sections specified, an equal amount

of land in alternate sections or parts of sections, designated by odd numbers, not previously sold, reserved, or otherwise appropriated, to be held by the State of Kansas for the like uses and purposes. The legislature of the State, by an act passed February 9, 1864, accepted the grant from the United States, and, in consideration that the Atchison, Topeka and Santa Fé Railroad Company would construct the road mentioned, directed the governor of the State, whenever any twenty consecutive miles were completed, to convey to that company by patent the lands granted by Congress to aid in its construction, to be selected opposite to and within the limit of ten miles of the road. On the 16th of the same month the company accepted the provisions of this act and filed its acceptance with the Secretary of State. On the 19th of March following, before any route of the road had been designated by the company or any map of it filed, the Commissioner of the General Land Office made an order withdrawing from private sale or location, and from pre-emption or homestead entry, all the public lands lying within ten miles of lines marked by him on a diagram as "the probable lines" of the road and its branches. This order was made at the request of Senators and Representatives in Congress from Kansas, and was approved by the Secretary of the Interior. On the 1st of January, 1866, the company filed in the Department of the Interior a map or profile of its road from Topeka to Emporia, adjacent to which and within twenty miles thereof are the lands in controversy. It is conceded that afterwards the road was constructed in full compliance with the act of Congress and the act of the State of Kansas, and that it was duly approved and accepted by the proper authorities. When its line was definitely fixed it appeared that of the lands lying within the limits of ten miles thereof, many sections and parts of sections had been sold by the United States, and to many the right of pre-emption and homestead settlement had attached, and that some had been reserved by the United States for other purposes, thus greatly diminishing the quantity which would otherwise be covered by the grant. To make up the deficiency the Secretary of the Interior selected the lands in controversy, taking them from

alternate sections designated by odd numbers, nearest the tiers of sections within the ten-mile limit, but outside of that limit and within twenty miles of the road. These indemnity lands were certified to the State by the land department against the objections of the plaintiff, and the proper officers of the State in May, 1873, executed a patent of them to the company.

The question, therefore, for determination is, whether the grant to Kansas, by the act of Congress of March 3, 1863, covered the title to these indemnity lands. We are clear that it did not. It granted only alternate sections, designated by odd numbers, within the limit of ten miles, and from them certain portions were to be excepted. For what was thus excepted other lands were to be selected from adjacent lands, if any then remained, to which no other valid claims had originated. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within with the ten-mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government, subject to its disposal at its pleasure. The grant to the Kansas Pacific Company, by the act of 1862, carried the odd sections within the limit of ten miles from its road, and by the act of 1864 such sections within the limit of twenty miles. The act of 1862 is to be construed, as already said, as though the larger number were originally inserted in it, and, with the exceptions stated, it must be held to pass the title to the grantee as against the United States, and against all persons not having acquired that title previous to the amendment. The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection.

By the very terms of the grant to Kansas, as we have seen, there was excepted from it any sections or parts thereof which the United States had sold or reserved for any purpose, or to which a pre-emption or homestead settlement had attached before the line of the road or its branches had been definitely fixed. And the Secretary was required to select, for like purposes, outside of the limits of the grant, as much lands, says the act, "as shall be equal to such lands as the United States have sold, reserved, or *otherwise appropriated*, or to which the rights of pre-emption or homestead settlements have attached as aforesaid." The reservation "for any purpose" is thus made to cover not merely a specific reservation in terms for the uses of the United States, but any appropriation of the lands by the government.

The line of the road of the Atchison, Topeka and Santa Fé Company was not definitely fixed until 1866. Until then the appropriation of lands, even within the limits of the grant, much less so of lands without them, was in no respect an impairment of its rights. The appropriation outside of those limits only lessened the number of sections from which the Secretary might under certain contingencies have the right to select indemnity lands; it had no other effect. The order of withdrawal of lands along the "probable lines" of the defendant's road made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant. And besides, it only purported to apply to lands within the ten-mile limit, and the lands in controversy lie outside of it, although the court below, overlooking the stipulation of the parties, stated the fact to be otherwise, an error which probably misled it to its conclusion.

It follows from the views expressed that the plaintiff, the Kansas Pacific Railway Company, under the acts of Congress of 1862 and 1864, by a compliance with all their provisions in the construction of its road, acquired the title to the lands in controversy, and has accordingly a right to record evidence of it in the form of a patent.

The decree of the court below is reversed and the case remanded, with directions to enter a decree adjudging that the title to the lands in controversy passed to the plaintiff under the acts of Congress of 1862 *and* 1864*; and that the defendant execute to the plaintiff a conveyance of its claim and interest therein.*

RICHARDSON *v.* TRAVER.

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

Submitted November 14, 1884.—Decided December 8, 1884.

H & M, being owners in common of a tract of land covered by a mortgage to D, from whom they purchased, agreed to partition, H taking tract 1, M taking tract 2, and tract 3 being subdivided between them. M agreed to assume the mortgage to D, and that H should take his portion free from the encumbrance. M sold his interest to Y, who borrowed from R through his agents to make the purchase, mortgaged his interest in tract 2 to secure the money borrowed, and agreed to apply the money borrowed to obtain a release of tract 2 from the mortgage. Instead of doing it he obtained with it a release of tract 3. Subsequently with money obtained from sale of lots in tract 3, and with other money advanced by them, R's agents acquired the notes secured by his mortgage : *Held,* That under all the circumstances of this case, this was to be regarded as a payment of the mortgage notes, and that R as against H was not entitled to be subrogated in the place of D, with the right to enforce the mortgage against tract 2.

This was an appeal from a decree in equity of the Circuit Court of the United States for the Northern District of Illinois. The facts which make the case are stated in the opinion of the court.

Mr. Frederic C. Ingalls for appellant.

Mr. A. McCoy for appellee.

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

The facts, as shown by the testimony in this case, are these: On or about the 19th of December, 1870, Henry J. Traver, the appellee, and Michael Traver, his brother, bought of John

Dickson a tract of land in the city of Chicago, containing about sixteen acres. They paid to Dickson at the time a small part of the purchase money in cash, and for the balance gave their four joint notes, each for the sum of $5,373.67½, payable respectively in two, three, four and five years from date, with interest semi-annually at the rate of eight per cent. per annum. The notes were secured by a deed of trust of the property to Enos Ayres, trustee. After the purchase they laid the property off into blocks and lots, making three blocks, numbered one, two and three respectively, and subdividing each block into lots. Previous to September, 1872, Michael Traver, who lived in Chicago and had the immediate charge of the property, sold some of the lots, partly for cash and partly on credit. On the 5th of September, 1872, an oral agreement was entered into between the two Travers by which Michael was to take all the cash and notes that had been received from sales, and all the unsold parts of block two, and all but eight lots of those unsold in block three, pay the debt to Dickson, and give Henry all of block one and eight lots in block three, clear of the encumbrance of the trust deed to Ayres. In part execution of this agreement Michael at the time conveyed to Henry his interest in block one and in the eight lots in block three. Henry did not convey to Michael until December 20, 1872. On that day, for the consideration of $100, as expressed in the deed, he remised, released, sold, conveyed and quit-claimed to Michael in fee simple, all his "right, title, interest, claim and demand" in the unsold lots in block two and in block three, except the eight which had been conveyed to him by Michael, and, at the same time, transferred to Michael all his interest in the moneys and securities which had been received for the lots sold. In his deed making the conveyance he covenanted that he had "not made, done, committed, executed or suffered any act or acts, thing or things, whatsoever, whereby, or by means whereof, the above-mentioned premises, or any part or parcel thereof, now are, or at any time hereafter may be, impeached, charged or encumbered in any way or manner whatever."

Michael finding himself unable to pay the note to Dickson which fell due in December, 1872, and the interest on the other

notes, entered into an oral agreement with James C. Hyde by which Hyde was to take the property off his hands as he took it from Henry, and pay the debt to Dickson, and relieve the premises conveyed to Henry from the lien of the trust deed to Ayres. Under this agreement Michael conveyed the part of the property, to which he held the title, to Hyde by deed, with full covenants of warranty expressing a consideration of $16,000, and transferred to him all debts due for lots sold. This deed was dated December 28, 1872, but the transaction was not finally ended until some days after that date. Hyde at the same time assumed orally the payment of the Dickson debt, that being the only consideration for the transfer. At the time of this transfer Hyde borrowed from Richardson, the appellant, through Hammond & Bogue, his agents in Chicago, $10,000, for which he executed two notes, payable three years from date, one for $6,000 and the other for $4,000, and secured them by two deeds of trust to Hammond as trustee, each upon different parts of block two. Together these deeds covered the whole of the block. Hammond & Bogue were only authorized to make loans for Richardson on unencumbered property. They knew at the time they paid the money over to Hyde that block two was encumbered by the deed of trust to Ayres, but Hyde promised to pay the past due note and the past due interest to Dickson out of the money he borrowed, and obtain a release from Ayres of that block. Hyde did pay the note and the interest past due and also the note falling due in December, 1873, but instead of getting a release from Ayres of block two, he, without the knowledge of Hammond & Bogue, took one of block three, thus leaving block two still under the encumbrance of a lien prior to that for the benefit of Richardson to the extent of the two notes to Dickson falling due four and five years from date.

When the note maturing in December, 1874, fell due, Hyde was unable to meet it, but in January, 1875, he sold nineteen lots in block two, for which he received $6,000 in cash. With this and other moneys advanced by Hammond & Bogue, Bogue went to the bankers to whom both the remaining Dickson notes had been sent for collection, and paid the money for

them and took them away uncancelled, they having been previously indorsed in blank by Dickson, that falling due in 1875 being "without recourse." One payment of $6,000 was made on the 15th of January, and the other, being $5,641.87, on the 29th. On the day the last payment was made, and after the notes had been taken up, Bogue went to Ayres with them and requested him to release block two from the lien of the trust deed to him. He stated to Ayres that he was the owner of the notes, and thereupon Ayres executed a release of block two, which Bogue signed and acknowledged with him. In this release Bogue is described as the "legal holder of the unpaid notes." After this Hyde paid Hammond & Bogue the money they had advanced to take up the notes from the bank. Hammond, also, at different times, released a part of the lots in block two from the lien of the deed of trust to him for the security of Richardson. The nineteen lots which had been sold, and from the proceeds of which the $6,000 came that was paid to the bank upon the notes on the 15th of January, were released when that sale was made. The other releases were executed when the advances of Hammond & Bogue were repaid by Hyde.

Henry J. Traver first heard of the release of the lien on block two under the trust in favor of Dickson a short time before the 5th of April, 1875, and at that date he brought suit in the Circuit Court of Cook County against Michael Traver, Hyde, Bogue, Ayres, Hammond, and others who had become interested in the property, not, however, including Richardson, to obtain a release of block one from the lien under the Ayres trust deed, on the ground that the Dickson notes had been paid. In this suit he obtained a preliminary injunction restraining Hyde, Bogue, and Ayres from enforcing the trust deed or selling or disposing of the two Dickson notes. On the 30th of June, 1875, while this suit was pending, Hammond & Bogue sent Richardson, in Boston, where he resided, a draft for $400 "in paym't of coupon of James C. Hyde due 28th inst. to 1st prox." In their letter to Richardson enclosing the remittance Hammond & Bogue made no mention of any change in the form of his securities, or of the suit which had been

begun by Henry J. Traver. On the 7th of October, 1875, Hyde and Hammond & Bogue answered the bill of Traver, and on the 8th Ayres filed his answer. In the answer of Hammond & Bogue they state that "on or about the time when the first of said two Dickson notes became due, the said Hyde requested these defendants to allow him to pay up said notes for $6,000 and $4,000 then held by said Richardson, and to purchase the said two Dickson notes. And these defendants, acting as the agents of said Richardson, at the request of said Hyde, agreed to and did receive payment of said $6,000 and $4,000 notes, secured by the deeds of trust to this defendant Hammond on said block two, and this defendant Hammond released the greater portion of said block two from the lien of said trust deeds, made to this defendant Hammond as trustee, there being about ten lots yet remaining not formally released, but this defendant Hammond was and is ready to release the same at any time at request of said Hyde, unless enjoined by the court. And the said Hyde, having paid up the interest on said two Dickson notes and a sufficient amount of the principal to reduce the same to the sum of ten thousand dollars, these defendants agreed to and did take said notes by purchase, acting for and in behalf of said Richardson, and the said Richardson is now the legal and equitable owner of the same for full value. And these defendants, as such agents, consented to extend the time of payment of said Dickson notes first becoming due for the period of one year. And these defendants, also at the request of said Hyde, consented to the release of said block two from the lien of said trust deed to said Ayres as trustee, and this defendant, Bogue, signed said release, joining with said trustee, but these defendants at that time supposed and believed that said Hyde was the owner of both block one and block two, and knew nothing of the said agreement between said complainant [Henry Traver] and said Michael Traver, and between said Michael Traver and said Hyde. And these defendants, for and in behalf of said Richardson, extended the time of payment of said Dickson note, first payable, for the term of one year; and the said Dickson notes are now in the hands and possession of these defendants

as the agents of the said Richardson, who is the legal and equitable owner of the same, and who paid full value therefor."

The answer of Hyde was in substance the same.

On the 8th of December following, Hammond & Bogue wrote Richardson as follows:

"With regard to the Traver loan, we have to say, from present appearances we do not think there is a prospect of any payment being made at present. But we are of opinion it will be for your interest to institute prompt proceedings to foreclose if nothing is paid. The security on this loan was modified by us from the form as originally taken, as follows: At the time of negotiating for the loan there was existing a prior purchase-money security of the same character as that taken by us. Our first arrangement, at the time of the negotiation of the loan, was to have this original encumbrance released, in order that your loan should be a first lien. Instead of the release we had the original security (being the purchase-money paper secured by deed of trust) transferred to us, for your account, in substitution of the security first taken, and which we hold for your security as a first and prior lien, and we think it advisable, in case no payment is made this month when the payment is due (December 19th), that proceedings for foreclosure in the United States court be commenced immediately. We are legally advised and believe that this course will result in procuring an early settlement, but if not, it will be a speedy proceeding by which a final result may be reached much sooner than is the case in the other courts. We would like you to advise and direct us in regard to immediate proceedings to foreclose as we may deem necessary for our interest. An early reply is important. Send all papers of both loans."

Richardson at once sent forward the two notes and deeds of trust, and their receipt was acknowledged by Hammond & Bogue under date of the 13th of December.

On the 28th of December suit was begun by Richardson in the Circuit Court of the United States for the Northern District of Illinois, against the Travers, Ayres, Hammond, and certain purchasers of the property, to enforce the lien of the

Ayres deed of trust on block one for the security of the two Dickson notes. In the bill Richardson stated that "on or about the 15th of January, 1875," he had, "for a good and valuable consideration, purchased from the said John Dickson the two notes aforesaid." Thereupon, Henry J. Traver filed a supplemental bill in his suit in the State court, under which he brought in Richardson as a party. Richardson appeared, and, on his petition, the case was removed to the Circuit Court of the United States for the Northern District of Illinois. When it got there it was consolidated with the suit which had been begun by Richardson. The Circuit Court, on final hearing, dismissed the bill of Richardson and rendered a decree in favor of Traver, cancelling the lien of the deed of trust to Ayres on block one. From that decree Richardson has appealed.

After a careful consideration of the evidence we are satisfied with the decree below. To our minds it is clear that the Dickson notes have been *paid* by Hyde, not *bought* by Richardson. Richardson never heard of the transaction in reference to the Dickson notes until nearly a year after it occurred. He held all the time his original notes and the deeds of trust which were given for their security. Long after the time when it is claimed the notes were paid Hyde, through Hammond & Bogue, remitted him the interest when it fell due according to the terms of the notes he had in his own hands, and did not intimate in any way that those notes had been paid and others substituted for them. The books of Hammond & Bogue contain nothing to connect Richardson with the taking up of the Dickson notes. The $6,000 which Hyde handed to Bogue, and which he used in taking up the notes on the 15th of January, was neither entered to the credit of Hyde nor Richardson. In fact, it nowhere appears in any account on the books. The $5,641.87 which Hammond & Bogue did advance was charged directly to Hyde, and his payments on that account were passed to his credit. In all the conversations with Bogue which have been testified to, he did not intimate that Richardson was the owner of the notes. It is no doubt true the parties supposed that by keeping the notes uncancelled they might be so used as to make the lien under the Ayres trust

on block one available as additional security for the ultimate payment of the Richardson notes, but as Hyde, not Richardson, paid the bank for them, if Hyde could not charge Henry Traver's property with their payment Richardson cannot. Michael Traver bound himself to Henry to pay the notes and discharge block one from the lien of the trust created for their security. Hyde bound himself to Michael Traver to carry out this agreement which had been made with Henry. When the notes were afterwards taken up from the bank, where there were sent for collection, with the money of Hyde, they were, in legal effect, *paid*, and from that time the lien on block one was discharged. Hyde could not himself enforce them against that property, neither can Richardson. Although Hammond & Bogue advanced a part of the money to take up the notes, it was afterwards repaid to them by Hyde, and that made all the money paid for the notes his own. Hyde, Hammond and Bogue all swear, with more or less directness, that Hyde paid the Richardson notes, and that this money was used to buy the Dickson notes, but this is contradicted by the well-established facts in the case, and it is apparent, from their own testimony, taken as a whole, that, until long after the Henry Traver suit was begun, they had no idea that they were doing anything more than keeping the Dickson lien alive as additional security for Richardson. The testimony satisfies us beyond doubt that both Hammond and Bogue knew all about the obligation of Hyde to discharge the lien of those notes on block one, and that the pretence of a payment of the Richardson notes, and the use of the money so paid to buy them, was all an afterthought. There is not a single act or fact which appears in the transaction to indicate that anything of the kind was in the minds of the parties at the time.

It is said, however, that parol evidence of the agreements between Henry and Michael Traver, and between Michael Traver and Hyde, is not admissible, because the "agreements were contradictory to the acknowledgments, and in opposition to the plain import of the covenants contained in the deeds. If, by possibility, they could be held as of force between the

original parties, they were ineffective and nugatory as to third parties."

Neither Michael Traver nor Hyde deny that the parol agreements were made precisely as charged in the Traver bill, and it is elementary learning that evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it. 1 Greenl. Ev. 286; 2 Phil. Ev. 353. In both these deeds a valuable consideration is expressed, and it is not inconsistent with the considerations so expressed to show, that the actual considerations were the agreements to pay the Dickson notes. The question here is not as to the liability of Henry J. Traver or Michael Traver upon the covenants in their respective deeds. Undoubtedly their covenants, such as they are, run with the land, but Richardson is not now claiming under the conveyances. The title, if any, which he has to the land embraced in those conveyances is not now disputed. He is suing to collect the Dickson notes, by enforcing their lien on property not included in his original security, and the question in the case is whether they have been paid, and in that is involved the further question, whether Hyde, through whom he got the notes, was bound to pay them. To show that Hyde was so bound, his agreement to that effect, as the consideration for the conveyance to him, was proven. As Richardson does not, in this suit, claim anything under that deed, the covenants cannot be used as an estoppel in his favor. The actual facts may therefore be shown.

It is also claimed that "Richardson is entitled to hold the Dickson security by way of subrogation." But relief is not asked, either in the bill of Richardson or in his answer to the Traver bill, on that account. In both his bill and answer he puts his claim entirely on the ground of the purchase and ownership of the Dickson notes, and makes no mention whatever of his original loan to Hyde, or of the security which was taken therefor. In the answers of Hammond, Bogue and Hyde it is distinctly stated that Richardson's notes were paid, and the Dickson notes bought with the money realized by this payment. Hammond & Bogue having advanced part of the

money to take up the notes, could undoubtedly have held them to secure the repayment of their advances; but, as that repayment has been made, the case stands precisely as it would if Hyde had himself furnished the money originally.

But if relief had been asked on the ground of subrogation, it could not have been granted on the facts as they now appear. The notes were paid by Hyde under his obligation for that purpose, and that discharged the security on block two as well as on block one. The question is not whether, if the notes had not been paid by Hyde, and Dickson were now endeavoring to enforce his security, Richardson could require him to exhaust his lien on block one before coming on block two; nor whether, if Richardson's security on block two had been diminished by a compulsory sale of that block for Dickson's benefit, he could resort to block one to make good his loss; but whether, having voluntarily released his security on block two, without the consent of or notice to Henry Traver, to enable Hyde to raise the money to take up the notes, he can hold the notes with a lien on block one in place of the security he gave up. The doctrine of subrogation, which is a creature of equity, has never been carried to that extent. If Richardson had in good faith paid the notes with his own money to protect himself under his junior security, he would have been put in the place of Dickson as the owner of the notes, and, upon a foreclosure, his rights in block two as against those of Henry Traver in block one could have been ascertained and protected. But such is not the case. His agents and trustee saw fit, without consulting Henry Traver, to allow Hyde to use block two to pay the notes. This block Hyde owned subject to the liens, 1, in favor of Dickson, and, 2, in favor of Richardson. As against Hyde, Henry Traver had the right to have block two sold to pay the Dickson debt before block one was resorted to, because Hyde was bound to pay the Dickson debt and release block one from encumbrance on that account. Whether, as against Richardson's junior encumbrance on block two, Traver could require Dickson to sell that block before coming on block one, depends entirely on the effect of Henry Traver's covenants in his deed of release and quit-claim to Michael, about which we

express no opinion, because to our minds it is clear that Richardson, by voluntarily releasing, without the consent of Henry Traver, a part of his junior security on block two to enable Hyde to raise the money to discharge the debt to Dickson, was not subrogated to the rights of Dickson under his original security on block one. If Traver had been consulted, and had consented to the keeping alive of the Dickson notes to take the place of the security of Richardson which had been released, the case would have been different, but as property bound for the Dickson debt was in fact used to pay it with the consent of the junior encumbrancer, no lien upon other property for the security of the Dickson debt can be kept alive for the benefit of the releasing junior encumbrancer without the consent of those whose interests in the other property are to be affected. The payment to Dickson discharged the debt and all that pertained to its continued existence.

Decree affirmed.

MIDDLETON *v.* MULLICA TOWNSHIP.

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

Argued October 17, 1884.—Decided December 8, 1884.

An act of the legislature of New Jersey construed,—to the effect that it authorized certain township officers to execute bonds for the township to raise money for bounties to volunteers.

The facts are stated in the opinion of the court.

Mr. F. C. Brewster and *Mr. F. C. Brewster, Jr.*, for plaintiff in error.

Mr. P. L. Voorhees for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This is an action of debt brought in the court below to re-

cover the amount of six bonds (or alleged bonds) of the township of Mullica, in the county of Atlantic and State of New Jersey, one being for $500 and the others for $1,000 each. The declaration also contains the common money counts. A copy of the instruments sued on was annexed to the declaration, all being in the following form:

"United States of America, State of New Jersey.

"[Bond No. 146.] Amount, $1,000.

"The township of Mullica, county of Atlantic, acknowledge themselves indebted to Samuel Crowley in the sum of one thousand dollars, lawful money of the United States; which sum they promise to pay to the said Samuel Crowley, or to his order, two years after date hereof, with interest at the rate of six per centum per annum, payable annually, the aforesaid sum of one thousand dollars having been borrowed of said Samuel Crowley, by order of said township committee, pursuant to a resolution passed January 1, 1864; interest payable at the State Bank at Camden.

"In witness whereof, the said township committee have caused this bond to be sealed with their seal, and attested by the signatures of their president and clerk, this 31st day of December, A. D. one thousand eight hundred and sixty-four.

"[L. S.] Edw'd T. McKean, *Clerk.*

Timothy Henderson, *President.*"

[U. S. Revenue Stamp, 50 cents.]

By one series of counts (six in number) these instruments were severally declared on as the writings obligatory of the township, sealed with its seal, and made payable and delivered to Crowley, as agent of the township, to assist it in passing away and transferring the bonds to raise money thereon for its use and benefit. In another series of counts (also six in number) the instruments are severally declared on as orders of the township, made by its authorized agents, Henderson, president, and McKean, clerk, of the township committee, and made payable to Crowley as the agent of the township to pass them away and raise money on them for the township. All the

counts averred that Crowley indorsed and delivered the bonds or orders to the plaintiff. The defendant pleaded *non est factum* to the first six counts (those in which the instruments were declared on as bonds), and *nil debet* to the others, and the statute of limitations (of six years) to all of them.

At the trial, the plaintiff proved the execution of the bonds by Henderson, president, and McKean, clerk, of the township committee, and the indorsement of them by Crowley to the plaintiff; and also put in evidence a book, called the defendant's bond book, produced by the defendant on the call of the plaintiff, and having the following heading: "Issue of bonds by the township of Mullica in pursuance of a resolution adopted January 1, 1864." At page 7 plaintiff read the following list of bonds:

Date of Bond.	*Number.*	*Amount.*	*To whom issued.*	*When due.*
Dec. 31, 1864.	145	$500	Samuel Crowley.	Dec. 31, 1866.
"	146	1,000	"	"
"	147	1,000	"	"
"	148	1,000	"	"
"	149	1,000	"	"
"	150	1,000	"	"

To show that the bonds were executed by lawful authority, the plaintiff read two acts of the legislature of New Jersey. The first (approved March 4, 1864) was entitled "An Act to legalize certain acts of the township of Mullica, in the county of Atlantic, relative to raising money to pay bounty to volunteers and to provide for the payment of the same," and recited and enacted as follows:

"WHEREAS the inhabitants of the township of Mullica, in the county of Atlantic, did, on the first day of January, Anno Domini eighteen hundred and sixty-four, vote to pay a bounty of two hundred and twenty-five dollars to each person volunteering to fill the quota of said township under the calls of the President of the United States (the said quota being thirty-four); and whereas the said inhabitants having no authority, under the laws of the State, to offer said bounty or borrow money for the payment of the same; therefore,

"1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That the said township of Mullica be authorized to provide for the payment of said bounties the sum of seven thousand six hundred and fifty dollars, and the interest thereon, by the issuing of their bonds, or township orders, bearing interest at the rate of six per centum per annum, and payable at such times as the township committee of said township may determine; *Provided*, that not less than fifteen hundred nor more than twenty-five hundred dollars shall be raised for the purpose of paying said bonds or orders in any one year, including the interest thereon.

"3. *And be it enacted*, That the acts and doings of the township committee and of the inhabitants of the said township of Mullica, mentioned in the first section of this act, to raise seven thousand six hundred and fifty dollars, and the interest thereon, to pay bounties to volunteers as aforesaid, to fill the quota of the said township, are valid in all respects and binding upon the inhabitants and taxable property of said township."

The other act is not material to the case and need not be recited.

Upon the evidence thus presented the court below ruled out the bonds and directed a verdict for the defendant, and the plaintiff excepted. The question raised by the bill of exceptions is, whether this direction was erroneous; and this involves the question whether the officers who executed the bonds had any authority to do so.

An examination of the organic laws of the State of New Jersey shows that the inhabitants of the several townships in the different counties are corporate bodies, being authorized, at their annual or special town meetings, "to vote, grant, and raise such sum or sums of money for the maintenance and support of the poor; the building and repairing of pounds; the opening, making, working, &c., of roads; the destruction of noxious wild animals and birds; for running and ascertaining the lines, and prosecuting or defending the common rights of such township, and for other necessary charges and legal objects and purposes thereof as are or shall be by law ex-

pressly vested in the inhabitants of the several townships of this State by this or some other act of the legislature."

They are also authorized, at their annual meetings, to elect a clerk, assessors, collectors, commissioners of appeal in matter of taxes, chosen freeholders to represent the township in the county board, surveyors of highways, overseers of the poor, constables, and a judge of election; and in addition to these officers, all having their appropriate duties to perform, they are also, by special provision, authorized "to elect five judicious freeholders, resident within the township, who shall be denominated the *township committee*, a majority of whom shall be a quorum, and shall continue in office one year and until others are chosen in their stead, which committee shall have authority, and it is hereby rendered their duty, to examine, inspect, and report to the annual or other town meetings the accounts and vouchers of the township officers, and to superintend the expenditure of any moneys raised by tax for the use of the township, or which may arise from the balance of the accounts of any of the township officers." Besides the duties here specified the township committee is invested with certain other powers, such as, in certain cases, to fill vacancies in the other township offices caused by death, removal, refusal to serve, &c., and to call special town meetings when they may deem it necessary; but they have no general authority to act for the township. This must be conceded; and it is clearly shown by the cases cited by the counsel for the defendant.

At the same time, it must be admitted that, in view of the peculiar functions and duties of the township committee, they are altogether the most appropriate officers of the township for the performance of such a duty as the issuing of township bonds, whenever such bonds are authorized to be issued, since the township itself has no permanent presiding officer, or head, but only a temporary chairman, called a moderator, who simply presides over the town meeting by which he is appointed. The question then arises, did the act of March 4, 1864, give the township committee authority to issue the bonds in question? If the act is carefully examined it will be seen that it not only ratified the proceedings of the town meeting held on the 1st of

January, 1864, voting a bounty of $250 to each person volunteering to fill the quota of the township, but that it authorized the township to provide for the payment of said bounties by issuing its bonds at six per cent. interest payable at such times as the township committee might determine. It ratified what had been resolved by the town meeting, and authorized the issue of township bonds to carry that resolution into effect. The question then arises, who were the proper persons to issue the bonds? The town meeting itself certainly could not do it. Is it not the plain inference of the statute that the bonds should be issued under the direction and supervision of the township committee, as they were to fix the time of payment, and were the only body which had the general superintendence of the township finances?

And here it is proper to notice that the proceedings of the town meeting on the 1st of January, 1864, were not given in evidence. Of course, the defendants had them in their possession, and could have produced them. We only know so much of said proceedings as is recited in the act of the legislature. It is possible that the town meeting, besides voting the bounties referred to in the act, directed the township committee (as would be natural) to issue the obligations of the township for the purpose of raising the money requisite to pay such bounties. On this point, the bond-book of the township may be entitled to much weight. It professes to exhibit the "Issue of bonds by the township of Mullica *in pursuance of a resolution adopted January* 1, 1864;" and it enumerates in that category the bonds in question in this suit. That is to say, the township book declares and shows that the bonds in suit were issued in pursuance of a resolution adopted January 1, 1864; and this declaration stood there on the book from 1864, when the bonds were issued, until the trial of the suit in 1871. The resolution thus referred to must, of course, have been part and parcel of the proceedings relating to bounties to be paid to volunteers, which were ratified by the act of March 4, 1864.

Taking all these things together, we are satisfied that, by the said act, which ratified the said proceedings, expressly including (as it does) "the acts and doings of the township committee,"

as well as of the inhabitants of the township, and authorizing the issue of bonds to carry out their intentions with such time of payment as the township committee should determine, it was the intention of the legislature to authorize the execution and issue of such bonds by the township committee.

There can be little doubt that this conclusion is in accordance with the justice of the case. Money was raised on these bonds. The plaintiff testified that he purchased them for value of Crowley (the payee), and received them from Crowley, or Henderson, or McKean, he could not recollect which. Evidently the township officers were concerned in the transaction. At all events, the plaintiff purchased them and paid for them; and they were duly entered in the township bond-book as bonds of the township, and there can be little doubt that the township reaped the benefit of the transaction. We have no doubt that they are the valid obligations of the township, and that the court below erred in ruling them out, and in directing a verdict for the defendant. They ought at least, to have been given to the jury under the evidence in the case.

The judgment of the Circuit Court is reversed, and the case is remanded with direction to award a venire facias de novo.

FORTIER *v.* NEW ORLEANS NATIONAL BANK.

NEW ORLEANS NATIONAL BANK *v.* FORTIER.

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

Argued November 17, 1884.—Decided December 1, 1884.

A bill was brought in the name of A. B. "in his capacity as president of the N. O. National Bank." Throughout the pleadings and all proceedings below it was treated as the suit of the bank. After appeal it was assigned for error that it was the suit of A. B., and, as A. B. and the defendant were citizens of the same State, that this court was without jurisdiction. *Held*, That the defendant was bound by the construction put upon the bill below, and that the objection to jurisdiction was too late.

Statement of Facts.

In Louisiana the certificate of a judge under article 127 of the Code, that he has examined a married woman apart from her husband touching a proposed borrowing of money by her, and that he is satisfied that the proposed debt is not to be contracted for her husband's debt or for his separate advantage, or for the benefit of his separate estate, or for the community, is not conclusive, but casts on the wife the burden of proving that the money borrowed did not inure to her benefit.

A national bank may loan on security of a mortgage if not objected to by the United States. *National Bank* v. *Matthews*, 98 U. S. 621, and *National Bank* v. *Whitney*, 103 U. S. 99, affirmed.

These were cross-appeals from a decree in equity in a cause brought by "Albert Baldwin, in his capacity of president of the New Orleans National Bank, a corporation organized under the National Banking Law, against Celestine Louise Fortier," who was a married woman, the wife of Polycarpe Fortier.

The purpose of the suit was to enforce the collection of a note "drawn," as the bill averred, "by the said Celestine Louise Fortier to her own order, and by her indorsed with the authorization of her said husband, dated at New Orleans, March 16, 1877, payable one year after date, bearing interest at eight per cent. per annum from maturity until paid, for ten thousand dollars." Leon Godchaux was the payee of the note, who, after its maturity and but a short time before the suit was brought, transferred it to the New Orleans National Bank. The note was secured by a mortgage, executed by Mrs. Fortier, on three squares and six lots of ground in the city of New Orleans, which were her separate property. The bill by which the suit was commenced prayed for an order of seizure and sale of the mortgaged premises, as provided by the Code of Practice of Louisiana.

The mortgage was in the ordinary form of mortgages in Louisiana, and was executed in the usual manner before a notary public and competent witnesses. Appended to it was the following certificate:

"The State of Louisiana, *Parish of Orleans, City of New Orleans:*

"Fourth District Court for the Parish of Orleans.

"I, W. T. Houston, judge of the Fourth District Court for

Statement of Facts.

the Parish of Orleans, do hereby certify that on this 14th day of March, 1877, personally came and appeared before me, at chambers, in the city of New Orleans, Mrs. Celestine Louise Labranche, of lawful age, the wife of Polycarpe Fortier, of this city, and by virtue of article 127 of the Revised Civil Code of Louisiana, I did then and there examine the said Mrs. P. Fortier, separate and apart from her said husband, and she stated that she appeared before me for the purpose of obtaining the certificate specified in said article to borrow the sum of ten thousand dollars for her separate benefit and advantage by mortgaging her separate property.

"I do further certify that then and there I examined her touching the object for which the said sum of money was to be borrowed, and that I have by her declaration, made on oath, ascertained to my satisfaction that the sum of ten thousand dollars, which the said Mrs. P. Fortier desires to borrow, is not for her husband's debts nor for his separate advantage or the benefit of his separate estate or for the community, but that the same is solely for her separate advantage, and I therefore give and sign this certificate in pursuance of said article, giving my sanction and authority to said Mrs. P. Fortier, with the authorization of her husband to hypothecate or mortgage her separate property for the purpose of borrowing the said sum of ten thousand dollars.

"Witness my hand and the seal of said court, this 14th day of March, 1877.

"W. T. Houston, *Judge.*"

A writ of seizure and sale having issued as prayed for in the bill, Mrs. Fortier filed her plea and a cross-bill. In the latter she prayed for an injunction to restrain the seizure and sale of the mortgaged premises. The grounds upon which she based her defence to the original bill, and the relief prayed by her cross-bill, were as follows: Admitting that at and before the date of the note and mortgage she was separated in property from her husband, Polycarpe Fortier, she averred that she was possessed in her own right, as of a separate estate, of the property described in the mortgage: that the consideration of the note

sued on and secured by the mortgage was in part money lent to her husband by Godchaux, the payee, and in part the payment and satisfaction of a debt due from her husband to Godchaux.

To show that Godchaux knew that the money was not borrowed for the separate benefit of Mrs. Fortier, the cross-bill further averred that, before the execution of the mortgage by her, it was agreed between her husband and Godchaux that the loan should be secured by a mortgage on her husband's property; but the titles not proving satisfactory to Godchaux, it was agreed between him and her husband that the mortgage to secure the loan should be placed on her separate property, and that it should be transferred to the property of her husband when his titles were perfected. For the reasons stated it was averred that the note and mortgage sued on were not binding on her property.

There was an answer and demurrer to the cross-bill. The answer denied that the note sued on was given for any other purpose than that expressed in the certificate of the judge appended to the mortgage, and averred that the money raised on the note was all paid to Mrs. Fortier except the discount, amounting to $1,025, and the sum of $1,200, which was, by her direction, handed to the notary to pay taxes due on the mortgaged premises.

The demurrer applied to all those averments of the cross-bill "tending to show that the said note and mortgage granted by her," Mrs. Fortier, "to secure the same were not executed for her own use and benefit, in opposition to her sworn declarations made on her examination by the judge of the Fourth District Court and the certificate of the said judge to that effect, and to all those averments in regard to the application made of the money lent by said Godchaux on the faith of said mortgage."

It was shown by the evidence that the mortgage and note were executed in the office of the notary; that Mr. and Mrs. Fortier and Godchaux, the payee of the note and the mortgagee, were present; that upon the execution and delivery of the papers Godchaux retained from the $10,000, for which the note was given, first, the discount of 10 per cent. on the face of

Statement of Facts.

the note, amounting to $1,025, and, second, the amount of a debt due from Mr. Fortier to him, being the sum of $1,800; that he gave his check to the notary for $1,200 to be applied to the discharge of taxes, &c., which were a lien on the mortgaged premises, and that he paid the residue of the $10,000 by handing to Mrs. Fortier his check on the Union National Bank for $5,975, payable to her order.

It was further shown that after Mrs. Fortier received the check it was deposited by Mr. Fortier, with her indorsement, to his own credit in the Louisiana National Bank, and the deposit was drawn out from time to time thereafter on his checks. The proceeds of the check for $1,200 handed to the notary were applied, after deducting the fees of the notary, to the payment of the taxes, interest and costs, which were a lien on the mortgaged premises.

Robert Duqué, a witness for the defendant, who appeared to be the friend and legal adviser of Mr. Fortier, the husband, testified that the latter, before the execution of the note and mortgage in suit, proposed to Godchaux to borrow of him $10,000 and to secure the same by a mortgage on the Fort Leon plantation, of which he was the owner; that Godchaux declined to make the loan on the security offered on account of some defect in the title, and that the loan was afterwards made on the security of the mortgage in suit, with the agreement between Mr. Fortier and Godchaux that when the former perfected his title to the Fort Leon plantation the mortgage should be transferred to it and the property of Mrs. Fortier released therefrom.

The testimony of Duqué on these points was directly and unequivocally contradicted by the deposition of Godchaux.

Godchaux also testified that before the loan was made to Mrs. Fortier he went to see the property which was afterwards mortgaged; that he was shown over it by Mrs. Fortier, who told him she wanted to borrow the money to improve the property and pay off the taxes due upon it.

This testimony of Godchaux, in reference to his inspection of the property and the statements of Mrs. Fortier, was not directly contradicted by her, although she was examined as a

witness in the case, nor was she questioned by her counsel in reference thereto. She testified that she received no money from Godchaux on the loan made by him, and that she did not receive any money on his check, which she admitted was indorsed by her, and that none of the money loaned was used for her separate benefit.

Upon final hearing the Circuit Court rendered a decree for the complainant, in the original bill for $7,860 with interest thereon from March 16, 1878, and five per cent. attorney's fees, having deducted from the amount appearing to be due upon the note of Mrs. Fortier the sum $2,140, that sum being the amount detained by Godchaux out of the proceeds of the note of Mrs. Fortier for the debt due him by Mr. Fortier, with the interest, &c. The court dismissed the cross-bill with costs. Both parties appealed.

Mr. John A. Campbell (*Mr. Thomas J. Semmes* was with him) for the bank.

Mr. B. F. Jonas (*Mr. Henry C. Miller* was with him) for Mrs. Fortier.

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

It is first assigned for error by Mrs. Fortier, the original defendant, that as the bill was filed in the name of "Albert Baldwin, in his capacity of president of the New Orleans National Bank," against the defendant, who is alleged to be a citizen of Louisiana, it does not appear that the parties were citizens of different States, and, as no other ground of jurisdiction is averred, the Circuit Court does not appear to have had jurisdiction of the case.

If Baldwin was, in fact, the complainant, there was no ground stated in the petition upon which the jurisdiction of the Circuit Court could rest, and the objection to the jurisdiction could be made at any time. But the counsel for the bank insists that the bank, and not Baldwin, was the complainant. The question is, therefore, how is the bill to be construed?

It is clear, upon an inspection of the whole record, that the

suit was treated by both parties and by the Circuit Court as the suit of the New Orleans National Bank, and not of Albert Baldwin. Every pleading in the case, including the answer and cross-bill filed by the defendant, and every order and decree made by the court, was entitled "*The New Orleans National Bank* v. *C. L. Fortier*." In the appeal bond given by the defendant the case was described in the same manner. The cause of action set out in the petition was the cause of action of the bank. The plea of the defendant to the original bill treated the bank as the complainant by averring that "the said bank is not the holder of the note for value, and that the note was sued on in the name of the bank merely to give the court jurisdiction." The answer to the cross-bill was styled the answer of the New Orleans National Bank. It averred that the bank was the holder of the note and mortgage sued on, and that the bill was intended to be, and was, the bill of complaint of the bank and not of Baldwin. There was no replication to this answer. It is plain, therefore, that the defendant carried on the litigation on the theory that the bank was the complainant, and the cause was entertained and decided by the Circuit Court on the same assumption.

We must adhere to the construction of the bill asserted by the bank and acquiesced in by the defendant. The defendant having herself so construed and treated the bill, will not be allowed on final hearing, in order to defeat the jurisdiction, to assert, for the first time, that Baldwin, and not the bank, was the complainant. It follows that the objection to the jurisdiction is not well taken.

We now come to the merits of the case. The contention of the counsel for complainant is, that Mrs. Fortier, having by the authorization of her husband and of the judge of the Fourth District Court, evidenced by his certificate, been empowered to borrow the money sued for to be used for her separate benefit and advantage, and to mortgage her separate property therefor, is concluded by the certificate of the judge, and cannot be heard to deny that the money was borrowed for her own use, or to assert that it was borrowed to pay her husband's debts, or for his separate advantage. On the other

hand, the counsel for the defendant insist that the money was in fact borrowed by Mrs. Fortier for the use of and to pay the debts of her husband, which Godchaux, the payee of the note, well knew, and that the money borrowed was so applied by the husband, and that she is not precluded by the certificate of the judge from showing these facts, and that being shown, they are a defence to the suit.

By article 2412 of the Civil Code of Louisiana of 1825, it was provided as follows: "The wife, whether separated in property by contract, or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

This article is now article 2398 of the Civil Code of 1870. The Supreme Court of Louisiana, construing it, has repeatedly decided that a debt contracted by a married woman, whether separated in property from her husband or not, could not be enforced against her unless the creditor established affirmatively that the debt inured to her separate benefit. *Dranguet* v. *Prudhomme*, 3 La. 74; *Pascal* v. *Sauvinet*, 1 La. Ann. 428; *Erwin* v. *McCalop*, 5 La. Ann. 173; *Brandigee* v. *Kew*, 7 Martin, N. S. 64; *Beauregard* v. *Her Husband*, 7 La. Ann. 294; *Moussier* v. *Zunts*, 14 La. Ann. 15. In the case last cited the court say: "It is a principle that has come down to us from the laws of Spain, that he who contracts with a married woman must show affirmatively that the contract inured to her advantage. The exception was when the wife renounced the 61st Law of Toro, but this exception no longer exists."

This article, thus construed, still continues to be the law of Louisiana, except as modified by the act of 1855, which now constitutes articles 126, 127, and 128 of the Revised Code of 1870. They are as follows:

"Article 126. A married woman over the age of twenty-one years may, by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and to secure the same, grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

"Article 127. In carrying out the power to borrow money

or contract debts, the wife, in order to bind herself or her paraphernal or dotal property, must, according to the amount involved, be examined at chambers by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted, and if he shall ascertain either the one or the other are for her husband's debts or for his separate benefit or advantage or for the benefit of his separate estate or of the community, the said judge shall not give his sanction authorizing the wife to perform the acts or incur the liabilities set forth in article 126.

"Article 128. If the wife shall satisfy the judge that the money about to be borrowed or debt contracted is solely for her separate advantage, or for the benefit of her paraphernal or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is required by article 127, which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all the courts of this State and have the same effect as if made by a *femme sole*."

The effect of these articles is simply to establish a new rule of evidence in cases of loans of money made to married women.

The cases in which they have been construed by the Supreme Court of Louisiana show clearly that the contention of the complainant, that the certificate of the judge is conclusive evidence of the fact that the money lent to a married woman was for her sole benefit, and that she will not be allowed to contradict it, cannot be sustained. The construction put upon these articles is that the effect of the authorization and certificate of the judge was to relieve the creditor from the burden of proving that the money lent by him to the wife inured to her benefit, and to cast the burden on the wife to prove that it did not. *City Bank* v. *Barrow*, 21 La. Ann. 396, 398.

In the case of *Barth* v. *Kasa*, 30 La. Ann. 940, it was held that prior to the act of 1855 the burden of proof to bind the wife was on the creditor, but that under that act, when the judge's authorization had been obtained, the burden of proof rested on the wife to show that she was not bound.

In *Claverie* v. *Gerodias*, 30 La. Ann. 291, the plaintiff holding the note of Gerodias, a married woman, secured by mortgage on her paraphernal property, executed by the authorization of the judge, took out executory process thereon. Mrs. Gerodias filed an opposition thereto on the ground, among others, that her note and mortgage were given for the purpose of securing the debt of the husband to Claverie. The latter admitted that the note was executed by Mrs. Gerodias to enable her husband to obtain the means of carrying on his trade, "and was given by him to the respondent," Claverie, "for that purpose to the knowledge of his wife."

Upon these facts the court said: "The law forbids the wife to become security of her husband, or to bind herself or property for his debts. Her note for such a purpose in the hands of the husband's creditor, who takes it knowingly, is utterly void. The act of 1855 (now articles 126, 127, and 128 C. C.) has no application to such a case as is here presented." And the court affirmed the judgment of the lower court, which decreed the nullity of the mortgage, the erasure of its inscription, and directed the surrender of her note to Mrs. Gerodias, notwithstanding the fact that the note and mortgage had been executed by virtue of the authorization and certificate of the judge, as provided in the act of 1855.

In *Barth* v. *Kasa*, *ubi supra*, it was held that when a married woman has, even under the authorization of the judge, executed her note and mortgage on her separate property to secure it, she may show by way of defence thereto that she gave the note and mortgage for the debt of her husband, being induced thereto by her husband and the creditor.

So in *Hall* v. *Wyche*, 31 La. Ann. 734, it was held that the authorization of a judge to a married woman to borrow money and execute a mortgage to secure its repayment does not preclude her from proving that with the knowledge of the creditor

the mortgage was given to secure an antecedent debt of the husband due to him.

These cases show conclusively that the contention of counsel for the complainant cannot be maintained.

On the other hand, it does not follow that because the money borrowed by the wife with the authorization of the judge was used to pay her husband's debts the note and mortgage given therefor are void and cannot be enforced. To make such a defence good it must be shown that the creditor knew when he made the loan that the money was not to be used for the separate benefit or advantage of the wife; for the lender, having in good faith paid the money to the wife or to another by her direction, is not bound, since the passage of the act of 1855, to see that it is used for her benefit. It has been so held by the Supreme Court of Louisiana.

In *McClellan* v. *Dane*, 32 La. Ann. 1197, the defendant was a married woman who had executed by the authorization of the judge the note and mortgage sued on. She alleged by way of defence that the note and mortgage were obtained from her through the influence of her husband, who received the money for which the note and mortgage were given, and that therefore as to her they were without consideration. In support of her defence Mrs. Dane offered evidence tending to show that the money borrowed was subsequently received by her husband and by him used for his own purposes. This evidence was admitted by the court below, and its admission was declared by the Supreme Court to be error. In giving judgment the court said: "The check representing the borrowed money was delivered to the wife, who indorsed the same and received the money which it called for, and to require more from the lender in such cases would be to defeat the very object of the law. . . . Our jurisprudence is firmly settled on this question, and it is unnecessary to quote authorities in support of the proposition that, in the absence of any allegation of fraud against the creditor himself, married women are bound, as all other persons, by their contracts and mortgages, executed under proper authorization, as required by the law of 1855 (Civil Code, 127 and 128), and cannot be allowed by parol tes-

timony to attempt to disprove the certificate of the judge and their own authentic declarations in acts of mortgage. Nor will the law authorize the inquiry into the subsequent disposition made of the funds borrowed by married women when properly authorized thereto. The law does not and cannot confer upon the lender in such circumstances the power and authority to watch over and control the acts of the married woman who has borrowed money from him, so as to prevent the improper use of the same."

In the still later case of *Dougherty* v. *Hibernia Insurance Co.*, 35 La. Ann. 629, the Supreme Court of Louisiana said: "Objections founded on the irregularity of the proceedings before the judge and on the use made of the money and the like, in the absence of fraud or complicity on the part of the lender, have no force. The jurisprudence is now well settled that in such case the lender is not bound to look behind the judge's certificate, and is not concerned as to the actual use of the money after it is paid to the wife or according to her direction." See also *Pilcher* v. *Pugh*, 28 La. Ann. 494; and *Henry* v. *Gauthreaux*, 32 La. Ann. 1103.

The result of these authorities, succinctly stated, is, that since the act of 1855, when a married woman, with the authorization of her husband and the sanction and certificate of the judge, borrows money, the creditor is not bound to show that the money was used for her separate benefit and advantage, but the debt may be enforced against her, and her separate property mortgaged to secure it, unless she shows that with the knowledge or connivance of the lender, the money was borrowed and used, not for her separate benefit, but for that of her husband.

This conclusion supports the decree of the Circuit Court. When Godchaux deducted and retained out of the money loaned on the note and mortgage of Mrs. Fortier, the sum of $1,800 to pay a debt due to himself from her husband, and paid over to her, or by her direction, only the residue, he was acting, so far as the sum just mentioned is concerned, in complicity with the husband and in fraud of the law, and he cannot shield himself under the authorization of the judge. This

sum, with the interest thereon, was properly deducted from the amount due on the note and mortgage. The $1,200 paid by Godchaux to the notary, by the direction of Mrs. Fortier, to clear off taxes, with the interest and costs which were a lien upon that property mortgaged by her, was applied for her separate benefit and advantage, and she cannot escape liability for it. As to the $5,975, the residue of the loan, we are of opinion that the defendant has not made it to appear affirmatively by preponderance of proof, as she was bound to do, that the money was borrowed by her with the knowledge or connivance of Godchaux to pay off the debts, or for the use of her husband. Godchaux, therefore, having handed to the defendant a check, payable to her own order, for the residue of the loan, his duty ceased. Under the act of 1855 he was not, as we have seen, bound at his peril to take care that she applied the money to her own separate benefit and advantage. So far, therefore, as the defence to the enforcement of the money paid by the check rested in the averment that the money borrowed of Godchaux was with his complicity borrowed for the use of the husband, and not for the separate advantage of the wife, it must fail.

Complaint is made in behalf of Mr. Fortier that the court erred in enforcing by its decree a loan of money made by a national bank on the security of a mortgage; the contention being that the loan on such a security was unauthorized by the national banking act, and was therefore void. In the case of *National Bank* v. *Matthews*, 98 U. S. 621, and *National Bank* v. *Whitney*, 103 U. S. 99, this point is expressly decided against the contention of the defendant, and in the latter case it was also held that an objection to the taking by the bank of a mortgage lien as security for future advances could only be made by the United States.

It follows from the views we have expressed that

The decree of the Circuit Court must be affirmed.

Syllabus.

LAMAR, Executor, *v.* MICOU, Administratrix.

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

Argued October 31, November 3, 1884.—Decided December 1, 1884.

The war of the rebellion, and the residence of both guardian and ward in the enemy's territory throughout the war, did not terminate the obligation of a guardian appointed before the war in a State never within that territory, nor discharge him from liability to account to the ward in the courts of that State after the war.

A receipt given to a guardian appointed in one State, by a guardian afterwards appointed in another State, for specific personal property of the ward, transferred by the former to the latter, does not discharge the former from responsibility to account for previous loss by his mismanagement of the ward's property. Nor is such responsibility lessened by the person last appointed guardian having before his appointment concurred and aided in the acts complained of.

Admissions by a ward's next of kin during the ward's lifetime cannot be set up in defence of a bill by such next of kin as the ward's administrator.

The widow of a citizen of one State does not, by marrying again, and taking the infant children of the first husband from that State to live with her at the home of the second husband in another State, change the domicil of the children.

A guardian, appointed in a State in which the ward is temporarily residing, cannot change the ward's domicil from one State to another.

A guardian, appointed in a State which is not the domicil of the ward, should not, in accounting in the State of his appointment for his investment of the ward's property, be held, unless in obedience to express statute, to a narrower range of securities than is allowed by the law of the State of the ward's domicil.

By the law of Georgia before 1863, and by the law of Alabama, a guardian might invest his ward's money in bank stock in Georgia or in New York, or in city bonds, or in bonds issued by a railroad corporation and indorsed by the State which had chartered it.

A guardian may, without order of court, sell personal property of the ward in his possession, and reinvest the proceeds.

A guardian, appointed in New York, before the war of the rebellion, of an infant then temporarily residing there, but domiciled in Georgia, sold bank stock of his ward in New York during the war, and there invested the proceeds in bonds issued before the war by the cities of Mobile, Memphis and New Orleans, and in bonds issued by a railroad corporation chartered by the State of Tennessee and whose road was in Tennessee and Georgia, and the railroad bonds indorsed by the State of Tennessee at the time of their issue; and deposited the bonds in a bank in Canada. *Held,* That if in so

Statement of Facts.

doing he used due care and prudence, having regard to the best pecuniary interests of his ward, he was not accountable to the ward for loss by depreciation of the bonds, although one object of the sale and investment was to save the ward's money from confiscation by the United States.

An investment by a guardian, of money of his ward, during the war of the rebellion, and while both guardian and ward were residing within the enemy's territory, in bonds of the so-called Confederate States, was unlawful, and the guardian is responsible to the ward for the sum so invested.

This was an appeal by the executor of a guardian from a decree against him upon a bill in equity filed by the administratrix of his ward.

The original bill, filed on July 1, 1875, by Ann C. Sims, a citizen of Alabama, as administratrix of Martha M. Sims, in the Supreme Court of the State of New York, alleged that on December 11, 1855, the defendant's testator, Gazaway B. Lamar, was duly appointed, by the surrogate of the county of Richmond in that State, guardian of the person and estate of Martha M. Sims, an infant of six years of age, then a resident of that county, and gave bond as such, and took into his possession and control all her property, being more than $5,000; that on October 5, 1874, he died in New York, and on November 10, 1874, his will was there admitted to probate, and the defendant, a citizen of New York, was appointed his executor; and that he and his executor had neglected to render any account of his guardianship to the surrogate of Richmond county or to any court having cognizance thereof, or to the ward or her administratrix; and prayed for an account, and for judgment for the amount found to be due.

The defendant removed the case into the Circuit Court of the United States for the Southern District of New York; and there filed an answer, averring that in 1855, when Lamar was appointed guardian of Martha M. Sims, he was a citizen of Georgia, and she was a citizen of Alabama, having a temporary residence in the city of New York; that in the spring of 1861 the States of Georgia and Alabama declared themselves to have seceded from the United States, and to constitute members of the so-called Confederate States of America, whereupon a state of war arose between the United States and the Confederate States, which continued to be flagrant for

more than four years after; that Lamar and Martha M. Sims were in the spring of 1861 citizens and residents of the States of Georgia and Alabama respectively, and citizens of the Confederate States, and were engaged in aiding and abetting the State of Georgia and the so-called Confederate States in their rebellion against the United States, and she continued to aid and abet until the time of her death, and he continued to aid and abet till January, 1865; that the United States by various public acts declared all his and her property, of any kind, to be liable to seizure and confiscation by the United States, and they both were, by the various acts of Congress of the United States, outlawed and debarred of any access to any court of the United States, whereby it was impossible for Lamar to appear in the Surrogate's Court of Richmond county to settle and close his accounts there, and to be discharged from his liability as guardian, in consequence whereof the relation of guardian and ward, so far as it depended upon the orders of that court, ceased and determined; that, for the purpose of saving the ward's property from seizure and confiscation by the United States, Lamar, at the request of the ward and of her natural guardians, all citizens of the State of Alabama, withdrew the funds belonging to her from the city of New York, and invested them for her benefit and account in such securities as by the laws of the States of Alabama and Georgia and of the Confederate States he might lawfully do; that in 1864, upon the death of Martha M. Sims, all her property vested in her sister, Ann C. Sims, as her next of kin, and any accounting of Lamar for that property was to be made to her; that on March 15, 1867, at the written request of Ann C. Sims and of her natural guardians, Benjamin H. Micou was appointed her legal guardian by the Probate Court of Montgomery County, in the State of Alabama, which was at that time her residence, and Lamar thereupon accounted for and paid over all property, with which he was chargeable as guardian of Martha M. Sims, to Micou as her guardian, and received from him a full release therefor; and that Ann C. Sims when she became of age ratified and confirmed the same. To that answer the plaintiff filed a general replication.

Statement of Facts.

The case was set down for hearing in the Circuit Court upon the bill, answer and replication, and a statement of facts agreed by the parties, in substance as follows:

On November 23, 1850, William W. Sims, a citizen of Georgia, died at Savannah in that State, leaving a widow, who was appointed his administratrix, and two infant daughters, Martha M. Sims, born at Savannah on September 8, 1849, and Ann C. Sims, born in Florida on June 1, 1851. In 1853 the widow married the Rev. Richard M. Abercrombie, of Clifton, in the county of Richmond and State of New York.

On December 11, 1855, on the petition of Mrs. Abercrombie, Gazaway B. Lamar, an uncle of Mr. Sims, and then residing at Brooklyn in the State of New York, was appointed by the surrogate of Richmond County guardian of the person and estate of each child "until she shall arrive at the age of fourteen years, and until another guardian shall be appointed;" and gave bond to her, with sureties, "to faithfully in all things discharge the duty of a guardian to the said minor according to law, and render a true and just account of all moneys and other property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof;" and he immediately received from Mrs. Abercrombie in money $5,166.89 belonging to each ward, and invested part of it in January and April, 1856, in stock of the Bank of the Republic at New York, and part of it in March and July, 1857, in stock of the Bank of Commerce at Savannah, each of which was then paying, and continued to pay until April, 1861, good dividends annually, the one of ten and the other of eight per cent.

In 1856, several months after Lamar's appointment as guardian, Mr. and Mrs. Abercrombie removed from Clifton, in the State of New York, to Hartford, in the State of Connecticut, and there resided till her death in the spring of 1859. The children lived with Mr. and Mrs. Abercrombie, Lamar as guardian paying Mr. Abercrombie for their board, at Clifton and at Hartford, from the marriage until her death; and were then removed to Augusta in the State of Georgia, and there lived with their paternal grandmother and her unmarried

daughter and only living child, their aunt; Lamar as guardian continuing to pay their board. After 1856 neither of the children ever resided in the State of New York. On January 18, 1860, their aunt was married to Benjamin H. Micou, of Montgomery in the State of Alabama, and the children and their grandmother thereafter lived with Mr. and Mrs. Micou at Montgomery, and the children were educated and supported at Mr. Micou's expense.

From 1855 to 1859 Lamar resided partly in Georgia and partly in New York. In the spring of 1861 he had a temporary residence in the city of New York, and upon the breaking out of the war of the rebellion, and after removing all his own property, left New York, and passed through the lines to Savannah, and there resided, sympathizing with the rebellion, and doing what he could to accomplish its success, until January, 1865, and continued to have his residence in Savannah until 1872 or 1873, when he went to New York again, and afterwards lived there. Mr. and Mrs. Micou also sympathized with the rebellion and desired its success, and each of them, as well as Lamar, failed during the rebellion to bear true allegiance to the United States.

At the time of Lamar's appointment as guardian, ten shares in the stock of the Mechanics' Bank of Augusta in the State of Georgia, which had belonged to William W. Sims in his lifetime, stood on the books of the bank in the name of Mrs. Abercrombie as his administratrix, of which one-third belonged to her as his widow, and one-third to each of the infants. In January, 1856, the bank refused a request of Lamar to transfer one-third of that stock to him as guardian of each infant, but afterwards paid to him as guardian from time to time two-thirds of the dividends during the life of Mrs. Abercrombie, and all the dividends after her death until 1865. During the period last named, he also received as guardian the dividends on some other bank stock in Savannah, which Mrs. Abercrombie owned, and to which, on her death, her husband became entitled. Certain facts, relied on as showing that he, immediately after his wife's death, made a surrender of her interest in the bank shares to Lamar, as guardian of her children, are not

material to the understanding of the decision of this court, but are recapitulated in the opinion of the Circuit Court. 7 Fed. Rep. 180–185.

In the winter of 1861–62, Lamar, fearing that the stock in the Bank of the Republic at New York, held by him as guardian, would be confiscated by the United States, had it sold by a friend in New York; the proceeds of the sale, which were about twenty per cent. less than the par value of the stock, invested at New York in guaranteed bonds of the cities of New Orleans, Memphis and Mobile, and of the East Tennessee and Georgia Railroad Company; and those bonds deposited in a bank in Canada.

Lamar from time to time invested the property of his wards, that was within the so-called Confederate States, in whatever seemed to him to be the most secure and safe—some in Confederate States bonds, some in the bonds of the individual States which composed the confederacy, and some in bonds of cities and of railroad corporations and stock of banks within those States.

On the money of his wards, accruing from dividends on bank stock, and remaining in his hands, he charged himself with interest until the summer of 1862, when, with the advice and aid of Mr. Micou, he invested $7,000 of such money in bonds of the Confederate States and of the State of Alabama; and in 1863, with the like advice and aid, sold the Alabama bonds for more than he had paid for them, and invested the proceeds also in Confederate States bonds; charged his wards with the money paid, and credited them with the bonds; and placed the bonds in the hands of their grandmother, who gave him a receipt for them and held them till the end of the rebellion, when they, as well as the stock in the banks at Savannah, became worthless.

Martha M. Sims died on November 2, 1834, at the age of fifteen years, unmarried and intestate, leaving her sister Ann C. Sims her next of kin. On January 12, 1867, Lamar, in answer to letters of inquiry from Mr. and Mrs. Micou, wrote to Mrs. Micou that he had saved from the wreck of the property of his niece, Ann C. Sims, surviving her sister, three bonds of the city of Memphis, indorsed by the State of Tennessee, one bond of

the city of Mobile, and one bond of the East Tennessee and Georgia Railroad Company, each for $1,000, and with some coupons past due and uncollected; and suggested that by reason of his age and failing health, and of the embarrassed state of his own affairs, Mr. Micou should be appointed in Alabama guardian in his stead. Upon the receipt of this letter Mrs. Micou wrote to Lamar, thanking him for the explicit statement of the niece's affairs, and for the care and trouble he had had with her property; and Ann C. Sims, then nearly sixteen years old, signed a request, attested by her grandmother and by Mrs. Micou, that her guardianship might be transferred to Mr. Micou, and that he might be appointed her guardian. And on March 15, 1867, he was appointed guardian of her property by the Probate Court of the county of Montgomery and State of Alabama, according to the laws of that State, and gave bond as such.

On May 14, 1867, Lamar sent to Micou complete and correct statements of his guardianship account with each of his wards, as well as all the securities remaining in his hands as guardian of either, and a check payable to Micou as guardian of Ann C. Sims for a balance in money due her; and Micou, as such guardian, signed and sent to Lamar a schedule of and receipt for the property, describing it specifically, by which it appeared that the bonds of the cities of New Orleans and Memphis and of the East Tennessee and Georgia Railroad Company were issued, and the Memphis bonds, as well as the railroad bonds, were indorsed by the State of Tennessee, some years before the breaking out of the rebellion. Micou thenceforth continued to act in all respects as the only guardian of Ann C. Sims until she became of age on June 1, 1872.

No objection or complaint was ever made by either of the wards, or their relatives, against Lamar's transactions or investments as guardian, until July 28, 1874, when Micou wrote to Lamar, informing him that Ann C. Sims desired a settlement of his accounts; and that he had been advised that no credits could be allowed for the investments in Confederate States bonds, and that Lamar was responsible for the security of the investments in other bonds and bank stock. Lamar was then

sick in New York, and died there on October 5, 1874, without having answered the letter.

Before the case was heard in the Circuit Court, Ann C. Sims died on May 7, 1878; and on June 20, 1878, Mrs. Micou was appointed, in New York, administratrix *de bonis non* of Martha M. Sims, and as such filed a bill of revivor in this suit. On October 3, 1878, the defendant filed a cross bill, repeating the allegations of his answer to the original bill, and further averring that Ann C. Sims left a will, which had been admitted to probate in Montgomery County in the State of Alabama, and afterwards in the county and State of New York, by which she gave all her property to Mrs. Micou, who was her next of kin; and that Mrs. Micou was entitled to receive for her own benefit whatever might be recovered in the principal suit, and was estopped to deny the lawfulness or propriety of Lamar's acts, because whatever was done by him as guardian of Martha M. Sims in her lifetime, or as guardian of the interests of Ann C. Sims as her next of kin, was authorized and approved by Mrs. Micou and her mother and husband as the natural guardians of both children. Mrs. Micou, as plaintiff in the bill of revivor, answered the cross bill, alleging that Ann succeeded to Martha's property as administratrix, and not as her next of kin, admitting Ann's will and the probate thereof, denying that Mrs. Micou was a natural guardian of the children, and denying that she approved or ratified Lamar's acts as guardian. A general replication was filed to that answer.

Upon a hearing on the pleadings and the agreed statement of facts, the Circuit Court dismissed the cross bill, held all Lamar's investments to have been breaches of trust, and entered a decree referring the case to a master to state an account. The case was afterwards heard on exceptions to the master's report, and a final decree entered for the plaintiff for $18,705.19, including the value before 1861 of those bank stocks in Georgia of which Lamar had never had possession. The opinion delivered upon the first hearing is reported in 17 Blatchford, 378, and in 1 Fed. Rep. 14, and the opinion upon the second hearing in 7 Fed. Rep. 180. The defendant appealed to this court.

Argument for Appellant.

Mr. Edward N. Dickerson for appellant.—I. If the two wards had a domicil in the State of New York in 1855, the relation of guardian and ward under the New York appointment was terminated by the change of that domicil in 1856, or before February 9, 1862. A probate court has no jurisdiction of the affairs of an infant except when either the domicil or the property of the infant is within its jurisdiction. The domicil of an infant is the domicil of the father, if living, and if he is dead it is the domicil of the mother. *Pennsylvania* v. *Ravenel*, 21 How. 103. It has been held in New York that the acquisition of a new domicil by the widow by re-marriage does not necessarily change the domicil of her minor child. *Browns* v. *Lynch*, 2 Bradford, 214. In Massachusetts, a guardian, though not a parent, acting in good faith, may shift the ward's domicil with his own. *Holyoke* v. *Haskins*, 5 Pick. 20. All agree that the rights and powers of guardians are local. *Morrell* v. *Dickey*, 1 Johns. Ch. 153; *Woodworth* v. *Spring*, 4 Allen, 321. Lamar therefore was under no obligation under the laws of New York as to the wards or the property after they left that State. Although not formally released, he doubtless would have been so on application. In equity, acts done in good faith, for which an order would have passed in course on application, will be regarded as ordered. *Hunt* v. *Freeman*, 1 Ohio, 490, 2d Ed. 226; *Lee* v. *Stone*, 5 Gill & Johns. 1.—II. The guardianship of Lamar, under the laws of New York, terminated in 1861, by reason of the war, and has never been revived. This was the legal effect of a state of war. During its existence a public enemy was denied access to the courts and could not transact business. It terminated contracts and partnerships, and by parity of reasoning terminated such relations as guardian and ward. See *Lasere* v. *Rochereau*, 17 Wall. 437; *Ketchum* v. *Mobile & Ohio Railroad Co.*, 2 Woods, 532.—III. After the commencement of the war, Lamar did everything as to the property, which he could have been required to do had the guardianship continued. The rule in regard to investments of trust funds is not the same everywhere. In England they must be invested in consols. *Howe* v. *Dartmouth*, 7 Ves. 137; *Holland* v. *Hughes*, 16 Ves. 111. In Massachusetts, the guar-

dian is to exercise the sound discretion which prudent men show in making permanent investments of funds with reference to the production of income. *Harvard College* v. *Amory*, 9 Pick. 446. In New York, he is bound to employ such diligence and prudence as prudent men employ in their own like affairs. *King* v. *Talbot*, 40 N. Y. 76. In Georgia, he was at that time bound to keep the money invested, and to do this in good faith upon security undoubted when taken. With the investments before war we have nothing to do. They were prudent, and could have been closed out at a profit when the war began. The passage of the confiscation acts made it Lamar's duty to transfer the investments. See especially act of July 17, 1862, ch. 195, § 6, 12 Stat. 591. When the investments came within the territory dominated by the Confederates, an investment in the bonds of those States became justifiable. See *Barton* v. *Bowen*, 27 Grattan, 849; *Brown* v. *Wright*, 39 Georgia, 96. *Horn* v. *Lockhart*, 17 Wall. 570, was decided by a divided court, and ought not to be extended beyond the limits of that case.—IV. The appointment by the Alabama court of Micou as guardian operated to release Lamar.—V. Micou then, as lawful guardian acting for Miss Sims, gave Lamar a release, and when she became of age she could not deny its effect.—VI. Even if not operative as a receipt when given, it became an absolute release by lapse of time before the ward became of age.—VII. Miss Ann Sims is estopped by her conduct, after she became of age, from claiming that Lamar has not fully accounted to her. *Kirby* v. *Taylor*, 6 Johns. Ch. 242, 249; *Forbes* v. *Forbes*, 5 Gill, 29; *McClelland* v. *Kennedy*, 8 Maryland, 230.—VIII. Mrs. Micou, the defendant in error, has no better right to recover than Miss Ann Sims would have had.—IX. Whatever may have been Miss Ann Sims's rights, the defendant in error is not entitled to recover. Although suing as administratrix, the recovery will be really for her own benefit. In February, 1867, she approved of what Lamar had done as guardian, and did so again in 1874. What she said could have estopped her had she herself been the *cestui que trust*. *Mooers* v. *White*, 6 Johns. Ch. 360; *Weed* v. *Small*, 7 Paige, 573. See *Cairncross* v. *Lorimer*, 7 Jurist, (N. S.), 149; *Illinois Central Railroad*

v. *Allen*, 39 Ill. 205; *Tibbs* v. *Brown*, 2 Grant (Penn.) 39.—X. There are the same estoppels as to the claim made in behalf of Martha Sims as to that made in behalf of Ann Sims.

Mr. Stephen P. Nash and *Mr. George C. Holt* for appellee. —I. A retiring guardian can only be discharged by order of a competent court, or by settlement with the ward after the latter attains majority. Perry on Trusts, §§ 921–923.—II. Lamar's duties and obligations are to be measured by the law of New York. Investments in bank stocks were unauthorized by that law. *King* v. *Talbot*, 40 N. Y. 76; *Adair* v. *Brimmer*, 74 N. Y. 539. The investment in the Georgia bank was further invalid as made out of the State. *Ormiston* v. *Olcott*, 84 N. Y. 339.—III. The transfer of the New York investments to investments in Confederate stocks during the war was an act in aid of the rebellion, and was void; *Horn* v. *Lockhart*, 17 Wall. 570; *McBurney* v. *Carson*, 99 U. S. 567; *Corker* v. *Jones*, 110 U. S. 317; and would have been disallowed in settlement of a guardian's account in Alabama. *Newman* v. *Reed*, 50 Ala. 297; *Houston* v. *Deloach*, 43 Ala. 364.—IV. The war did not terminate the guardianship, nor affect the liability of the guardian to account to the ward. War suspends, but does not annul contract obligations. 3 Phillimore International Law, 735; *Hanger* v. *Abbott*, 6 Wall. 533; *Insurance Co.* v. *Davis*, 95 U. S. 425, 430. In the latter case the relation was that of principal and agent, which bears a resemblance to that of guardian and ward.—V. The fact that the ward lived in enemy's country during the war is immaterial. She was too young to be disloyal except by fiction of law. Even if active disloyalty had been established, that would not have justified the guardian's investments. *Horn* v. *Lockhart*, 17 Wall. 570; *Alexander* v. *Bryan*, 110 U. S. 414.—VI. The fact that the ward's property in New York was liable to confiscation is no justification for its transfer and investment in Southern securities. The rights of Southern enemies to property within the loyal States were not affected unless proceedings were taken for confiscation. *Conrad* v. *Waples*, 96 U. S. 279; *Airhart* v. *Massieu*, 98 U. S. 491.—VII. The appointment of Micou as guardian of Ann

Sims and Lamar's transfer to him of the remaining securities were no defence. A guardian continues to retain all his powers and to be subject to all his duties and liabilities till the appointment of a successor by the same court which appointed him. *In re Dyer*, 5 Paige, 534; *In re Nicoll*, 1 Johns. Ch. 25. —VIII. The defence of ratification is inapplicable. Martha died before she became of age. She therefore could not ratify. Ann is it is true in some sense the representative of her sister, but she never ratified as representative. The defence of ratification must be clearly proved, and it must appear that the party ratifying had full knowledge of the facts. *Adair* v. *Brimmer*, cited above. An administratrix suing is not chargeable with notice acquired before her appointment. 1 Greenl. Ev. § 179; 1 Cowen & Hill Notes to Phil. Ev. Ch. 8, § 10. As Ann and Mrs. Micou at the time of these investments had no interest in Martha's property, there was nothing for an estoppel to work on. *Ex parte Smith*, 2 Mont. D. & DeG. 113; *Dillett* v. *Kemble*, 10 C. E. Green, 66; *Plant* v. *McEwen*, 4 Conn. 544.—IX. The guardian was chargeable with the full value of the shares in Mechanics' Bank, Georgia, standing in the name of Mrs. Abercrombie, as administratrix, and in the shares of the Bank of Commerce standing in her name individually. It is the duty of a guardian to take all reasonable steps to collect and protect the property of his ward, whether situated in the State where he is appointed or not. It is true that a guardianship is a local office, but that does not authorize a guardian to shut his eyes and let his ward's property in other States go to waste. *Taylor* v. *Bemiss*, 110 U. S. 42; *Shultz* v. *Pulver*, 3 Paige, 182; affirmed 11 Wend. 361; *Matter of Butler*, 38 N. Y. 397.—X. There was no error in charging the guardian with interest at six per cent. *King* v. *Talbot*, cited above. That is the rule in New York; and the United States court will follow the State rule. *Suydam* v. *Williamson*, 24 How. 427; *Pennington* v. *Gibson*, 16 How. 65.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The authority of the Surrogate's Court of the county of Rich-

mond and State of New York to appoint Lamar guardian of the persons and property of infants at the time within that county, and the authority of the Supreme Court of the State of New York, in which this suit was originally brought, being a court of general equity jurisdiction, to take cognizance thereof, are not disputed; and upon the facts agreed it is quite clear that none of the defences set up in the answer afford any ground for dismissing the bill.

The war of the rebellion, and the residence of both ward and guardian within the territory controlled by the insurgents, did not discharge the guardian from his responsibility to account, after the war, for property of the wards which had at any time come into his hands, or which he might by the exercise of due care have obtained possession of. A state of war does not put an end to pre-existing obligations, or transfer the property of wards to their guardians, or release the latter from the duty to keep it safely, but suspends until the return of peace the right of any one residing in the enemy's country to sue in our courts. *Ward* v. *Smith*, 7 Wall. 447; *Montgomery* v. *United States*, 15 Wall. 395, 400; *Insurance Co.* v. *Davis*, 95 U. S. 425, 430; *Kershaw* v. *Kelsey*, 100 Mass. 561, 563, 564, 570; 3 Phillimore International Law (2d ed.) § 589.

The appointment of Micou in 1867 by a court of Alabama to be guardian of the surviving ward, then residing in that State, did not terminate Lamar's liability for property of his wards which he previously had or ought to have taken possession of. The receipt given by Micou was only for the securities and money actually handed over to him by Lamar; and if Micou had any authority to discharge Lamar from liability for past mismanagement of either ward's property, he never assumed to do so.

The suggestion in the answer, that the surviving ward, upon coming of age, ratified and approved the acts of Lamar as guardian, finds no support in the facts of the case.

The further grounds of defence, set up in the cross bill, that Micou participated in Lamar's investments, and that Mrs. Micou approved them, are equally unavailing. The acts of Micou, before his own appointment as guardian, could not bind

the ward. And admissions in private letters from Mrs. Micou to Lamar could not affect the rights of the ward, or Mrs. Micou's authority, upon being afterwards appointed administratrix of the ward, to maintain this bill as such against Lamar's representative, even if the amount recovered will inure to her own benefit as the ward's next of kin. 1 Greenl. Ev. § 179.

The extent of Lamar's liability presents more difficult questions of law, now for the first time brought before this court.

The general rule is everywhere recognized, that a guardian or trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions, no attempt has been made to establish a more definite rule; in others, the discretion has been confined, by the legislature or the courts, within strict limits.

The Court of Chancery, before the Declaration of Independence, appears to have allowed some latitude to trustees in making investments. The best evidence of this is to be found in the judgments of Lord Hardwicke. He held, indeed, in accordance with the clear weight of authority before and since, that money lent on a mere personal obligation, like a promissory note, without security, was at the risk of the trustee. *Ryder* v. *Bickerton*, 3 Swanston, 80, note; *S. C.* 1 Eden, 149, note; *Barney* v. *Saunders*, 16 How. 535, 545; Perry on Trusts, § 453. But in so holding, he said: "For it should have been on some such security as binds land, or something, to be answerable for it." 3 Swanston, 81, note. Although in one case he held that a trustee, directed by the terms of his trust to invest the trust money in government funds or other good securities, was responsible for a loss caused by his investing it in South Sea stock; and observed that neither South Sea stock nor bank stock was considered a good security, because it depended upon the management of the governor and directors, and the capital might be wholly lost; *Trafford* v. *Boehm*, 3 Atk. 440, 444; yet in another case he declined to charge a trustee for a loss on South Sea stock which had fallen in value since the trustee received it; and said that "to compel trustees

to make up a deficiency, not owing to their wilful default, is the harshest demand that can be made in a court of equity." *Jackson* v. *Jackson*, 1 Atk. 513, 514; *S. C.* West Ch. 31, 34. In a later case he said: "Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value, or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the *cestui que trust*, was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer, No. If there is no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it; to add hazard or risk to that trouble, and subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." That this opinion was not based upon the fact that in England trustees usually receive no compensation is clearly shown by the Chancellor's adding that the same doctrine held good in the case of a receiver, an officer of the court, and paid for his trouble; and the point decided was that a receiver, who paid the amount of rents of estates in his charge to a Bristol tradesman of good credit, taking his bills therefor on London, was not responsible for the loss of the money by his becoming bankrupt. *Knight* v. *Plymouth*, 1 Dickens, 120, 126, 127; *S. C.* 3 Atk. 480. And the decision was afterwards cited by Lord Hardwicke himself as showing that when trustees act by other hands, according to the usage of business, they are not answerable for losses. *Ex parte Belchier*, Ambler, 218, 219; *S. C.* 1 Kenyon, 38, 47.

In later times, as the amount and variety of English government securities increased, the Court of Chancery limited trust investments to the public funds, disapproved investments either in bank stock, or in mortgages of real estate, and prescribed so strict a rule that Parliament interposed; and by the statutes of 22 & 23 Vict. ch. 35, and 23 & 24 Vict. ch. 38, and by general

orders in chancery, pursuant to those statutes, trustees have been authorized to invest in stock of the Bank of England or of Ireland, or upon mortgage of freehold or copyhold estates, as well as in the public funds. Lewin on Trusts (7th ed.) 282, 283, 287.

In a very recent case, the Court of Appeal and the House of Lords, following the decisions of Lord Hardwicke, in *Knight* v. *Plymouth* and *Ex parte Belchier*, above cited, held that a trustee investing trust funds, who employed a broker to procure securities authorized by the trust, and paid the purchase money to the broker, if such was the usual and regular course of business of persons acting with reasonable care and prudence on their own account, was not liable for the loss of the money by fraud of the broker. Sir George Jessel, M. R., Lord Justice Bowen, and Lord Blackburn affirmed the general rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinary prudent man of business would conduct his own; Lord Blackburn adding the qualification that "a trustee must not choose investments other than those which the terms of his trust permit." *Speight* v. *Gaunt*, 22 Ch. D. 727, 739, 762; 9 App. Cas. 1, 19.

In this country, there has been a diversity in the laws and usages of the several States upon the subject of trust investments.

In New York, under Chancellor Kent, the rule seems to have been quite undefined. See *Smith* v. *Smith*, 4 Johns. Ch. 281, 285; *Thompson* v. *Brown*, 4 Johns. Ch. 619, 628, 629, where the chancellor quoted the passage above cited from Lord Hardwicke's opinion in *Knight* v. *Plymouth*. And in *Brown* v. *Campbell*, Hopk. Ch. 233, where an executor in good faith made an investment, considered at the time to be advantageous, of the amount of two promissory notes, due to his testator from one manufacturing corporation, in the stock of another manufacturing corporation, which afterwards became insolvent, Chancellor Sanford held that there was no reason to charge him with the loss. But by the later decisions in that State investments in bank or railroad stock have been held to be at the risk of the trustee, and it has been intimated that the

only investments that a trustee can safely make without an express order of court are in government or real estate securities. *King* v. *Talbot*, 40 N. Y. 76, affirming *S. C.* 50 Barb. 453; *Ackerman* v. *Emott*, 4 Barb. 626; *Mills* v. *Hoffman*, 26 Hun, 594; 2 Kent Com. 416, note *b*. So the decisions in New Jersey and Pennsylvania tend to disallow investments in the stock of banks or other business corporations, or otherwise than in the public funds or in mortgages of real estate. *Gray* v. *Fox*, Saxton, 259, 268; *Halstead* v. *Meeker*, 3 C. E. Green, 136; *Lathrop* v. *Smalley*, 8 C. E. Green, 192; *Worrell's Appeal*, 9 Penn. St. 508, and 23 Penn. St. 44; *Hemphill's Appeal*, 18 Penn. St. 303; *Ihmsen's Appeal*, 43 Penn. St. 431. And the New York and Pennsylvania courts have shown a strong disinclination to permit investments in real eatate or securities out of their jurisdiction. *Ormiston* v. *Olcatt*, 84 N. Y. 339; *Rush's Estate*, 12 Penn. St. 375, 378.

In New England, and in the Southern States, the rule has been less strict.

In Massachusetts, by a usage of more than half a century, approved by a uniform course of judicial decision, it has come to be regarded as too firmly settled to be changed, except by the legislature, that all that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion, such as men of prudence and intelligence exercise in the permanent disposition of their own funds, having regard not only to the probable income, but also to the probable safety of the capital; and that a guardian or trustee is not precluded from investing in the stock of banking, insurance, manufacturing or railroad corporations, within or without the State. *Harvard College* v. *Amory*, 9 Pick. 446, 461; *Lovell* v. *Minot*, 20 Pick. 116, 119; *Kinmonth* v. *Brigham*, 5 Allen, 270, 277; *Clark* v. *Garfield*, 8 Allen, 427; *Brown* v. *French*, 125 Mass. 410; *Bowker* v. *Pierce*, 130 Mass. 262. In New Hampshire and in Vermont, investments, honestly and prudently made, in securities of any kind that produce income, appear to be allowed. *Knowlton* v. *Bradley*, 17 N. H. 458; *Kimball* v. *Reding*, 11 Foster, 352, 374; *French* v. *Currier*, 47 N. H. 88, 99; *Barney* v. *Parsons*, 54 Vermont, 623.

In Maryland, good bank stock, as well as government securities and mortgages on real estate, has always been considered a proper investment. *Hammond* v. *Hammond*, 2 Bland, 306, 413; *Gray* v. *Lynch*, 8 Gill, 403; *Murray* v. *Feinour*, 2 Maryland Ch. 418. So in Mississippi, investment in bank stock is allowed. *Smyth* v. *Burns*, 25 Mississippi, 422.

In South Carolina, before the war, no more definite rule appears to have been laid down than that guardians and trustees must manage the funds in their hands as prudent men manage their own affairs. *Boggs* v. *Adger*, 4 Rich. Eq. 408, 411; *Spear* v. *Spear*, 9 Rich. Eq. 184, 201; *Snelling* v. *McCreary*, 14 Rich. Eq. 291, 300.

In Georgia, the English rule was never adopted; a statute of 1845, which authorized executors, administrators, guardians and trustees, holding any trust funds, to invest them in securities of the State, was not considered compulsory; and before January 1, 1863 (when that statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order, or else be at the risk of the trustee), those who lent the fund at interest, on what was at the time considered by prudent men to be good security, were not held liable for a loss without their fault. Cobb's Digest, 333; Code of 1861, § 2308; *Brown* v. *Wright*, 39 Georgia, 96; *Moses* v. *Moses*, 50 Georgia, 9, 33.

In Alabama, the Supreme Court, in *Bryant* v. *Craig*, 12 Alabama, 354, 359, having intimated that a guardian could not safely invest upon either real or personal security without an order of court, the legislature, from 1852, authorized guardians and trustees to invest on bond and mortgage, or on good personal security, with no other limit than fidelity and prudence might require. Code of 1852, § 2024; Code of 1867, § 2426; *Foscue* v. *Lyon*, 55 Alabama, 440, 452.

The rules of investment varying so much in the different States, it becomes necessary to consider by what law the management and investment of the ward's property should be governed.

As a general rule (with some exceptions not material to the consideration of this case) the law of the domicil governs the

status of a person, and the disposition and management of his movable property. The domicil of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate; although, for the protection of either, a guardian may be appointed in any State where the person or any property of an infant may be found. On the continent of Europe, the guardian appointed in the State of the domicil of the ward is generally recognized as entitled to the control and dominion of the ward and his movable property everywhere, and guardians specially appointed in other States are responsible to the principal guardian. By the law of England and of this country, a guardian appointed by the courts of one State has no authority over the ward's person or property in another State, except so far as allowed by the comity of that State, as expressed through its legislature or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicil, and to support the authority of the guardian appointed there. *Hoyt* v. *Sprague*, 103 U. S. 613, 631, and authorities cited; *Morrell* v. *Dickey*, 1 Johns. Ch. 153; *Woodworth* v. *Spring*, 4 Allen, 321; *Milliken* v. *Pratt*, 125 Mass. 374, 377, 378; *Leonard* v. *Putnam*, 51 N. H. 247; *Commonwealth* v. *Rhoads*, 37 Penn. St. 60; *Sims* v. *Renwick*, 25 Georgia, 58; Dicey on Domicil, 172–176; Westlake Private International Law (2d ed.) 48–50; Wharton Conflict of Laws (2d ed.) §§ 259–268.

An infant cannot change his own domicil. As infants have the domicil of their father, he may change their domicil by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicil, change the domicil of the infants; the domicil of the children, in either case, following the independent domicil of their parent. *Kennedy* v. *Ryall*, 67 N. Y. 379; *Potinger* v. *Wightman*, 3 Meriv. 67; *Dedham* v. *Natick*, 16 Mass. 135; Dicey on Domicil, 97–99. But when the widow, by marrying again, acquires the domicil of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicil which she derives from her second husband their domicil; and they retain the domicil which they had, before her second marriage, acquired from her or from their father.

Cumner v. *Milton*, 3 Salk. 259; *S. C.* Holt, 578; *Freetown* v. *Taunton*, 16 Mass. 52; *School Directors* v. *James*, 2 Watts & Sergeant, 568; *Johnson* v. *Copeland*, 35 Alabama, 521; *Brown* v. *Lynch*, 2 Bradford, 214; *Mears* v. *Sinclair*, 1 West Virginia, 185; Pothier Introduction Générale aux Coutumes, No. 19; 1 Burge Colonial and Foreign Law, 39; 4 Phillimore International Law (2d ed.) § 97.

The preference due to the law of the ward's domicil, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the State of his domicil, especially when he actually resides there, rather than by the law of any State in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the State of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from State to State, from considerations of health, education, pleasure or convenience, and guardians were appointed in each State, the guardians appointed in the different States, even if the same persons, might be held to diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must indeed be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicil of the ward. Bar International Law, § 106 (Gillespie's translation), 438; Wharton Conflict of Laws, § 259.

It may be suggested that this would enable the guardian, by changing the domicil of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicil, may change that domicil. But the ward does not derive a domicil from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicil that the father had. *Wood* v. *Wood*, 5

Paige, 596, 605. And any guardian, appointed in the State of the domicil of the ward, has been generally held to have the power of changing the ward's domicil from one county to another within the same State and under the same law. *Cutts* v. *Haskins*, 9 Mass. 543; *Holyoke* v. *Haskins*, 5 Pick. 20; *Kirkland* v. *Whately*, 4 Allen, 462; *Anderson* v. *Anderson*, 42 Vermont, 350; *Ex parte Bartlett*, 4 Bradford, 221; *The Queen* v. *Whitby*, L. R. 5 Q. B. 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicil of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicil beyond the limits of the State in which the guardian is appointed and to which his legal authority is confined. *Douglas* v. *Douglas*, L. R. 12 Eq. 617, 625; *Daniel* v. *Hill*, 52 Alabama, 430; Story Conflict of Laws, § 506, note; Dicey on Domicil, 100, 132. And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing cannot change the ward's permanent domicil from one State to another.

The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicil of the testator; the guardian is most fitly appointed at the domicil of the ward, and may be appointed in any State in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicil of the testator; in the other case, it is the law of the domicil of the ward.

As the law of the domicil of the ward has no extra-territorial effect, except by the comity of the State where the property is situated, or where the guardian is appointed, it cannot of course prevail against a statute of the State in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. *Hoyt* v. *Sprague*, 103 U. S. 613. Cases may also arise with facts so peculiar or so

complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicil of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the State in which he was appointed, might perhaps be excused for not having complied with stricter rules prevailing at the domicil of the ward. But in a case in which the domicil of the ward has always been in a State whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the State in which he was appointed.

The domicil of William W. Sims during his life and at the time of his death in 1850 was in Georgia. This domicil continued to be the domicil of his widow and of their infant children until they acquired new ones. In 1853, the widow, by marrying the Rev. Mr. Abercrombie, acquired his domicil. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal obligation to support them, and was in fact paid for their board out of their property, make his domicil, or the domicil derived by her from him, the domicil of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under ten years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicil in that State.

Upon these facts, the domicil of the children was always in Georgia from their birth until January, 1860, and thenceforth

was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two States their domicil was is immaterial to the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicil from one State to another. See Hargrave's note 66 to Co. Lit. 88 *b*; Reeve Domestic Relations, 315; 2 Kent Com. 219; Code of Georgia of 1861, §§ 1754, 2452; *Darden* v. *Wyatt*, 15 Georgia, 414.

Whether the domicil of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicil was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicil.

It remains to apply the test of that law to Lamar's acts or omissions with regard to the various kinds of securities in which the property of the wards was invested.

1. The sum which Lamar received in New York in money from Mrs. Abercrombie he invested in 1856 and 1857 in stock of the Bank of the Republic at New York, and of the Bank of Commerce at Savannah, both of which were then, and continued till the breaking out of the war, in sound condition, paying good dividends. There is nothing to raise a suspicion that Lamar, in making these investments, did not use the highest degree of prudence; and they were such as by the law of Georgia or of Alabama he might properly make. Nor is there any evidence that he was guilty of neglect in not withdrawing the investment in the stock of the Bank of Commerce at Savannah before it became worthless. He should not therefore be charged with the loss of that stock.

The investment in the stock of the Bank of the Republic of New York being a proper investment by the law of the domicil of the wards, and there being no evidence that the sale of that stock by Lamar's order in New York in 1862 was not judicious, or was for less than its fair market price, he was not

responsible for the decrease in its value between the times of its purchase and of its sale. He had the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession, and to reinvest the proceeds. *Field* v. *Schieffelin*, 7 Johns. Ch. 150; *Ellis* v. *Essex Merrimack Bridge*, 2 Pick. 243. That his motive in selling it was to avoid its being confiscated by the United States does not appear to us to have any bearing on the rights of these parties. And no statute under which it could have been confiscated has been brought to our notice. The act of July 17, 1862, ch. 195, § 6, cited by the appellant, is limited to property of persons engaged in or abetting armed rebellion, which could hardly be predicated of two girls under thirteen years of age. 12 Stat. 591. Whatever liability, criminal or civil, Lamar may have in curred or avoided as towards the United States, there was nothing in his selling this stock, and turning it into money, of which his wards had any right to complain.

As to the sum received from the sale of the stock in the Bank of the Republic, we find nothing in the facts agreed by the parties, upon which the case was heard, to support the argument that Lamar, under color of protecting his wards' interests, allowed the funds to be lent to cities and other corporations which were aiding in the rebellion. On the contrary, it is agreed that that sum was applied to the purchase in New York of guaranteed bonds of the cities of New Orleans, Memphis and Mobile, and of the East Tennessee and Georgia Railroad Company; and the description of those bonds, in the receipt afterwards given by Micou to Lamar, shows that the bonds of that railroad company, and of the cities of New Orleans and Memphis, at least, were issued some years before the breaking out of the rebellion, and that the bonds of the city of Memphis and of the railroad company were at the time of their issue indorsed by the State of Tennessee. The company had its charter from that State, and its road was partly in Tennessee and partly in Georgia. Tenn. Stat. 1848, ch. 169. Under the discretion allowed to a guardian or trustee by the law of Georgia and of Alabama, he was not precluded from investing the funds in his hands in bonds of a railroad

corporation, indorsed by the State by which it was chartered, or in bonds of a city. As Lamar, in making these investments, appears to have used due care and prudence, having regard to the best pecuniary interests of his wards, the sum so invested should be credited to him in this case, unless, as suggested at the argument, the requisite allowance has already been made in the final decree of the Circuit Court in the suit brought by the representative of the other ward, an appeal from which was dismissed by this court for want of jurisdiction in 104 U. S. 465.

2. Other moneys of the wards in Lamar's hands, arising either from dividends which he had received on their behalf, or from interest with which he charged himself upon sums not invested, were used in the purchase of bonds of the Confederate States, and of the State of Alabama.

The investment in bonds of the Confederate States was clearly unlawful, and no legislative act or judicial decree or decision of any State could justify it. The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington* v. *Smith*, 8 Wall. 1; *Head* v. *Starke*, Chase, 312; *Horn* v. *Lockhart*, 17 Wall. 570; *Confederate Note Case*, 19 Wall. 548; *Sprott* v. *United States*, 20 Wall. 459; *Fretz* v. *Stover*, 22 Wall. 198; *Alexander* v. *Bryan*, 110 U. S. 414. An infant has no capacity, by contract with his guardian, or by assent to his unlawful acts, to affect his own rights. The case is governed in this particular by the decision in *Horn* v. *Lockhart*, in which it was held that an executor was not discharged from his liability to legatees by having invested funds, pursuant to a statute of the State, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate States, which became worthless in his hands.

Neither the date nor the purpose of the issue of the bonds of the State of Alabama is shown, and it is unnecessary to consider the lawfulness of the investment in those bonds, because Lamar appears to have sold them for as much as he had paid for them, and to have invested the proceeds in additional Confederate States bonds, and for the amount thereby lost to the estate he was accountable.

3. The stock in the Mechanics' Bank of Georgia, which had belonged to William W. Sims in his lifetime, and stood on the books of the bank in the name of his administratrix, and of which one-third belonged to her as his widow, and one-third to each of the infants, never came into Lamar's possession; and upon a request made by him, the very next month after his appointment, the bank refused to transfer to him any part of it. He did receive and account for the dividends; and he could not, under the law of Georgia concerning foreign guardians, have obtained possession of property of his wards within that State without the consent of the ordinary. Code of 1861, §§ 1834–1839. The attempt to charge him for the value of the principal of the stock must fail for two reasons: First. This very stock had not only belonged to the father of the wards in his lifetime, but it was such stock as a guardian or trustee might properly invest in by the law of Georgia. Second. No reason is shown why this stock, being in Georgia, the domicil of the wards, should have been transferred to a guardian who had been appointed in New York during their temporary residence there.

The same reasons are conclusive against charging him with the value of the bank stock in Georgia, which was owned by Mrs. Abercrombie in her own right, and to which Mr. Abercrombie became entitled upon her death. It is therefore unnecessary to consider whether there is sufficient evidence of an immediate surrender by him of her interest to her children.

The result is, that

Both the decrees of the Circuit Court in this case must be reversed, and the case remanded for further proceedings in conformity with this opinion.

Statement of Facts.

CARTER *v.* CARUSI & Another, Executors.

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

Argued November 24, 25, 1884.—Decided December 15, 1884.

The provision in § 715 Rev. Stat. District of Columbia, that a lender contracting to receive an illegal rate of interest, shall forfeit all such interest, and shall be entitled to recover only the principal sum, applies only to cases in which the illegal interest has been contracted for, but has not been paid.

The remedy given by § 716 Rev. Stat. District of Columbia to recover back unlawful interest actually paid is exclusive.

It is not error in a charge to make no reference to an issue raised by a plea, but unsupported by proof.

Failure to instruct a jury upon an issue raised by a plea cannot be assigned as error, if the court below was not requested to charge the jury upon that issue.

The Revised Statutes of the United States relating to the District of Columbia provide as follows:

"§ 715. If any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract in writing, or six per cent. upon any verbal contract, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation.

"§ 716. If any person or corporation within the District shall directly or indirectly take or receive any greater amount of interest than is provided for in this chapter upon any contract or agreement whatever, it shall be lawful for the person, or his personal representative, or the corporation paying the same, to sue for and recover all the interest paid upon any such contract or agreement from the person or his personal representatives or from the corporation receiving such unlawful interest; but the suit to recover back such interest shall be brought within one year after such unlawful interest shall have been paid or taken."

The transactions out of which the cause of action in this case and the defences thereto arose, occurred in the District of Columbia while these sections were in force.

Statement of Facts.

The suit was brought October 16, 1878, by the defendants in error, executors of Nathaniel Carusi, deceased, against Carter, the plaintiff in error, as indorser upon a note, dated May 29, 1873, made by Joseph Daniels, for the payment to Carter of $4,000 three years after date, with interest at the rate of eight per cent. per annum.

Carter filed six pleas, the first five of which only it is material to notice. The first two pleas were, in substance, the general issue.

The third plea averred that the plaintiffs ought not to recover $992 of the amount of the note sued on, with the interest on said sum, because Carusi, the testator, after becoming the owner of the note, made, on February 4, 1876, a verbal agreement with Daniels, the maker, by which he contracted to receive from Daniels interest at the rate of ten per cent. per annum, payable quarterly, upon the full amount of the principal and interest due on the note at its maturity, to wit, $4,960, and, in pursuance of such agreement, did, between February 4, 1876, and January 1, 1878, receive, as illegal interest, eight payments of $124 each, amounting to $992.

The fourth plea was similar to the third, except that it averred that the instalments of illegal interest were paid, some to Carusi, the testator, in his lifetime, and the others, after his death, to the plaintiffs.

The fifth plea averred that the defendant was only liable on the note as indorser; that on June 1, 1876, Carusi, the testator, in consideration of the promise of Daniels, the maker, to pay usurious interest of ten per cent. on the note, in quarterly instalments of $124 each, agreed to extend, and did extend, the time of payment from quarter to quarter as long as Daniels paid the quarterly instalments of usurious interest, and that Daniels paid said quarterly instalments until January 1, 1878, and that the extension of the time for the payment of the note was agreed to by Carusi without the consent of the defendant Carter.

Issue was taken on the pleas, and upon the trial in special term the jury returned a verdict for the plaintiffs, upon which the court rendered judgment. The case was carried, by writ

of error, to the Supreme Court of the District of Columbia, in general term, by which the judgment of the court in special term was affirmed. The writ of error in this case brought up that judgment for review.

It appeared by the bill of exceptions taken upon the trial that the making and indorsing of the note having been admitted by the counsel for the defendant, the plaintiffs gave evidence tending to prove that demand for payment thereof was duly made upon the maker, and notice of the dishonor was duly given by the plaintiffs to the defendant, and the plaintiffs rested.

Thereupon the defendant gave evidence tending to prove that Carusi, the testator, in his lifetime, and his executors, after his death, received, after the maturity of the note sued on, from Daniels, the maker, in quarterly instalments, interest thereon down to September 1, 1877, at the rate of ten per cent. per annum, calculated upon the amount of principal and interest due on the note at maturity, and that such instalments amounted to $621.10, but that the payments were not made in pursuance of any contract, verbal or written, between Carusi, the testator, and Daniels, or the plaintiffs and Daniels.

Thereupon the plaintiffs introduced evidence tending to show the following facts: "That Joseph Daniels, the maker of the note sued on, had, in or about the month of January, 1876, negotiated a loan of $10,000 from" Carusi, "the testator," of the plaintiffs, upon which he agreed to pay interest quarterly at the rate of ten per cent. per annum, and to secure which he offered to execute a deed of trust on certain property in the city of Washington.

This property was encumbered by a deed of trust made by Daniels to secure the note sued on, and two others of the same date, made also by him, for $4,000 each, payable to Carter, the first in one and the other in two years. Carusi, learning that the property was thus encumbered, declined to lend the money until the encumbrances were removed; but Daniels promising to do this, and urging Carusi "to hold said negotiation open" until he could do it, the $10,000 was "deposited in bank" by Carusi "and reserved for Daniels."

Statement of Facts.

Carter being still the holder of the second and third notes executed to him by Daniels, and the second being now overdue, threatened to sell the real estate covered by the deed of trust given to secure them. Thereupon, as a temporary expedient to relieve Daniels, Carusi, the testator, agreed to purchase the third note which had not matured, and the defendant Carter agreed to extend the time for the payment of the second note. The third note, which is the one sued on in this case, was purchased accordingly before maturity by Carusi, and was indorsed by Carter, the payee, who received therefor from Carusi, $4,853, that sum being the principal with the interest due thereon at the date of its transfer. Daniels voluntarily offered to pay interest at the rate of ten per cent. per annum on the amount both of principal and interest due on the note at maturity, that amount being $4,960, but Carusi declined to receive the same without first obtaining the consent of the defendant thereto, and he communicated to the defendant the offer of Daniels to pay interest as aforesaid, and the defendant consented that Carusi might receive the same, and no payment of interest by Daniels was received by the plaintiffs without their first having obtained the consent of Carter thereto. The plaintiffs further gave evidence tending to prove that there was no agreement between them or their testator and Daniels for indulgence or extension of time for payment of the note, or for forbearance to sue thereon.

Upon this state of the pleadings and evidence the defendant requested the court to charge the jury:

First. That if either the third or fourth plea was proven, their verdict should be for $4,000, the principal of the note, less whatever amount the jury might regard as proven to have been paid by Daniels in the nature of interest to the testator or to the plaintiffs.

Second. That if the jury found that either the testator or the plaintiffs at any time after the maturity of the note in suit received interest thereon at a greater rate than six per cent. per annum, the receipt of such interest was illegal and would prevent the plaintiffs from recovering more than the principal of the note, less all amounts of interest paid on account of it.

The court refused these charges, and instructed the jury that the only remedy for the recovery of money paid for interest in excess of the interest allowed by law was suit brought, under § 716 of the Revised Statutes of the District of Columbia, within one year, and that the prohibition contained in § 715 of the Revised Statutes of the District of Columbia applied exclusively to cases in which illegal interest had been contracted for but not paid.

The errors assigned were the refusal of the court to give the instructions prayed for by the defendant, and the instructions given by the court.

Mr. H. O. Claughton, for plaintiff in error.

Mr. Walter D. Davidge, for defendants in error.

Mr. Justice Woods delivered the opinion of the court. He recited the facts as above stated, and continued:

We are of opinion that there is no error in the charges given or in the refusal to charge as requested. The sections of the Revised Statutes relating to the District of Columbia were correctly construed by the court. Their meaning is plain. § 715 provides for the case where the party contracts to receive a greater rate of interest than ten per cent. upon a written and six per cent. upon a verbal contract, and declares that he shall forfeit the whole interest so contracted to be received, and shall recover only his principal debt. The evidence tended to show that the payment by Daniels to Carusi, the testator, of ten per cent. interest was voluntary, and that there was no contract for its payment or agreement for indulgence or extension of time for payment on account thereof. It is plain that under this section the plaintiff in error was not entitled to the charges requested by him.

§ 716 provides for the recovery, by the person who has paid a greater rate of interest than is allowed by law, upon any agreement or contract, of all interest paid on such contract or agreement, provided he brings suit to recover the same within one year after the unlawful interest shall have been paid. This

section, it is also clear, brings no aid to the plaintiff in error. This is not a suit to recover back usurious interest paid, but to enforce the collection of the note upon which it is contended the usurious interest was received. The plaintiff in error did not pay the unlawful interest, but it was paid by Daniels, and it was paid by him more than a year before this suit was brought, and more than a year before the defence set up by the plaintiff in error. If Daniels himself, who paid the alleged usurious interest, had brought a suit to recover it back, his action would have failed, because not begun within the time prescribed by the statute. The plaintiff in error, therefore, who has paid no interest, legal or illegal, is in no better position, at least, than Daniels, and cannot set up the provisions of § 716 in his defence. Under neither section is the plaintiff in error entitled to any relief.

His counsel, however, contend that, if he is not entitled to relief under the statute, his common-law right to reclaim or set-off usurious interest paid still remains to him.

But this court has repeatedly decided against this contention of the plaintiff in error. In *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, the court declared that the penalty imposed on a national bank for taking a greater rate of interest than that allowed by the national banking act, was the loss of the entire interest, and that no loss of the entire debt was incurred by the bank as a penalty by reason of the provisions of the usury law of a State.

So in *Barnet* v. *National Bank*, 98 U. S. 555, it was held that in a suit by a national bank against the parties to a bill of exchange discounted by it, the assignees of an acceptor could not, having intervened as parties, set up, by way of counter-claim or set-off, that the bank knowingly took and was paid a greater rate of interest thereon than that allowed by law, but that, the national banking act having prescribed as a penalty for the taking of such unlawful interest that the person paying the same might, in an action of debt against the bank, recover back twice the amount so paid, he could have redress in no other form or mode of procedure.

So in *Driesbach* v. *National Bank*, 104 U. S. 52, it was held

that usurious interest paid to a national bank on renewing a series of notes, of which those in suit were the last, could not be applied in satisfaction of the principal of the debt. See also *Cook* v. *Lillo*, 103 U. S. 792, and *Walsh* v. *Mayer*, 111 U. S. 31. In the case last cited it was held generally that a statute which prescribes a legal rate of interest, and forbids the taking of a higher rate, under penalty of a forfeiture of the entire interest, and declares that the party paying such higher rate of interest may recover it back by suit brought within twelve months, confers no authority to apply the usurious interest actually paid to the discharge of the principal debt, and that a suit for its recovery, brought within twelve months, was the exclusive remedy.

There was, therefore, no error in the refusal of the court to charge as requested or in the charge given.

It is further assigned for error that the court neglected to give the jury any instruction upon the issue raised by the fifth plea, the plaintiff in error contending that there was evidence to support that plea, and that the court, though not requested, should have submitted to the jury the issue of fact raised by the plea. We look in vain through the record to find any evidence that would have justified the jury in returning a verdict for the defendant on the fifth plea. On the contrary, the evidence tended strongly to disprove it. The court might, therefore, without injustice to the defendant, have withdrawn from the jury the consideration of the fifth plea. *Parks* v. *Ross*, 11 How. 362, 373; *Hickman* v. *Jones*, 9 Wall. 197; *Pleasants* v. *Fant*, 22 Wall. 116; *Commissioners of Marion County* v. *Clark*, 94 U. S. 278.

But even if there had been evidence to support the plea, as it does not appear that the court was requested to charge the jury upon the issue raised thereby, the failure of the court to do so cannot be assigned for error. *Express Co.* v. *Kountze*, 8 Wall. 342.

We find no error in the record.

The judgment of the Supreme Court of the District of Columbia is affirmed.

BIRDSELL & Others *v.* SHALIOL & Another.

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

Argued November 12, 1884.—Decided December 8, 1884.

Judgment for and payment of nominal damages upon a bill in equity by a patentee, without joining his licensee, against one who has made and sold a machine in violation of the patent, are no bar to a bill in equity by the patentee and licensee together, for the benefit of the licensee, against another person who afterwards uses the same machine.

This was a bill in equity for an injunction and damages for the infringement of a patent for an improvement in machines for threshing and hulling clover seed. The answer set up a former decree as an estoppel. The case was heard in the Circuit Court upon a statement of facts agreed by the parties, by which it appeared to be as follows:

Birdsell was the inventor and patentee of the improvement, and granted to the Birdsell Manufacturing Company, a corporation of which he was the president and active manager and owner of a large part of the stock, an exclusive oral license to make, vend and use his invention, but did not give it authority to license others to make, vend and use. The corporation paid him no royalty, but set apart a sinking fund to defray the expense of defending the patent in the courts.

A former suit in equity was brought by Birdsell against the Ashland Machine Company for an infringement of his patent by making and selling large numbers of machines. The Birdsell Manufacturing Company was not made a party to this suit, but participated in instituting it and carrying it on till its close. In that suit a perpetual injunction was decreed, and the case was referred to a master, before whom damages sustained by the Birdsell Manufacturing Company were proved and claimed, and who reported that the defendant had made no profits for which it should account, and that, if any damages had been sustained, they had been sustained by the Birdsell Manufacturing Company, a stranger to the suit, and that Birdsell, the plaintiff,

was entitled to recover only one dollar, as nominal damages. The Ashland Machine Company afterwards, pending that suit, became insolvent; and a decree was rendered in Birdsell's favor, according to the master's report, for nominal damages and for costs, which were paid by that company.

The present suit was brought by Birdsell and the Birdsell Manufacturing Company against Gerhart Shaliol and John Feikert, who had used one of the machines manufactured by the Ashland Machine Company, and embraced in the master's report in the suit against that company.

The Circuit Court held that in the former suit the Birdsell Manufacturing Company, although not named as a party plaintiff in the bill, was in reality a co-plaintiff with Birdsell; and that, by the final decree in that suit and the recovery and payment of nominal damages, Birdsell and the Birdsell Manufacturing Company were estopped to maintain the present bill; and therefore dismissed the bill, with costs. The plaintiffs appealed to this court.

Mr. W. W. Leggett (*Mr. M. D. Leggett* was with him) for appellants.

No appearance for appellees.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The plaintiffs in the present suit, Birdsell, the patentee, in whom is the legal title, and the Birdsell Manufacturing Company, his licensee, in whom is the beneficial interest, make three objections to the decree set up by way of estoppel: 1. That the Birdsell Manufacturing Company was not a party. 2. That the present defendants were not parties. 3. That only nominal damages were recovered and paid.

1. A licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger; an action at law for the benefit of the licensee must be brought in the name of the patentee alone; a suit in equity may be brought by the patentee and the licensee together. *Gayler* v. *Wilder*, 10 How. 477, 495; *Littlefield* v. *Perry*, 21 Wall. 205, 223;

Paper Bag Cases, 105 U. S. 766, 771. In a suit in equity brought by the patentee alone, if the defendant seasonably objected to the nonjoinder of the licensee, the court might, as Judge Lowell did in *Hammond* v. *Hunt*, 4 Banning & Arden, 111, order him to be joined. But when a suit in equity has been brought and prosecuted, in the name of the patentee alone, with the licensee's consent and concurrence, to final judgment, from which, if for too small a sum, an appeal might have been taken in the name of the patentee, we should hesitate to say, merely because the licensee was not a formal plaintiff in that suit, that a new suit could be brought to recover damages against the same defendant for the same infringement.

2. It is a more serious question whether a decree in favor of the patentee, upon a bill in equity against one person for making and selling a patented machine, is a bar to a subsequent suit by the patentee against another person for afterwards using the same machine within the term of the patent. A license from the patentee to make, use and sell machines gives the licensee the right to do so, within the scope of the license, throughout the term of the patent; and has the same effect upon machines sold by the licensee under authority of his license, that a sale by the patentee has upon machines sold by himself, of wholly releasing them from the monopoly, and discharging all claim of the patentee for their use by anybody; because such is the effect of the patentee's voluntary act of licensing or selling, in consideration of the sum paid him for the license or sale. *Adams* v. *Burke*, 17 Wall. 453. But an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the future use of the machine. On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed. *Suffolk Co.* v. *Hayden*, 3 Wall. 315, 320; *Root* v. *Railway Co.*, 105 U. S. 189, 198; *Needham* v. *Oxley*, 8 Law Times (N. S.) 604; *S. C.* 2 New Rep. Eq. & Com. Law, 388; *Frearson* v. *Loe*, 9 Ch. D. 48, 67. No more does one, who pays damages for selling a machine in infringement of a patent,

acquire for himself or his vendee any right to use that machine. In the case of a license or a sale by the patentee, the rights of the licensee or the vendee arise out of contract with him. In the case of infringement, the liability of infringers arises out of their own wrongful invasion of his rights. The recovery and satisfaction of a judgment for damages against one wrongdoer do not ordinarily confer, upon him or upon others, the right to continue or repeat the wrong.

This view is in accord with the judgment of Vice-Chancellor Wood (afterwards Lord Chancellor Hatherley) in two suits brought by a patentee, the one against the manufacturer, and the other against the user, where the plaintiff asked for an injunction against each, for an account against the manufacturer, and for damages against the user, and declined to accept an offer of the user to pay him the like royalties that other persons paid. It was argued in behalf of the user that the patentee was not entitled to damages against him, as well as to an account against the manufacturer; and could not have an account against the seller without adopting the sale, and, if he adopted the sale, had no right to get anything from the purchaser. But the Vice-Chancellor held that the plaintiff was entitled to an injunction, to an account, or, upon his waiving that, to damages against the manufacturer, and also to damages against the user, and said: "With regard to the damages, it has never, I think, been held in this court that an account, directed against a manufacturer of a patented article, licenses the use of that article in the hands of all the purchasers. The patent is a continuing patent, and I do not see why the article should not be followed in every man's hand, until the infringement is got rid of. So long as the article is used, there is continuing damage." "As to the royalties, I cannot compel the plaintiff to accept the same royalty from these defendants as he receives from others. I cannot in the decree do less than give the plaintiff his full right, and I cannot bargain for him what he may choose, or may not choose, to do." *Penn* v. *Bibby*, L. R. 3 Eq. 308; *S. C.* 15 Weekly Reporter, 192.

3. If one person is in any case exempt from being sued for damages for using the same machine for the making and sell-

ing of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of two wrongdoers, and has received full compensation from one of them. In that view, the case of the patentee, whose right of property under his patent had been invaded, would be analogous to that of one from whom personal property had been taken.

But, according to the law of England, as well as of America, the owner of a chattel, which others have taken from him and converted to their own use, is not deprived of his property therein by recovering judgment for damages against any or all of them, without actual satisfaction by somebody. By the law of England, indeed, as declared by its courts, upon technical grounds, the owner of a chattel, who has recovered judgment for its value in trover against one of two joint tortfeasors, cannot, although that judgment remains unsatisfied, bring a like action against the other for the same cause. But, even by that law, such a judgment against the one, without satisfaction, does not vest the property in the chattel in him, or bar a subsequent action against the other for continuing to detain the chattel. Holroyd and Littledale, JJ., in *Morris* v. *Robinson*, 5 D. & R. 34, 47, 48; *S. C.* 3 B. & C. 196, 206, 207; *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584, and L. R. 7 C. P. 547, 554; *Ex parte Drake*, 5 Ch. D. 866. In *Brinsmead* v. *Harrison*, Mr. Justice Willes observed that to say that the mere obtaining judgment for nominal damages vests the property in the defendant would be an absurdity. L. R. 6 C. P. 588.

By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass. *Lovejoy* v. *Murray*, 3 Wall. 1. The reasons are therefore stronger, if possible, here than in England for holding that a judgment for nominal damages against one wrongdoer does not bar a suit against another for a continuance of the wrong.

The result is, that, in any view of the case, the decree of the Circuit Court dismissing this bill was erroneous, and must be

Reversed.

STATE OF MARYLAND, for use of Markley, *v.* BALDWIN & Others.

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

Argued November 13, 14, 1884.—Decided December 15, 1884.

A suit on an administrator's bond, taken in the name of a State for the benefit of parties interested, is, for the purposes of jurisdiction, to be regarded as a suit in the name of the party for whose benefit it is brought.

Testimony as to admissions and conduct of a deceased person cannot be impeached by proof of that person's statement concerning the character of the witness testifying to them.

If one of the issues at a trial be whether parties cohabiting together in a State in which marriage is a civil contract, to which no attending ceremonies are necessary, were man and wife, it is the duty of the court to direct the jury, in the absence of statutory regulations on the subject, to the necessity of proof of some public recognition of the marriage, by which it can be known, or reputation of the relation may obtain.

A general verdict upon distinct issues raised by several pleas cannot be sustained if there was error as to the admission of evidence, or in the charge of the court, as to any one of the issues.

This was a suit on an administrator's bond taken in the name of the State of Maryland for the benefit of the parties interested. It was commenced in a State court of Maryland, against citizens of Maryland, and was removed to the Circuit Court of the United States on the ground that the real party in interest was a citizen of New Jersey. The facts raising the questions of jurisdiction, and the questions on the merits, are all fully stated in the opinion of the court.

Mr. Albert Constable for plaintiff in error.

Mr. Archibald Sterling, Jr., for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This is an action, brought for the use of Markley, a citizen of New Jersey, upon the bond of the administrators of the estate of Daniel Lord, deceased, who died intestate in 1866, in Cecil County, Maryland, of which State he was at the time a

citizen, and in which he owned real and personal property. It was commenced in the Circuit Court of that county. The defendants are citizens of Maryland.

Markley filed his affidavit setting forth his citizenship and that of the defendants, and that he had reason to believe and did believe that, from prejudice and local influence, he would not be able to obtain justice in the State court. The action was thereupon removed to the Circuit Court of the United States for the district. It would appear somewhat singular that a party should aver his inability to obtain justice, from the causes stated, in an action brought for his benefit in the name of the State in one of her own courts, but from the fact that the State is only a formal plaintiff, the actual litigation being between the other parties.

By the law of Maryland the bond of an administrator is taken to the State, but is held for the security of persons interested in the estate of the deceased. The name of the State is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond. If the residence of these parties be in different States, the Circuit Court of the United States has jurisdiction.

A statute of Virginia in force in 1809 required bonds given by executors for the faithful execution of their duties to be made payable to the justices of the peace of the county where letters were issued, but allowed suits to be brought upon them at the instance of any party aggrieved; and in *Browne* v. *Strode*, 5 Cranch, 303, this court held that the Circuit Court of the United States for the district had jurisdiction of an action upon such a bond in the name of the justices of the peace for the use of a British subject, though the defendants were citizens of Virginia, the real controversy being between them and an alien.

A statute of Mississippi in force in 1844 required sheriffs to execute bonds to the governor of the State for the faithful performance of their duties, which could be prosecuted by any party aggrieved, until the whole penalty was recovered. In *McNutt* v. *Bland*, 2 How. 9, an action was brought in the

Circuit Court of the United States for the District of Mississippi in the name of the governor for the use of citizens of New York against defendants who were citizens of Mississippi, and on demurrer it was held that the Circuit Court had jurisdiction, this court observing that there was a controversy and a suit between citizens of New York and citizens of Mississippi, and there was neither between the governor and the defendants, that as an instrument of the State his name was on the bond and to the suit, but in no just view of the Constitution could he be considered as a litigant party. "Both," it added, "look to things not names—to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law." The justices of the peace in the one case and the governor in the other were mere conduits through whom the law afforded a remedy to persons aggrieved, who alone constituted the complaining parties. So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court.

The declaration, after stating the appointment by the Orphan's Court of Cecil County of two of the defendants as administrators, and the execution of the bond by them as principals, and by the other defendants as sureties, alleges that the administrators took possession of the personal property of the deceased, paid all his debts, and on the 23d of October, 1867, passed their account, showing such payment, and that there was in their hands for distribution the sum of $24,439.43. It also alleges that Markley is a child and heir-at-law of the deceased, and as such entitled to one-fourth part of the personal estate of which he died possessed; that the administrators have not distributed the surplus in their hands as required by law, but have refused to pay him the portion to which he is entitled, although requested so to do, and that thus they have not discharged their duty.

The defendants filed several pleas, in substance as follows:

1st. That Markley was not one of the heirs of the deceased, and therefore not entitled to a distributive share of his estate;

2d. That the administrators had fully administered upon the estate and had no property of the deceased, and had not had since the commencement of the action;

3d. That the personal estate of the deceased was insufficient to satisfy the debts which they had paid;

4th. That before the commencement of the action they had paid to creditors of deceased an amount which, with the expenses of administration, exceeded the value of his whole personal estate which had come into their hands; and

5th. That they had compromised with Markley for his claim against the estate, both real and personal, and paid him $3,500, which he had received in full satisfaction and discharge of his claim.

Upon these pleas issues were joined and tried by the court with a jury, which found a general verdict for the defendants. Judgment having been entered, the case was brought here on writ of error.

On the trial evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given.

Upon the issue made by the first plea, evidence was introduced to establish a marriage between Markley's mother and the deceased. It showed that her maiden name was Rebecca Markley; that whilst retaining that name, she lived with him, he passing also by the name of Markley; that they had several children; that to her sisters and to one Cross, his son-in-law, he frequently spoke of her as his wife; that he so called her in their presence, and she called him her husband, and to the doctor who attended her during her confinement he spoke of her as his wife. No witness was present at any marriage ceremony,

or at any contract of marriage between the parties; a marriage was inferred from their declarations and their living together. In explanation of his adopting her name of Markley, one of the sisters states that he informed her that he desired to keep his marriage secret from his mother, as she was a Quakeress and hostile to his marriage out of the society to which she belonged. On the other hand, it appeared, from other witnesses, that his being married was never communicated to his family; that neither his brothers, sisters, nor intimate companions and associates ever heard of it; and that his mother was an Episcopalian, and therefore his professed reason for keeping his marriage secret from her was a mere pretence to conceal his actual relations to the woman with whom he was living, whatever they were. Cross testified that the deceased had admitted to him his marriage with Miss Markley, and had given the reason mentioned for concealing his own name and taking hers; also, that the deceased had great confidence in him, and after Rebecca's death had spoken of his marriage and stated that he owed to her all his early success. One of the defendants, called as a witness for the defence, was permitted, against the objection of the plaintiff, to testify to conversations with the deceased about Cross, and that the deceased had expressed great distrust of him, calling him anything but an honest man, and stating that Cross had been in the penitentiary, and that it had cost the deceased $500 to get him out. This testimony was clearly inadmissible; it was mere heresay. Testimony as to the admissions and conduct of a person cannot be impeached by his statements to a third party as to the character of the witness. The evidence, too, was material. It tended directly to discredit Cross and thus weaken the force of his statements respecting the asserted marriage. It is impossible to say what effect it may have had on the minds of the jury on the question of the marriage.

As the case must, for this error, go back for a new trial, it is proper to say that, by the law of Pennsylvania, where, if at all, the parties were married, a marriage is a civil contract, and may be made *per verba de præsenti*, that is, by words in the present tense, without attending ceremonies, religious or civil. Such is

also the law of many other States in the absence of statutory regulation. It is the doctrine of the common law. But where no such ceremonies are required, and no record is made to attest the marriage, some public recognition of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills, and other formal instruments. From such recognition the reputation of being married will obtain among friends, associates, and acquaintances, which is of itself evidence of a persuasive character. Without it the existence of the marriage will always be a matter of uncertainty; and the charge of the court should direct the jury to its necessity in the absence of statutory regulations on the subject. Otherwise the jury would be without any guide in their deliberations.

The law of Pennsylvania, as we are advised, requires, in some form, such recognition. See *Nathan's Case*, 2 Brewster, 149, 153; *Commonwealth* v. *Stump*, 53 Penn. St. 132.

Judgment reversed and cause remanded for a new trial.

ARTHUR, Collector, *v.* MORGAN.

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

Submitted November 26, 1884.—Decided December 22, 1884.

A carriage in use abroad for a year by its owner, who brings it to this country for his own use here, and not for another person nor for sale, is "household effects" under § 2505 Rev. Stat. (p. 484, 2d ed.), and free from duty.

A protest against paying 35 per cent. duty on the carriage, which states that the carriage is "personal effects," and had been used over a year (as shown

Statement of Facts.

by affidavit), and that, under § 2505 of the Revised Statutes, "personal effects in actual use" are free from duty, is a sufficient protest, on which the amount paid for duty can be recovered back on the ground that the carriage was free from duty as "household effects," under the same section.

Julia Morgan imported into the port of New York, from Europe, in May, 1876, a carriage, on which, at the appraised value of $667, the collector exacted a duty of 35 per cent., amounting to $233.45, under the following provision of Schedule M of § 2504 of the Revised Statutes (p. 474, 2d ed.): "Carriages and parts of carriages: thirty-five per centum ad valorem." She protested in writing to the collector against paying the 35 per cent. duty, on the ground that the carriage was "personal effects" and had been used by her "over a year," and that she had shown that fact by affidavit, and that, under § 2505 of the Revised Statutes, "personal effects in actual use" (Ib. 487) were free from duty. She appealed from the decision of the collector to the Secretary of the Treasury, and he affirmed it, and then she brought this suit. At the trial the above facts were shown, and the plaintiff proved that the affidavit referred to was to the effect that the carriage was old and had been in use by her abroad for more than one year before its importation; that the affidavit was deposited with the defendant, and transmitted by him to the Secretary, with the appeal; that she was a native citizen of the United States, and had lived abroad some three years, as a temporary resident, prior to the importation, and had returned to this country about two weeks before the importation; that the carriage had been purchased by her in France, and had been used by her as a family carriage abroad for more than one year before its importation; and that it was imported by her for her own use in this country, and was not intended for any other person or persons or for sale. The defendant offered no testimony, but moved the court to direct a verdict for the defendant on the following grounds:

"First; that no evidence was offered to support the claim made in the plaintiff's protest, that the carriage was a personal effect in actual use, within the meaning of that term as used in section 2505 Revised Statutes of the United States.

"Second; that the said protest was insufficient to raise the point that the carriage was included within the meaning of the term 'household effects,' as that term is used in section 2505 Revised Statutes of the United States.

"Third; that, even if the protest be considered sufficient to raise the last point, the carriage in question cannot properly be held to be included within the true sense and meaning of the term 'household effects,' as that term is used in section 2505 Revised Statutes of the United States."

The court denied the motion on each ground, and the defendant excepted to each ruling. A verdict was rendered for the plaintiff, the court having directed it on the ground that, on the testimony and within the meaning of § 2505, the carriage was "a household effect," and the exaction of duties was illegal. The defendant excepted to the direction, and, after a judgment against him, brought this writ of error.

Mr. Solicitor-General for plaintiff in error.

Mr. L. W. Emerson for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court. He recited the facts as stated above, and continued:

It was provided by § 2505 of the Revised Statutes of 1874, that the importation of the following articles should be exempt from duty:

1. "Books, household effects, or libraries, or parts of libraries, in use, of persons or families from foreign countries, if used abroad by them not less than one year, and not intended for any other person or persons, nor for sale." (P. 484, 2d ed.)

2. "Personal and household effects, not merchandise, of citizens of the United States dying abroad." (P. 487, 2d ed.)

3. "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." (P. 489, 2d ed.)

By § 1 of the act of August 10, 1790, ch. 39, 1 Stat. 181, there were exempted from duty, "the clothes, books, household furniture, and the tools or implements of the trade or profession of persons who come to reside in the United States." This exemption was continued by § 2 of the act of May 2, 1792, ch. 27, 1 Stat. 260.

As to the above clause 1, Schedule I of the act of July 30, 1846, ch. 74, 9 Stat. 49, exempted from duty "household effects, old and in use, of persons or families from foreign countries, if used abroad by them, and not intended for any other person or persons, or for sale." The same exemption was continued in § 3 of the act of March 3, 1857, ch. 98, 11 Stat. 194, and in § 23 of the act of March 2, 1861, ch. 68, 12 Id. 195. By § 22 of the act of July 14, 1870, ch. 255, 16 Id. 265, 268, exemption was extended, in addition, to "household effects of persons and families returning or emigrating from foreign countries, which have been in actual use abroad by them, and not intended for any other person or persons, or for sale, not exceeding the value of five hundred dollars." The above clause 1 first appeared in § 5 of the act of June 6, 1872, ch. 315, 17 Stat. 234, and is now in force as part of § 2503 of the Revised Statutes, by virtue of § 6 of the act of March 3, 1883, ch. 121, 22 Stat. 518.

As to the above clause 2, § 9 of the act of August 30, 1842, ch. 270, 5 Stat. 560, exempted from duty "books, and personal and household effects, not merchandise, of citizens of the United States dying abroad." Omitting the words "books and" this provision was repeated in Schedule I of the act of July 30, 1846, ch. 74, 9 Stat. 49, and in § 3 of the act of March 3, 1857, ch. 98, 11 Id. 194, and in § 23 of the act of March 2, 1861, ch. 68, 12 Id. 195, and is now in force as part of § 2503 of the Revised Statutes, by virtue of § 6 of the act of March 3, 1883, ch. 121, 22 Stat. 520.

The history of clause 3 above is fully given in *Astor* v. *Merritt*, 111 U. S. 210.

In June, 1876, the Attorney-General advised the Secretary of the Treasury that the words "personal effects," in clause 3 above, did not include carriages previously in use, but only

such things as are worn, like apparel, upon the person, or are used in connection therewith; and shortly afterwards he advised the same officer that the words "household effects," in clause 1 above, did not include carriages used abroad not less than one year and intended for personal use here. 15 Opinions, 113, 125. On this construction the department has acted. The last opinion proceeded on the ground that early and repeated decisions in England had held that books, wares, horses, &c., did not pass under bequests of "household goods and effects," and that the express mention of books, in clause 1, and the omission of other articles so determined not to be included under the general term "household effects," indicated that "carriages" were not within the exemption.

The word "effects" means "property or worldly substance." When it is accompanied, in a will, by words of narrower import, the bequest, if not residuary, may be confined to species of property *ejusdem generis* with those previously described. But the analogies to be derived from wills are not strictly applicable to a case like the present, and no material aid can be derived from decisions in regard to wills. The construction of the words "household effects" in a will often depends largely on the meaning of words in other provisions in the will, and upon the qualification by the word "other," as referring to specific articles before named, like the word "other" in clause 3 above. In the present case the only direct qualification of "effects" is "household."

Persons who dwell together as a family constitute a "household." In New York, a statute exempted from execution a cow "owned by any person being a householder." In *Woodward* v. *Murray*, 18 Johns. 400, a judgment debtor, who owned a cow, had left his wife and children, they continuing to reside in the house he had occupied. While they were on the road, removing to the house of the wife's father, with the cow and their household furniture, the cow was seized on execution. The court held that the exemption continued so long as the wife and children remained together "as a family," and that they continued to be the debtor's "household" and he the "householder."

The question for decision in this case is, whether the carriage of the plaintiff fell under either of these heads: (1) "household effects, in use, of a person or a family from a foreign country, used abroad by the person or the family not less than one year, and not intended for any other person or persons, nor for sale;" (2) "personal effects (not merchandise), nor for sale, of a person arriving in the United States."

The carriage had been in use as a family carriage, abroad, by the plaintiff, as owner, for more than a year. She came from abroad after a temporary residence there of three years, and imported the carriage two weeks later for use here, and not for any other person nor for sale. Was it "household effects" or "personal effects" of the plaintiff? We think that it fell within clause 1 and was "household effects."

In the provision respecting the "household effects" of persons or families, there is an evident intention to include articles which pertain to a person as a householder or to a family as a household, which have been used abroad not less than a year, and are not intended for others nor for sale. A carriage is peculiarly a family or household article. It contributes, in a large degree, to the health, convenience, comfort and welfare of the householder or of the family. The statute is not limited to articles of household furniture, or to things whose place is necessarily within the four walls of a house. Clause 2 above uses the words "personal and household effects." This serves to show that, by the use of the words "household effects," alone, in clause 1, in the same section of the statute, something is intended different from "personal effects;" and that those words embrace articles which the words "personal effects" do not cover. So, too, if the words "other personal effects," in clause 3, should be extended to embrace articles properly covered by the words "household effects" in clause 1, such household effects would come in free, although not used abroad for a year, and the door would be opened wide for the introduction, without duty, of large numbers of articles, as "household effects," which it is intended should pay duty. We do not find it necessary, in this case, to consider any further the construction of the words "other personal effects," in clause 3, because

we place our decision on the ground that this carriage was "household effects" of the plaintiff.

The protest claimed that the carriage was "personal effects" in actual use, under § 2505, and, as such, free and not subject to the duty imposed on it, but did not claim it to be "household effects." The solicitor-general concedes that the objection to the protest is a "bare technicality," and that its language could hardly mislead the officers. A proper protest, as well as an appeal, are prerequisites to the right to sue. § 3011 Rev. Stat., as amended by the act of February 27, 1877, ch. 69, 19 Stat. 247. The protest must set forth "distinctly and specifically" the grounds of objection to the decision of the collector as to the rate and amount of duties. § 2931 Rev. Stat. This provision was taken from the act of June 30, 1864, ch. 171, § 14, 13 Stat. 214, and is substantially the same as that in the act of February 26, 1845, ch. 22, 5 Id. 727. A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure. *Converse* v. *Burgess*, 18 How. 413; *Swanston* v. *Morton*, 1 Curtis, 294; *Kriesler* v. *Morton*, Id. 413; *Burgess* v. *Converse*, 2 Id. 216; *Steegman* v. *Maxwell*, 3 Blatchford, 365; *Frazee* v. *Moffitt*, 20 Id. 267. This protest apprised the collector that the carriage was claimed to be free, under § 2505, as a carriage actually used abroad over a year. The "household effects" clause was in the mind of the party and the collector could not fail to so understand. The protest was sufficient.

The judgment of the Circuit Court is affirmed.

ENGLAND *v.* GEBHARDT.

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

Submitted November 20, 1884.—Decided December 8, 1884.

No question of fact can be re-examined in this court on a writ of error, unless the evidence is brought into the record by a bill of exceptions, or some method known to the practice of courts of error for that purpose is adopted, such as, for instance, an agreed statement of facts, or a special finding in the nature of a special verdict.

Papers on file in the court below are not part of the record in the case when brought here by writ of error, unless they are put into the record by some action of the court below, as by bill of exceptions or some equivalent act.

The opinion of the court below, when transmitted with the record in accordance with Rule 8, § 2, is no part of the record.

This was a writ of error brought under the act of March 3, 1875, ch. 137, § 5, 18 Stat. 472, to reverse an order of the Circuit Court remanding a suit at law to the State court from which it had been removed. The suit was begun by Jacob W. Gebhardt, the defendant in error, against Isaac W. England, the plaintiff in error, in the Supreme Court of New Jersey, and a summons was duly served on England. The pleadings were made up and issue joined in the State court. When that was done there was nothing in the record to show the citizenship of the parties; but, on the 6th of September, 1883, which was in time, England filed a petition, accompanied by the necessary bond for the removal of the suit to the Circuit Court of the United States for the District of New Jersey. The petition set forth that England was a citizen of New Jersey and Gebhardt a citizen of New York, both at the time of the commencement of the suit, and at the time of the presentation of the petition. The removal was asked for solely on the ground of the citizenship of the parties. Upon the presentation of the petition, the State court entered an order to the effect that it would proceed no further, and a copy of the record was filed in the Circuit Court on the 25th of September.

On the 14th of March, 1884, the following order was made in the cause:

Argument for Plaintiff in Error.

"This cause coming on to be heard on a motion to remand this cause to the New Jersey Supreme Court, in the presence of Joseph A. Beecher, attorney for the plaintiff, and of A. Q. Keasbey, attorney for the defendant, and the matter having been argued by the respective attorneys, and the court having taken time to consider the same, and the court being of opinion that there is not in said cause so attempted to be removed to this court a controversy between citizens of different States, according to the true intent and meaning of the act of Congress in this behalf, it is now, . . . on motion of Joseph A. Beecher, ordered that the said motion be, and the same is hereby, granted, and this cause is remanded to the New Jersey Supreme Court to proceed therewith according to law, and it is further ordered that the said plaintiff do recover of the said defendant, Isaac W. England, the costs of this motion to be taxed."

The motion on which this order was made was not set out in the record. There were, however, in the transcript what purported to be certain affidavits sworn to in the months of November and December, 1883, and filed February 25, 1884, which had indorsed thereon, "Affidavits, on motion to remand," and there was also what purported to be the opinion of the judge denying the motion, from which it appeared that "the motion to remand this cause was founded upon the allegation that both the plaintiff and defendant were citizens of the State of New Jersey when the summons was issued and served and the petition for removal was filed. It was resisted by the defendant upon the ground that at both of these periods of time the plaintiff was residing in, and was a citizen of New York." There was no bill of exceptions in the record, and no authentic finding or statement of the facts on which the order to remand was made, or of the evidence submitted by the parties. Neither did the order to remand itself refer in any manner to the affidavits as the foundation of the action which was taken.

Mr. A. Q. Keasbey for plaintiff in error.—Before the act of 1875, 18 Stat. 470, an order remanding a cause to a State

court was not reviewable. *Insurance Co.* v. *Comstock*, 16 Wall. 258; *Railroad Co.* v. *Wiswall*, 23 Wall. 507. But the act of 1875, section 5, provided that if in any suit removed "it shall appear to the satisfaction of the Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," the court shall remand the suit and make such order as to costs as shall be just; "but the order dismissing or remanding said cause to the State court shall be reviewable in the Supreme Court on writ of error or appeal as the case may be." The only question before the Circuit Court on the motion to remand was that of the citizenship of the plaintiff below, upon which its jurisdiction depended. It decided this question, which was a mixed one of law and fact, against the plaintiff in error, and made an order to remand. That order the statute expressly makes reviewable in this court. The plaintiff in error has the right, under the statute, to submit that question on which the jurisdiction depended for decision here. In *St. Paul & Chicago Railway Co.* v. *McLean*, 108 U. S. 212, the court held that where the Circuit Court refused to exercise its discretion to allow a party seeking to remove a cause to file the transcript after the first day of the term, this court would not interfere with such discretion, unless it was clearly improperly exercised. But what is sought to be reviewed in this case is not an exercise of the discretion of the Circuit Court, but its judgment on the law and the facts, out of which the question of its jurisdiction arose. This is expressly made a subject of review in this court by the statute. The record shows that it was erroneous; it should be reversed.

Mr. John R. Emery for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court. He recited the facts as above stated, and continued:

It was decided in *Babbitt* v. *Clark*, 103 U. S. 606, 611, that "Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that

where the suit was in equity an appeal should be taken." This was a suit at law, and it was, therefore properly brought here by writ of error. But as a writ of error brings up for review only such errors as are apparent on the face of the record, it follows that nothing can be considered here on such a writ in this class of cases, any more than in others, that is not presented in some appropriate form by the record. This record shows an averment in the petition for removal that the parties to the suit were citizens of different States, and a finding of the court that they were not. This implies the finding of a fact upon evidence submitted upon a hearing by the court, but before the questions presented and decided at such a hearing can be re-examined on a writ of error, they must be brought into the record by a bill of exceptions, or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose. *Storm* v. *United States*, 94 U. S. 76, 81; *Suydam* v. *Williamson*, 20 How. 427; *Baltimore & Potomac Railroad Co.* v. *Trustees Sixth Presbyterian Church*, 91 U. S. 127, 130. That this rule is applicable to the class of cases to which that now under consideration belongs was expressly decided in *Kearney* v. *Denn*, 15 Wall. 51, 56.

The record in the case contains nothing of the kind. The affidavits, copies of which appear in the transcript, form no part of the record proper. The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. *Sargeant* v. *State Bank of Indiana*, 12 How. 371, 384; *Fisher* v. *Cockerell*, 5 Pet. 248, 254. This may be done by a bill of exceptions, or something which is equivalent. Here, however, that has not been done. It nowhere appears that the affidavits were ever brought to the attention of the court, much less that they constituted the evidence on which the ruling was made. The case is, therefore, in this respect, different from *Bronson* v. *Schulten*, 104 U. S. 410, 412, where the order setting aside the judgment referred to and identified

in terms the affidavits found in the transcript as the foundation of the order which was made.

Neither is the opinion of the court a part of the record. Our Rule 8, sec. 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below.

The order to remand is affirmed.

NEW ORLEANS INSURANCE COMPANY *v.* ALBRO COMPANY.

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

Submitted November 17, 1884.—Decided December 8, 1884.

It is within the discretion of a Circuit Court to take an appeal bond in which each surety is severally bound for only a specified part of the obligation.

The omission in an appeal bond, to mention the term at which the judgment was rendered, is not fatal; but may be cured.

A defence to a suit on a policy against perils of the sea and barratry, that the sale of the cargo after loss of the vessel was made with a want of diligence which the evidence in the case showed was equivalent to barratry, *Held*, To be frivolous.

This was a motion to dismiss, with which a motion to affirm was combined under the rule. The grounds for both branches of the motion are fully stated in the opinion of the court.

Mr. Charles E. Schmidt for plaintiff in error.

Mr. O. B. Sansum for defendant in error.

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

The motion to dismiss is put on the ground that the security bond is defective, 1, because the sureties are not jointly or severally bound for the full amount of the obligation, but each

severally for a specified part only, and, 2, because the judgment brought under review by the writ of error is not described with sufficient certainty.

The bond is certainly unusual in form, but we cannot say that it is not within the legal discretion of a justice or judge, under some circumstances, to take it. Cases may arise in which it will be impossible to obtain security if this mode is not adopted. It being within the discretion of the judge to accept such a bond as security, his action in that particular is final, and, under the rule laid down in *Jerome* v. *McCarter*, 21 Wall. 17, not reviewable here.

In the matter of the description of the judgment the bond is in the form which has been much in use, except that it omits the term at which the judgment was rendered. The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security.

It is apparent from the record that the writ of error must have been sued out for delay only. The suit was upon a policy issued by the Insurance Company to the Albro Company for the insurance of a cargo of mahogany and cedar wood on board the bark Commodore Dupont, against the perils of the sea and the barratry of the master of the bark at and from the port of Santa Anna, Mexico, to the port of New Orleans. The bark was driven on the bar at Santa Anna and wrecked in a severe gale while loading, and her cargo was cast on the sea and driven ashore. While in this condition the cargo was sold, and the proceeds, which were but small, after deducting charges and expenses, paid over by the master to the Albro Company. In the petition the loss of the vessel and her cargo is averred, and also the sale of the cargo under the orders of the port authorities at Santa Anna. In the answer the loss of the vessel was admitted, but it was insisted, by way of defence, that due diligence was not used by the master in saving the cargo and forwarding it to its place of destination as the policy required. Upon the trial "the plaintiffs introduced evidence

tending to show that the sale of the insured cargo by the master was made under such circumstances as constituted a necessity for making the same, and rendered the act of the master in making the same the act of the defendants, in that, under the law of insurance, the authority therefor would be implied. The defendants introduced evidence tending to establish the absence of those circumstances which so gave authority to the master to make such sale, and tending to show the failure on his part to seasonably communicate with the owners and underwriters; and the same evidence, introduced by the defendants, besides being applicable to the two issues, as stated above, tended further to establish that the act of the master in making the said sale of the insured cargo was an act of barratry, in that it was made, and especially was made, in time and manner, knowingly contrary to his best judgment and to the injury of whomsoever it might concern; and all the evidence tending to establish a barratrous sale came from the defendant.

"The court instructed the jury that, under the pleadings, the evidence which had been adduced before them in the cause authorized them to inquire and find—

"1st. Whether the sale of the master was made under such circumstances as, according to the principles or rules in the law of marine insurance (which were stated to the jury), made the act of sale on the part of the master the act of the underwriters, and that if upon this question they found for the plaintiff, then the defendant's liability was established.

"2dly. The court instructed the jury that if they found that, according to the principles and rules of marine insurance (which had been stated to them), the act of sale on the part of the master was not the act of the underwriters, but they found that, while he had exceeded his authority he had acted in good faith, then the defendant was discharged from all liability.

"3dly. The court further instructed the jury that if they found that, according to the rules and principles of marine insurance (which had been explained to them), the act of sale by the master was not the act of the underwriters, the defendants, still, if they found that such sale was barratrously made, *i. e.*,

was an act of barratry, which was defined to them by the court, then also the liability of the defendant was established.

"No exception was taken by the counsel for the defendant to the rules or principles of law by which the court, in its instructions, had stated they must determine the question of implied authority from the defendant on the part of the master to make the sale, nor to the test by which the jury was to determine whether an act of barratry had been committed.

"But the counsel for the defendant, before the jury retired to deliberate upon their verdict, reserved an exception to that part of the charge of the court alone by which the court submitted the question of barratry or no barratry to the jury, in the instruction numbered 3d."

We are unable to discover even the semblance of an error in the part of the charge excepted to. The petition presented distinctly the question of the liability of the insurance company, under its policy, for the loss of the cargo which had been stranded by a peril of the sea and sold by the master of the vessel. The defence was in effect, that the cargo ought to have been gathered up after the stranding and forwarded to the place of destination. Upon the issue thus raised by their pleadings the parties went to trial, and testimony was submitted to the jury on both sides. That of the insurance company tended to show not only that the sale was not justified by the circumstances, but that in making the sale the master was guilty of barratry. The court told the jury, in substance, that if the master, acting in good faith, sold the cargo when he ought not to have done so, the insurance company would not be bound by his sale; but, "if the sale was barratrously made, *i. e.*, was an act of barratry," the company must make good the loss—and this clearly because it had insured against the barratry of the master as well as the perils of the sea. It is true that the parties did not, in their pleadings, rely upon the barratry either as a ground of action or of defence, but the insured did sue for the loss occasioned by the perils of the sea and the sale by the master, and the insurance company, in attempting to prove that the sale was not justifiable under the circumstances, gave evidence tending to prove that it was bar-

ratrously made. It was upon this evidence coming from the insurance company that the court told the jury that the barratry of the master would not relieve the company from its liability in this action for the loss which followed from the stranding by a peril of the sea, and the subsequent barratrous sale. Certainly we are not called upon to retain a case on our docket for argument upon such a question.

There was sufficient color of right to a dismissal to make it proper for us to entertain a motion to affirm with the motion to dismiss.

The motion to dismiss is denied, but that to affirm is granted.

Affirmed.

UNITED STATES *v.* NORTH.

UNITED STATES *v.* EMORY.

APPEALS FROM THE COURT OF CLAIMS.

Submitted November 20, 1884.—Decided December 8, 1884.

Officers of the army and officers of the navy, engaged in the service of the United States in the war with Mexico, and who served out the time of their engagement, are, since the act of February 19, 1879, 20 Stat. 316, entitled to the three months' extra pay allowed under the act of July 19, 1848, 9 Stat. 248.

The extra pay which such officers are entitled to receive is to be computed at the rate which they were entitled to receive at the time when they were discharged or ordered away.

Officers in the regular army or navy engaged in the military service of the United States in the war with Mexico, "served out the term of their engagements," or were "honorably discharged" within the meaning of the act of 1848, when the war was over, or when they were ordered or mustered out of that service.

These suits were brought in the Court of Claims.

James H. North was an officer in the navy of the United States from May 29, 1829, to January 14, 1861, when he resigned. He served in the war with Mexico, as lieutenant, on

board the frigate Potomac, from February 10, 1846, until July, 1847, when his vessel sailed for the United States.

William H. Emory was an officer in the regular army of the United States most of the time from July 1, 1831, to July 1, 1876, when he was placed on the retired list. He was appointed first lieutenant of topographical engineers July 7, 1838, and promoted to captain April 24, 1851. On or about the 1st of October, 1847, while he was lieutenant of engineers, he was appointed by the President as lieutenant-colonel in the District of Columbia and Maryland volunteers for service during the war with Mexico. He took the oath of office in Washington about the 2d of October and joined his regiment in Mexico, under the orders of the War Department, and served with it "in the war with Mexico" until mustered out of service, as lieutenant-colonel, on the 24th of July, 1848. Upon his muster out as lieutenant-colonel he resumed his former rank as lieutenant of engineers, and continued his service as such.

These suits were brought to recover the "three months' extra pay" allowed to those "who were engaged in the military service of the United States in the war with Mexico" by the following statutes:

1. Act of July 19, 1848, ch. 104, § 5, 9 Stat. 248:

"SEC. 5. *And be it further enacted*, That the officers, non-commissioned officers, musicians and privates engaged in the military service of the United States in the war with Mexico, and who served out the time of their engagement, or may have been honorably discharged,—and first to the widows, second to the children, third to the parents, and fourth to the brothers and sisters of such who have been killed in battle, or who died in service, or who, having been honorably discharged, have since died, or may hereafter die, without receiving the three months' pay herein provided for,—shall be entitled to receive three months' extra pay: *Provided*, That this provision of this fifth section shall only apply to those who have been in actual service during the war."

2. Act of February 19, 1879, ch. 90, 20 Stat. 316:

"*Be it enacted, &c.*, That the Secretary of the Treasury be,

and he is hereby, directed, out of any moneys in the treasury not otherwise appropriated, to pay to the officers and soldiers 'engaged in the military service of the United States in the war with Mexico, and who served out the time of their engagement, or were honorably discharged,' the three months' extra pay provided for by the act of July nineteenth, eighteen hundred and forty-eight, and the limitations contained in said act, in all cases, upon the presentation of satisfactory evidence that said extra compensation has not been previously received: *Provided*, That the provisions of this act shall include also the officers, petty officers, seamen, and marines of the United States Navy the Revenue Marine Service and the officers and soldiers of the United States Army employed in the prosecution of said war."

The Court of Claims gave judgment in favor of North for three months' sea service pay as lieutenant in the navy, and in favor of Emory for three months' pay as lieutenant-colonel of volunteers, without the allowances of an officer in addition to his pay. From these judgments the United States appealed.

Mr. Solicitor-General for appellant.

Mr. A. Macdonald McBlair for appellee North.

Mr. S. S. Henkle for appellee Emory.

Mr. Chief Justice Waite delivered the opinion of the court. He recited the facts as above stated, and continued:

The questions are—

1. Whether the officers of the navy and of the regular army who were employed in the prosecution of the war with Mexico are entitled to the three months' extra pay provided for by the act of 1848, and if so, then,

2. What is the "pay" to which they are entitled?

We have no hesitation in answering the first of these questions in the affirmative. All the doubts there may have been upon that subject when the act of 1848 stood alone were, in our opinion, removed by the act of 1879. It is difficult to see

why the proviso was added to that act, if it were not to make it plain that Congress intended to include "the officers, petty officers, seamen, and marines of the United States Navy, the Revenue Marine Service, and the officers and soldiers of the United States Army employed in the prosecution of said war" among those who were entitled to the "extra pay" provided for.

The answer to the second question is, to our minds, attended with no greater difficulty. Those of the regular army or navy who were "engaged in the military service of the United States in the war with Mexico" may be said to "have served out the term of their engagement," or to have been "honorably discharged," within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of that service. Being in the army and navy, their "engagement" was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority.

The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, "shall be entitled to receive three months' extra pay," evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, and as Emory was mustered out of his service in the war as lieutenant-colonel of volunteers, his pay must be in accordance with that rank.

As the effect of the statutes on which the several claimants rely was fully and elaborately considered in the opinion of the Court of Claims, *Emory* v. *United States*, 19 C. Cl. 254, and we affirm the judgments of that court, it is unnecessary to do more than state in this brief way the conclusions to which we have come.

The judgment in each case is *Affirmed.*

Mr. Justice Blatchford took no part in the decision of this cause.

THE ELIZABETH JONES.

THE WILLIS.

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

Argued November 13, 1884.—Decided December 15, 1884.

A schooner was sailing E. by N., with the wind S., and a bark was close hauled, on the port tack. The schooner sighted the green light of the bark about half a point on the starboard bow, about three miles off, and starboarded a point. At two miles off she starboarded another point. As a result the light of the bark opened about two points. The bark let her sails shake and then filled them twice. The schooner continued to see the green light of the bark till the vessels were within a length of each other, when the bark opened her red light. At the moment the vessels were approaching collision, the schooner put her helm hard a-starboard, and headed northeast. At that juncture the bark ported, and her stem struck the starboard side of the schooner amidships, at about a right angle: *Held*, That the bark was in fault and the schooner free from fault.

If the case was one of crossing courses, under article 12 of the Rules prescribed by the act of April 29, 1864, ch. 69, 13 Stat. 58, the schooner being free and the bark close-hauled on the port tack, the bark did not keep her course, as required by article 18, and no cause for a departure existed under article 19, and she neglected precautions required by the special circumstances of the case, within article 20.

The final porting by the bark was not excusable, as being done *in extremis*, because it was not produced by any fault in the schooner.

The decree of the Circuit Court was affirmed, without interest.

On the 12th of August, 1873, James R. Slauson and William R. Pugh filed a libel in admiralty, in the District Court of the United States for the Northern District of Illinois, against the bark Elizabeth Jones, to recover damages for the total loss of the schooner Willis, owned by them, and of the freight money on her cargo, through a collision which occurred between the two vessels shortly before two o'clock A. M. on the 11th of November, 1872, on Lake Erie. The Willis was on a voyage from Chicago to Buffalo with a cargo of barley, and the Jones was bound from Buffalo to Chicago with a cargo of coal.

Statement of Facts.

The libel alleged that the course of the Willis was east by north, the wind being from the southward, and about south, and about a six-knot breeze; that about two o'clock A. M. the lookout reported a green light half a point on the starboard bow of the Willis, and apparently two or three miles distant; that the Willis had the wind free, and the vessel showing the green light, and which afterwards proved to be the Jones, was, to those on board of the Willis, evidently by the wind and close-hauled; that the helm of the Willis was put to starboard, and she went off a point and was steadied; that the Jones came on, still showing her green light, when, in order to give her a wide berth, the helm of the Willis was again put to starboard, and she went off another point and was steadied; that the Jones continued to approach, but, apparently, not holding her course, keeping away, though still showing her green light only; that the helm of the Willis was put to starboard, and she swung off so as to head northeast; that, about the same time, the Jones showed both her red and green lights; that the Jones immediately came into collision with the Willis, head on, striking her amidships, at right angles, crushing in her side, and causing her to sink in a very short time; that, had the Jones kept her course, she would have passed the Willis on her starboard hand, safely; and that the Jones not only kept away while she was approaching the Willis, but when she had neared the Willis, so that there was imminent danger of colliding, she improperly ported, instead of starboarding, her helm.

On the 1st of October, 1873, the owners of the Jones filed their answer to the libel. It averred that the Willis had the wind free, about a six-knot breeze, from about south; that the Jones was sailing by the wind, close-hauled; that the Willis discovered the Jones two or three miles distant; that immediately preceding the collision the Willis put her helm to starboard, and the Jones put her helm to port, but in approaching the Willis the Jones did not change her course until a collision became imminent, and the Willis made no change of course to avoid the Jones, except, as before stated, immediately preceding the collision; that the lookout of the Jones discovered what proved to be the light of the Willis from two to four

miles distant; that she "was approaching the Jones in an opposite direction from the course of the Jones; that, when the light of the Willis was first seen, it was almost dead ahead, and continued on that line as the vessels approached each other;" that the Jones was kept steadily on her course until, seeing that there was danger of a collision, her helm was ported, but those in command of the Willis caused her helm to be put to starboard, which threw her across the bows of the Jones and caused the collision, and that it resulted entirely from the fault of the Willis.

On the 4th of October, 1873, the owners of the Jones filed a cross-libel against the Willis, to recover for damage caused to the Jones by the collision. It contained substantially the same averments as the answer to the libel of the Willis, adding the fact that the Jones struck the Willis between her fore and main rigging.

The case was heard on pleadings and proofs by the District Court, in February, 1875, and, after the hearing and before a decision, leave being granted to the owners of the Jones to amend their answer and their cross-libel, they filed an amended answer on the 8th of March, 1875. It varied the allegations of the original answer, by stating that the Willis discovered the Jones about three miles distant, but did not see the green light of the Jones; that, immediately preceding the collision, the Jones began to put her helm to port, but, seeing that the Willis was starboarding her helm, immediately changed it to starboard; that the lookout of the Jones discovered, about half a point on his port bow, and three miles off, the red light of a vessel that proved to be the Willis; that, after the light of the Willis was first seen, it continued to show more on the port bow of the Jones; that the Jones was kept on her course until immediately before the collision, when she began to port her helm, but, seeing that the Willis was starboarding her helm, immediately changed it to starboard, but the Willis continued to starboard her helm, which threw her across the bows of the Jones; and that the starboard bow of the Jones came in contact with the starboard side of the Willis about amidships. On the same day the owners of the Jones filed an amended

cross-libel, containing substantially the same averments as the amended answer, in variation of those in the original cross-libel. The original libel was, by stipulation, made the answer to the cross-libel.

In July, 1875, the District Court entered a decree, finding that the Willis was in fault, dismissing her libel, pronouncing for the libellants in the cross-libel, and awarding to them $1,500 damages. The owners of the Willis appealed to the Circuit Court. In August, 1881, that court entered a decree, finding that the Jones was in fault, reversing the decree of the District Court, dismissing the cross-libel, pronouncing for the libellants in the original libel, and awarding to them $32,826.75 for damages and interest. From that decree the owners of the Jones appealed.

The Circuit Court filed the following findings of fact:

"First. That on the 11th day of November, 1872, a collision occurred between the schooner Willis and the bark Elizabeth Jones, on Lake Erie, at about 16 miles east of Point au Pelee. The libellant, the schooner Willis, was bound for Buffalo; the respondent, the bark Jones, was bound for Chicago. The vessels collided at a quarter before two in the morning. The Willis was sailing east by north. The bark was sailing a general course southwest by west one-half west, steering by the wind. The wind was south, about a six-knot breeze, at the time of the collision. Previous to the collision it had been southeast, picking up to the westward. At twelve o'clock the wind was east. At twenty minutes after one it was southeast. At the time of the collision it was south. The Willis had the wind free, and the bark was close-hauled on the port tack. Both vessels had their proper lights and watch on deck. The vessels were between two and four miles apart when they sighted each other's lights. The night, though it occasionally clouded up, was favorable, and light enough to make objects easily discernible for two or three miles. The schooner was laden with a cargo of barley, and the bark with a cargo of coal. When the vessels collided, the starboard side of the stem of the bark struck the schooner on the starboard side between the fore and main rigging—struck her amidships, at about

right angles, on the starboard side. The schooner and her cargo sank in less than half an hour and were a total loss. The injury sustained by the Jones was fixed in the decree of the District Court at $1,500.

Second. The officers and men of the schooner Willis first sighted the green light of the bark Jones, about half a point off the schooner's starboard bow, at a distance of about three miles off, and continued to see the green light of the Jones until the vessels were within a length of each other, when the Jones opened her red light.

Third. The helm of the Willis, as soon as the light of the Jones appeared, was at once put to starboard, and she went off a point and then steadied, the light of the Jones thereupon opening about a point and a half. When about two miles distant the helm of the Willis was again put to starboard a point, and then steadied, the light of the Jones thereupon opening about two points.

Fourth. That the mate in command of the Jones gave the following order immediately after first sighting the light of the Willis: 'I went aft to the man at the wheel to see how she was headed, and her sails were then kind of shaking. I told him to "look out and keep the sails full." Then I went forward again. By the time I got forward the sails was lifting. Again I told him to keep the sails full—"draw up and keep the sails full."'

Fifth. At the moment the vessels were approaching collision, the helm of the Willis was put hard a-starboard, and she must have swung so as to head northeast, and thus have exposed her starboard side. At this juncture the Jones ported her helm, and the vessels collided, the stem of the Jones striking the Willis amidships, on the starboard side."

The Circuit Court also filed the following conclusions of law:

"First. The court finds, as a conclusion of law, that this case falls under the 12th article of the regulations for preventing collisions at sea, applicable to the navigation of vessels.

Second. That the bark Jones, being close-hauled, and the schooner Willis being free, it became the duty of the Willis to

keep out of the way, and she, having come into collision, must show why she did not discharge that duty and avoid the collision.

Third. The court finds, as a matter of law, that each of the changes heretofore recited in the findings of fact, as having been made by the Jones, was improper.

Fourth. The court also finds, as a matter of law, that the changes recited in the findings of fact, as having been made by the Willis, were proper."

Mr. Wirt Dexter, for appellants.

Mr. Robert Rae, for appellees.

Mr. Justice Blatchford delivered the opinion of the court. He recited the facts as above stated, and continued:

There is a bill of exceptions, containing exceptions by the claimants of the Jones to the first, third and fourth conclusions of law. Our review of the decree below is limited by statute to a determination of the questions of law which arise on the record, under the facts stated by the Circuit Court. The opinion of that court, although, as required by a rule of this court, annexed to and transmitted with the record, is no part of it.

When this collision occurred, the regulations in force for preventing collisions on the water were those prescribed by the act of April 29, 1864, 13 Stat. 58. Articles 11, 12, 18, 19, and 20 of the "Steering and Sailing Rules" in that act have a bearing on this case, and are as follows:

"Two sailing ships meeting.

Article 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Two sailing ships crossing.

Article 12. When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of

the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward."

"CONSTRUCTION OF ARTICLES 12, 14, 15 AND 17.

ARTICLE 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article:

PROVISO TO SAVE SPECIAL CASES.

ARTICLE 19. In obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

NO SHIP UNDER ANY CIRCUMSTANCES TO NEGLECT PROPER PRECAUTIONS.

ARTICLE 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights, or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

A reference to the statements of the original answer of the Jones, and of her original cross-libel, shows, that the case she first attempted to make was one under Article 11, of two sailing vessels meeting end on or nearly end on, so as to involve risk of collision, where both are required to port. This is shown by the averments that the Willis "was approaching the Jones in an opposite direction from the course of the Jones; that, when the light of the Willis was first seen, it was almost dead ahead, and continued on that line as the vessels ap-

proached each other;" and that the Jones, seeing danger of a collision, ported, but the Willis starboarded. After the trial before the District Court, the amended answer and the amended cross-libel set up a case where the Jones saw, on her port bow, the red light of the Willis; that light continued to show more on the port bow of the Jones; the Willis did not see the green light of the Jones; and immediately before the collision, the Jones began to port her helm, but, seeing that the Willis was starboarding, changed her helm to starboard. This new theory on the part of the Jones as to her defence indicates plainly that she was conscious that her porting was a wrong manœuvre, and that she undertook to account for the collision by alleging that she saw the red light of the Willis on her port bow, and that it opened more on that bow, and that the Willis, by starboarding after that, came across her path. This theory is negatived by the findings of the Circuit Court.

The salient facts exhibited in those findings are as follows: The Willis was sailing east by north. The Jones was sailing a general course southwest by west half west, steering by the wind. The collision occurred at a quarter before two A. M. At twelve midnight the wind was east. At twenty minutes past one, twenty-five minutes before the collision, the wind was southeast. At that time, if the Jones was sailing southwest by west half west, her course was nine points and a half from the wind, and she was not close-hauled. She could certainly, though a bark, hold the wind at seven points off. At the same time, the Willis, if sailing east by north, was five points from the wind. The wind being a six-knot breeze, it is plain, in view of the combined speed of the vessels, that they had not yet seen each other twenty-five minutes before the collision. The wind was hauling to the southward, and changed the four points, to south, in those twenty-five minutes. If, because of that change of the wind, the Jones, to hold the wind, fell off to seven points from the wind, she would be heading west by south, or directly opposite to the east by north course of the Willis.

The Willis made the green light of the Jones about half a point on her starboard bow, about three miles off, and contin-

ued to see that green light till the Jones was within a length off, when the Jones opened her red light. As soon as the Willis saw the green light of the Jones, she put her own green light against it by starboarding, and went off a point, and then steadied; that is, she headed east-northeast. It follows, that she showed her green light to the Jones. This starboarding by the Willis was when the vessels were about three miles apart, and from fifteen to eighteen minutes before the collision, as their combined speed was from ten to twelve miles an hour. The Jones must have seen that the Willis was falling off, and trying to get out of her way. Green light to green light was safety. When the Willis thus headed east-northeast, the green light of the Jones was one point and a half on her starboard bow. When the vessels were about two miles apart, that is, from ten to twelve minutes, the Willis fell off one point more, to northeast by east, and the green light of the Jones got to be two points on her starboard bow. All this time the Willis was trying to get out of the way of the Jones. She did so in a proper manner, by carrying her own green light away from the green light of the Jones, and by taking a course which did not and could not cross the course of the Jones. When the Willis thus, at two miles distance from the Jones, headed northeast by east, the Jones, with the wind south, would, if close-hauled at seven points from the wind, head no farther off than west by south. At the collision, the Willis was heading northeast, or one point more off; and the starboard side of the stem of the Jones struck the starboard side of the Willis amidships, at about right angles. To do this, the Jones must have headed about northwest, which was a change, by porting, of five points from her course of west by south, which latter course, with the wind south, would have allowed her, at seven points off, to be close-hauled, and have her sails full.

The Jones ran into danger by porting. She did not port to avoid collision or immediate danger. She ported when she must have seen, all the time, that the Willis was going away from her. This porting by the Jones was no part of keeping her course, and it caused the collision. It was a departure, by

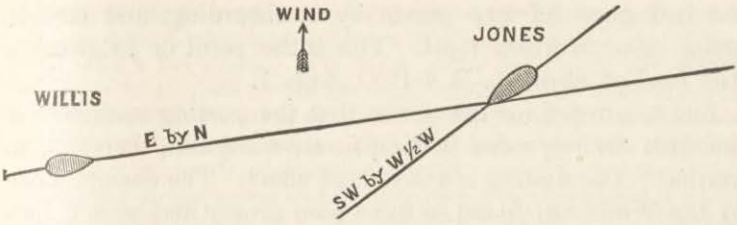
the Jones, from the course which the Willis, constantly seeing the green light of the Jones, had a right to think the Jones would keep, especially in view of the persistent falling off of the Willis. It was, therefore, a change of course by the Jones. It was a change, by her, across the course of the Willis, to the extent of five points beyond her close-hauled course of west by south.

Conceding it to have been the duty of the Willis, under article 12, to keep out of the way of the Jones, it was equally the duty of the latter not to baffle or prevent the efforts of the Willis to that end. Her departure from the requirement of article 18, that she should keep her course, cannot be justified under article 19, because there were no special circumstances which rendered such departure necessary in order to avoid immediate danger. In *The Elizabeth Jenkins*, L. R. 1 P. C. App. 501, it is laid down, that if a ship bound to keep her course under article 18, justifies her departure from that course under the words of article 19, she takes upon herself the obligation of showing, both that her departure was, at the time it took place, necessary, in order to avoid immediate danger, and that the course adopted by her was reasonably calculated to avoid that danger. Under article 20, the special circumstances of the case required that the Jones should be careful not to port as and when she did. Article 20 was in force at the time of this collision, although it is not re-enacted in the Revised Statutes. Why it was omitted is not apparent, as it had not been repealed. It was one of the articles in the British act of 1862, 25 and 26 Vict., ch. 63, from which our act of 1864 was taken, and it still remains an article in the regulations promulgated by the British order in council of August 14, 1879, 4 P. D. 241, which states that it has been made to appear that the government of the United States is willing that those regulations shall apply to ships of the United States, whether within British jurisdiction or not, after September 1, 1880. We do not intend to intimate, however, that the precautions it enacts are not to be enforced as parts of the general law of navigation, though not now embodied in any statute.

The Circuit Court held that each of the changes recited in the findings of fact, as having been made by the Jones, was improper; and that the changes recited therein as having been made by the Willis were proper. In regard to the Jones, it is contended for her that she was at liberty to make such variations from her course as the wind rendered necessary, to enable her to keep her sails filled and keep on her port tack. It must be concluded, from the fourth finding of fact and the third conclusion of law, that the Jones was manœuvred on two occasions in such a manner as, first, to allow her sails to shake, and, second, to allow her to fall off and fill her sails; that this falling off was effected by putting her helm up or to port; and that the Circuit Court regarded these manœuvres as changes and as improper ones. In view of what it is found the Willis was doing, it is plain that these changes were calculated to baffle the efforts of the Willis, by starboarding, to get away from the Jones; and that they amounted to a following up of the Willis by the Jones. Although the wind had got as far as south, the Jones had no right to persist in falling off toward the Willis to an extent sufficient to produce a collision, when the Willis was all the while going away in the same direction. The duty of the Jones to keep her course did not permit her to do so in such a way as to bring about a collision with a vessel whose green light was constantly receding. There is no idea appertaining to keeping a course which justifies holding to it in such way as to bring on a peril. The only principle inherent in it is to so act as to enable the other vessel, on whom the duty rests, to adopt with success means of getting out of the way.

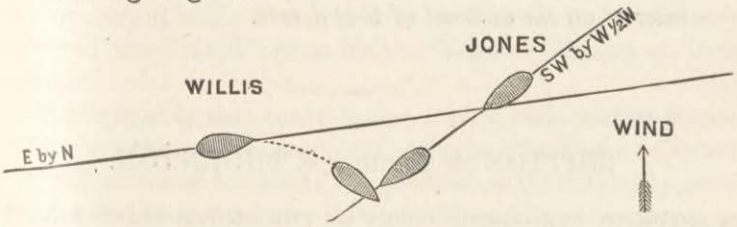
It is apparent that, notwithstanding the alleged endeavor of the Jones to keep close-hauled, with the wind south, the Willis, by her starboarding two points, from a course east by north to a course northeast by east, would have gone clear of the Jones, but for the porting of the Jones, as found in the fifth finding of fact, which carried her head around at least five points towards the Willis. The following diagram illustrates the courses and bearings of the two vessels, prior to any starboarding by the Willis and to any porting by the Jones:

Opinion of the Court.



It shows the Willis on a course east by north, and the Jones on a course southwest by west half west, five points and a half from south. At that time the vessels were three miles apart, or fifteen to eighteen minutes. When they were two miles apart, or ten to twelve minutes, after the Willis had twice starboarded, and to northeast by east, the green light of the Jones bore two points on the starboard bow of the Willis. Then, with any proper falling off of the Jones to hold a south wind, even to the extent of seven points, or to west by south, when the Willis was on a course northeast by east, or two points away from the course of the Jones, there would have been no collision, if the Jones had not ported five points more.

It is contended for the Jones that the Willis should have ported, instead of starboarding. But, as she saw the green light of the Jones on her starboard bow, to have ported would have thrown her across the course of the Jones, as shown by the following diagram:



By starboarding and going away from the green light of the Jones, the Willis took a course of safety, and, in the language of the cases "determined the risk." Article 12 applies only to cases where the vessels "are crossing so as to involve risk of collision." Even assuming, on the facts found, that these vessels were crossing, so as to involve risk of collision, when they first sighted each other, the Willis "determined the risk" when

she had gone off two points by starboarding, and brought green light to green light. This is the point in judgment in *The Earl of Elgin*, L. R. 4 P. C. App. 1.

But it is urged for the Jones that the porting mentioned in the fifth finding was a porting *in extremis*, and, therefore, excusable. The finding is not to that effect. The changes made by the Willis are found to have been proper and were proper. This being so, no fault of the Willis induced the final act of porting by the Jones. To be an excusable mistake *in extremis*, a pardonable manœuvre, though contributing to or inducing a collision, when the manœuvre would have been faulty if not excusable, it must be one produced by fault or mismanagement in the other vessel. *New York & Liverpool Steamship Co.* v. *Rumball*, 21 How. 372, 383; *The Nichols*, 7 Wall. 656, 666; *The Carroll*, 8 Id. 302, 305; *The Dexter*, 23 Id. 69, 76; *The Bywell Castle*, 4 P. D. 219. The last case is a well-considered judgment by Lords Justices James, Brett and Cotton, in the Court of Appeal, and the rule there formulated is, that "where one ship has, by wrong manœuvres, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind."

On the whole case, we are of opinion that

The decree of the Circuit Court must be affirmed, but without interest on the amount of that decree.

BRITTON & Another *v.* THORNTON.

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

Argued November 26, 1884.—Decided December 15, 1884.

Under a devise to one person in fee, and, in case he should die under age and without children, to another in fee, the devise over takes effect upon the death at any time of the first devisee under age and without children.

A testator devised to E, daughter of his son N, a parcel of land in fee, provided that should E die in her minority, and without lawful issue then

Statement of Facts.

living, the land should revert and become a part of the residue of his estate; devised other land to his son W for life, and to J, son of W, in fee, with a like proviso; gave to his widow certain real and personal property for life; and devised the residue of his estate to his executors, and directed that the income be suffered to accumulate until his eldest grandchild then living should attain the age of twenty-one years, or until the decease of his son W, whichever should first occur, and then the whole to be equally divided among all his grandchildren then living, and in making such division the amount of the devises to J and to E, according to an estimate of their present value, to be made by three appraisers, to be charged to them as part of their respective shares. *Held*, That the estate of E in the land specifically devised to her was devested by her dying under age and without issue, though after the deaths of the testator and of W.

A statute of a State, enacting that two concurring verdicts and judgments in ejectment shall be conclusive of the title, establishes a rule of property in land within the State, and binds the courts of the United States.

Under the statute of Pennsylvania of April 13, 1807, enacting that two concurring verdicts and judgment thereon between the same parties in ejectment shall be conclusive and bar the right, one judgment on a special verdict is not conclusive of any fact found by that verdict; and two verdicts and judgments are not conclusive upon a title not therein adjudicated.

This was an action of ejectment brought on April 12, 1880, in the Court of Common Pleas of the County of Fayette and State of Pennsylvania, by John Russell Thornton, a citizen of that State, against George A. Wilson, a citizen of Ohio, and William Britton and George E. Hogg, citizens of Pennsylvania, his tenants at will; and removed by Wilson into the Circuit Court of the United States for the Western District of Pennsylvania.

At the trial in that court, before a jury, both parties claimed title under the will of Joseph Thornton, who died on October 25, 1839, seized of the land; the plaintiff as his surviving grandchild, and the defendants through Eliza Ann Thornton; and the following facts were admitted:

Joseph Thornton's will, which was duly admitted to probate, besides devising certain real and personal property to his widow for life, directing his executors to pay at their discretion to his son Nelson the sum of $365 a year during his life, and making other devises and bequests, contained the following:

"Item: I give and devise to my son, William S. Thornton,

during his natural life, all that body of land lying in Luzerne Township, Fayette County, on which he now lives, consisting of four parcels adjoining each other, which I purchased of Samuel McMullin, Nicholas Miller, Eliza Coleman, and the heirs of Abraham Merritt, to hold the same without impeachment of waste."

"Item: To my grandson, Joseph Thornton, son of my said son William, I give and devise all the lands in the preceding item devised to his father, to possess and enjoy the same from the death of his father, forever: Provided, that [if] the said Joseph die in his minority, and without lawful issue then living, the said land shall revert and become a part of the residue and remainder of my estate hereinafter disposed of."

"Item: To Eliza Ann Thornton, natural daughter of my said son Nelson, I give and devise all that plantation bought of Andrew Porter and John Davis, lying on the Monongahela River, in Luzerne Township, adjoining Eliza Crawford, Thomas Neelan, Joseph Crawford, and Joseph Crawford, Jr., containing, as is supposed, two hundred and sixty acres, besides allowances, be the same more or less, she paying out of the rents to my executors the sum of three hundred and sixty-five [dollars] annually during the life of my said son Nelson: Provided, that should the said Eliza Ann die in her minority, and without lawful issue then living, the land hereby devised shall revert and become a part of the residue of my estate hereinafter disposed of."

"Item: All the rest and residue of my estate not heretofore disposed I give, devise and bequeath to my executors; and I do hereby authorize and empower them, or the survivor of them or their successors in the said office, to sell and convey any and all of my real estate not herein fully disposed of, if in their discretion they shall think it for the advantage or convenience of my estate, and whenever they may think proper so to do; and in the mean time to receive the rents, issues and profits of the real estate and the proceeds of the personal and the dividends of all stocks, and apply them to the payment of the legacies of this my will.

Statement of Facts.

"It is my will that the rents, issues and profits of the real estate given to my executors, or the proceeds thereof, if sold, and the dividends of all my estate given to them, or the proceeds, if sold, and the proceeds of all other personal estate not required to pay the debts and legacies heretofore given, be vested by my executors in stocks or put out at interest and suffered to accumulate until my eldest grandchild then living shall attain the age of twenty-one years, or until the decease of my son William, whichever shall first occur, and then the whole to be equally divided among all my grandchildren then living, and the children of any who may be dead leaving issue, such issue to take by representation. The said Eliza Ann, natural daughter of my son Nelson, to be considered a grandchild, and to be entitled to share as such; and in making such division the amount of the devise made to Joseph, son of my son William, and to the said Eliza Ann, according to an estimate of their present value, to be made by three men appointed by my executors or by the Orphans' Court, to be charged to them or their children as part of their respective shares."

William S. Thornton died in 1852, before any of the testator's grandchildren had attained the age of twenty-one years. Eliza Ann Thornton, on January 1, 1856, married John S. Krepps, and died on January 23, 1857, without lawful issue then living, and leaving her husband her heir at law; and he, on November 16, 1872, conveyed the land in dispute to Britton, who, on March 8, 1873, conveyed an undivided half of it to Hogg; and on February 8, 1878, Britton and Hogg conveyed the whole to the defendant Wilson. Krepps died on November 16, 1873. The plaintiff, John Russell Thornton, was the sole surviving grandchild and heir at law of the testator, all the other grandchildren having died without issue.

There was conflicting evidence of the date of Eliza Ann's birth; the evidence for the plaintiff tending to show that it was February 12, 1836; and the evidence for the defendants tending to show that it was February 12, 1835.

The defendants requested the court to instruct the jury that, William S. Thornton having died in the lifetime of Eliza Ann, she, as grandchild of the testator, and by virtue of the residuary

clause in his will, became entitled in fee to the land in dispute, and that the defendants, having succeeded to her title, were entitled to a verdict. The court refused this instruction; and afterwards instructed the jury that the case turned upon their determination of the contested question of fact, whether she died before or after attaining the age of twenty-one years; and that if she died under that age, and the plaintiff was the only living descendant of the testator, he was entitled to recover.

The defendants put in evidence a certified copy of a record of the Circuit Court at May term 1878, of an action of ejectment between the same parties for the same land, in which a special verdict was returned finding the facts above admitted, and also that Eliza Ann at the time of her death was above the age of twenty-one years, and a judgment was rendered thereon, which was still in force and unreversed. The defendants requested that the jury might be instructed that that verdict and judgment were conclusive evidence that Eliza Ann was of age at the time of her death, and therefore the verdict in this case must be for the defendants. This instruction was refused.

The defendants then put in evidence a certified copy of a record of the Court of Common Pleas of Fayette County at March term 1858, of an action of ejectment for the same land, brought by Joseph Thornton's executors against Krepps (under whom these defendants claimed title), by which it appeared that a verdict was returned for Krepps under an instruction of the court that he was entitled to possession as the surviving husband of Eliza Ann, and judgment was rendered thereon, which was still in full force and unreversed. The defendants requested the court to instruct the jury that the verdicts and judgments in the two cases, records of which had been put in evidence by them, availed in law to conclude the controversy, and the verdict in this case should be for the defendants. The court refused this instruction, because by the record of 1858 it appeared that the only matter determined was that Krepps, as surviving husband of Eliza Ann, took a life estate as tenant by the curtesy, upon any construction of the will of Joseph Thornton, and whether she died under or above the age of twenty-one years.

Argument for Plaintiff in Error.

The defendants excepted to the refusals to instruct and to the instructions given in this case, and, a verdict being returned for the plaintiff, sued out this writ of error.

Mr. George Shiras, Jr., for plaintiff in error.—I. In the proviso to the specific devise the testator was contemplating and providing for the death of Eliza Ann *in his lifetime.* The testator used the same language in the devise to Joseph. It is not probable that he intended that they should take absolute estates in the residuary part of his estate, and defeasible estates in the land specifically devised to them. Our construction gives effect to both clauses of the will. See 3 Jarman on Wills, ch. 48; *Doe* v. *Sparrow*, 13 East, 359. Another view is that the testator may have meant the death of Eliza Ann before the time fixed for the division. *Besant* v. *Cox*, 6 Ch. Div. 604; *Olivant* v. *Wright*, 1 Ch. Div. 346. The Supreme Court of Pennsylvania was in error in supposing that Eliza Ann died before the time for the division.—II. Not disputing that in Pennsylvania a single verdict and judgment in ejectment is not conclusive as to title, even between the same parties, we contend that the special verdict and judgment were conclusive as to the question of fact, Eliza Ann's age. The general principle is that a point or matter of fact, once adjudicated by a court of competent jurisdiction, may be shown and relied on as an estoppel in any subsequent suit, in the same or any other court, when either party, or the privies of either party, allege anything inconsistent with it; and this, too, whether the subsequent suit is upon the same or a different cause of action. *Betts* v. *Starr*, 5 Conn. 550; *Hopkins* v. *Lee*, 6 Wheat. 109; *Outram* v. *Morewood*, 3 East, 346; *Aurora City* v. *West*, 7 Wall. 82, 94; *Tioga Railroad* v. *Blossburg Railroad*, 20 Wall. 137.—III. Admitting the general rule in Pennsylvania that two successive verdicts and judgments in ejectment in favor of the same party are conclusive, we claim that, if the record discloses, in one of the cases, that the verdict and judgment were obtained because of some fact in the case which was conclusive in that particular case only, then such verdict and judgment *do not count* as against the losing party. The act of April 13, 1807,

by its 4th section provides that two successive verdicts and judgments "shall be final and conclusive and bar the right." Nothing is said in the statute as to the incidents or evidence in the trials. Its terms attribute final and conclusive effect to the verdicts and judgments, regardless of other questions than the identity of the parties and of the causes of action.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The question which lies at the foundation of this case is what estate Eliza Ann Thornton took in the land which Joseph Thornton specifically devised to her, "provided that, should the said Eliza Ann die in her minority, and without lawful issue then living, the lands hereby devised shall revert and become part of the residue of my estate hereinafter disposed of."

By this specific devise, Eliza Ann Thornton took an estate in fee, defeasible by an executory devise over.

That the estate devised to her, though without words of inheritance, was not an estate for life merely, but was an estate in fee, is not disputed, and is apparent from the description of the subject of the devise as "that plantation bought of Andrew Porter and John Davis;" from the charge, imposed upon her personally, to pay an annuity out of the rents; and from the devise over in the contingency of her dying under age and without issue then living, thereby implying that her estate would not be terminated by her death after coming of age or leaving issue; as well as from the provision of the statute of Pennsylvania of April 8, 1833, that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate." 2 Jarman on Wills (5th Am. ed.) 270, 271, 276, and note 2; Purdon's Digest (10th ed.) 1475, § 10.

It is equally clear that, upon her death under age and without issue then living, her estate in fee was defeated by the executory devise over. When indeed a devise is made to one

person in fee, and "in case of his death" to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. 2 Jarman on Wills, ch. 48; *Briggs* v. *Shaw*, 9 Allen, 516; Lord Cairns in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, 395. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. *O'Mahoney* v. *Burdett*, above cited; 2 Jarman on Wills, ch. 49.

We find nothing in this will to take the case out of the general rule, or to support the argument of the plaintiff in error that the testator intended that the devise over should not take effect if Eliza Ann survived him, or at least if she survived his son William.

The phrase in the specific devise that, in the prescribed contingency, the land shall "revert and become part of the residue," is quite as consistent with the happening of the contingency after the estate has once vested in the devisee, as with its happening in the testator's lifetime and before any estate has vested in her.

The direction in the residuary clause that the residue shall be divided among all the testator's grandchildren when the oldest living grandchild shall attain the age of twenty-one years, or at the death of the testator's son William, whichever shall first occur, does not necessarily require a single and final division of the whole residue upon the death of William or the coming of age of a grandchild; for either of those events might happen before the termination of the widow's estate for life in that part of the property, real and personal, which upon her death must fall into the residue; and the coming of age of a grandchild might happen during the life of William, to whom also the testator had devised a life estate in other land.

The provision that Eliza Ann, a natural daughter of the testator's son Nelson, shall be considered a grandchild and share as such in the residue, is coupled with a provision that the specific devise to her, according to an estimate to be made of its value, shall be charged to her as part of her share. The reasonable construction of this provision, as both parties agree, is that the estimate made for that purpose shall be of the value of the land devised to her, not of the value of her defeasible estate in the land. By estimating the land at its full value, she would take an equal share with each grandchild in the whole property, if her estate in the land became indefeasible; and she would lose no more than the land, if her estate was defeated by the contingency prescribed in the specific devise, of her dying in her minority and without issue then living.

By the specific devise, it is only upon that contingency that the land devised to her is to "revert and become a part of the residue;" and, upon a view of the whole will, we are satisfied that the Circuit Court rightly held that she took nothing in this land under the residuary devise, and that her title under the specific devise was defeated by her dying under age and leaving no issue surviving her.

This conclusion accords with that of the Supreme Court of Pennsylvania in an action of ejectment for the same land, brought in 1874 by John Russell Thornton, the present plaintiff, against Britton, one of the grantors of the present defendant Wilson, in which that court, as appears by opinions not officially reported, but copies of which have been submitted to us, held, and, upon petition for reargument, reaffirmed, that, "as to this particular tract of land, the estate of Eliza Ann became extinct, by the terms of the will itself, at the time of her death without issue."

The other questions in the case depend upon the construction and effect of the statute of Pennsylvania of April 13, 1807, by which, "when two verdicts shall, in any writ of ejectment between the same parties, be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought; but when there may be verdict against verdict between the same parties, and judgment thereon, a

third ejectment in such case, and judgment thereon, shall be final and conclusive, and bar the right." Purdon's Digest, 535, § 15.

This statute, giving a conclusive effect to judgments in ejectment, which they did not have at common law, establishes a rule of property concerning the title in land within the State of Pennsylvania, and binds the courts of the United States as well as the courts of the State. *Miles* v. *Caldwell*, 2 Wall. 35; *Blanchard* v. *Brown*, 3 Wall. 245; *Equator Co.* v. *Hall*, 106 U. S. 86.

By the clear intention of this statute, as by its uniform interpretation by the Supreme Court of Pennsylvania, it requires two concurring verdicts and judgments thereon in a common-law ejectment between the same parties, upon the same title, to conclude the right. The words "the same parties" of course include their heirs or assigns. *Evans* v. *Patterson*, 4 Wall. 224; *Drexel* v. *Man*, 2 Penn. St. 267. An award of referees has been made by the legislature, and a judgment after full hearing upon general demurrer or case stated has been deemed by the court equivalent to a verdict. *Ives* v. *Leet*, 14 S. & R. 301; *Mercer* v. *Watson*, 1 Watts, 330. But in *Mercer* v. *Watson* the court, after full consideration of the terms of the statute and of the reasons for its passage, concluded that "the legislature did not intend to bar the party from bringing a new action of ejectment for the same land, upon the same title, until after two decisions should be had against him upon a full view and consideration of the whole of his case, and all the circumstances connected with it which he might think material, either by two judgments of a court of competent jurisdiction rendered upon general verdicts, special verdicts, cases stated, or in cases of demurrer to the pleadings or the evidence." 1 Watts, 344. And in *Treaster* v. *Fleisher*, 7 W. & S. 137, it was adjudged that, although the statute did not expressly say so, the former verdicts and judgments must have been on the same title; because, in the words of Chief Justice Gibson, "it certainly could not have been intended that a title should be barred by adjudication without having been adjudicated." 7 W. & S. 138. To the same effect are

Syllabus.

Kinter v. *Jenks*, 43 Penn. St. 445; *Chase* v. *Irvin*, 87 Penn. St. 286; *Barrows* v. *Kindred*, 4 Wall. 399, and *Merryman* v. *Bourne*, 9 Wall. 592.

The special verdict in the former action in the Circuit Court had no greater effect than a general verdict, and could not, consistently with the statute, be held to be of itself conclusive upon the general question of title, or upon any question necessarily involved in the determination of that title.

The verdict and judgment in the former action in the Court of Common Pleas were incompetent evidence under the statute, because, as the bill of exceptions in the present case shows, they did not pass upon the question whether Eliza Ann had an indefeasible title in the land, but only upon the point that her husband had a title by the curtesy therein, whether her title was defeasible or indefeasible. In Pennsylvania, birth of issue is not necessary to create an estate by the curtesy. Purdon's Digest, 806, § 4; *Thornton* v. *Krepps*, 37 Penn. St. 391.

Judgment affirmed.

CHEW HEONG *v.* UNITED STATES.

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

Argued October 30, 1884.—Decided December 8, 1884.

The fourth section of the act of Congress, approved May 6, 1882, ch. 126, as amended by the act of July 5, 1884, ch. 120, prescribing the certificate which shall be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884.

The rule re-affirmed that repeals of statutes by implication are not favored, and are never admitted where the former can stand with the new act.

Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.

Chew Heong, a Chinese laborer, arrived in the United States

Statement of Facts.

November 17, 1880, remained in the country until June, 1881, departed then for Honolulu, where he remained until September, 1884, when he returned to the United States. During the period of his absence the Chinese restriction acts of May 6, 1882, 22 Stat. 58, and July 5, 1884, 23 Stat. 115, were enacted. As he had no certificate as required by those acts, the authorities of the United States did not permit him to land. Being detained upon the vessel in the harbor of San Francisco, he filed in the Circuit Court of the United States for the District of California his petition for a writ of habeas corpus, alleging that he was unlawfully deprived of his liberty on the steamship, as he did not come within the restrictions of the statutes. Mr. Justice Sawyer ordered the writ to issue. On the hearing before Mr. Justice Field and Judge Sawyer, there being a division of opinion, the writ was discharged and the petitioner remanded, and a certificate was entered of division of opinion on the following questions:

1. Whether the provisions of section (four) 4 of the "Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, as amended by the act approved July 5, 1884, prescribing the certificate which shall be produced by Chinese laborers as the "only evidence permissible to establish a right of re-entry" into the United States, are applicable to Chinese laborers who were residing in the United States on November 17, 1880, and who departed from the United States by sea prior to May 6, 1882, and remained out of the United States till after July 5, 1884?

2. Whether upon the record and facts herein set forth and stated the petitioner is entitled to re-enter the United States and to land from said steamship under the provisions of the said amended restriction act?

3. Whether a Chinese laborer who was residing in the United States on November 17, 1880, and departed from the United States by sea before May 6, 1882, remaining out of the United States till after July 5, 1884, is entitled to re-enter the United States by steamship and to land therefrom without producing to the collector the certificate prescribed by section four of the said restriction act, as amended July 5, 1884?

This writ of error was sued out by the petitioner.

The treaties and statutes upon which the petitioner's contention was founded are so fully set forth in the opinion, that it is only necessary to refer to it.

Mr. Harvey S. Brown and *Mr. Thomas D. Riordan* for the petitioner.

Mr. Assistant Attorney-General Maury opposing.

Mr. Justice Harlan delivered the opinion of the court.

This case comes before us upon a certificate of division in opinion upon questions that require a construction of the act of Congress approved May 6, 1882, ch. 126, 22 Stat. 58, entitled "An Act to execute certain treaty stipulations relating to Chinese,"—commonly known as the Chinese restriction act—and of the act amendatory thereof, approved July 5, 1884, ch. 220, 23 Stat. 115.

The facts deemed important in the consideration of these questions, and as to which there is no dispute, are these: The plaintiff in error, Chew Heong, is a subject of the Emperor of China, and a Chinese laborer. He resided in this country on the 17th of November, 1880, on which day commissioners plenipotentiary, upon the part of the United States and China, concluded, at Peking, a treaty containing articles in modification of former treaties between the same countries. 22 Stat. 826. He departed from the United States for Honolulu, in the Hawaiian Kingdom, on the 18th of June, 1881, and remained there until September 15, 1884, when he took passage on an American vessel bound for the port of San Francisco. Arriving at that port on September 22, 1884, his request to be permitted to leave the vessel was denied, and he was detained on board, under the claim that the act of Congress of May 6, 1882, as amended, forbade him to land within the United States. He was thereupon brought before the Circuit Court of the United States for the District of California upon a writ of habeas corpus. The United States Attorney for that District, who was permitted to intervene in behalf of the government, objected to his discharge, and asked that such orders be made

as would effect his removal from the country. It was held that he was not entitled to re-enter or to remain in the United States, and must be deported to the place whence he came, to wit, Honolulu.

The questions certified involve the inquiry, whether § 4 of the act approved May 6, 1882, as amended by that of July 5, 1884, prescribing the certificate which shall be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States, is applicable to Chinese laborers who, residing in this country on November 17, 1880, departed by sea prior to May 6, 1882, and remained out of the United States till after July 5, 1884.

In behalf of the plaintiff in error it is contended that he left for Honolulu with the right secured by treaty to re-enter the United States at his pleasure, subject only to such regulations and restrictions as did not substantially affect his enjoyment of that right; that this privilege does not depend upon his having procured, before he left the United States in 1881, a collector's certificate for which the law, at that time, made no provision; and, consequently, that his right to return, if questioned, must be determined by such evidence as is competent under the general principles of law.

The contention on behalf of the government is, that his admission into this country, upon evidence other than the certificate prescribed by the act of 1884, would be inconsistent with the intention of Congress as manifested by the language of both the original and amendatory acts.

If, as claimed by plaintiff in error, the treaty of 1880, fairly interpreted, secured to him, at the time of his departure for Honolulu, the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right, the court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country. "There would no longer be any security," says Vattel, "no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises." Vattel, Book 2, ch. 12. And as

sovereign nations, acknowledging no superior, cannot be compelled to accept any interpretation, however just and reasonable, "the faith of treaties constitutes in this respect all the security of contracting powers." Ib. ch. 17. "Treaties of every kind," says Kent, "are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith." 1 Kent Com. 174. A treaty that operates of itself without the aid of legislation is equivalent to an act of Congress, and while in force constitutes a part of the supreme law of the land. *Foster* v. *Neilson*, 2 Pet. 253, 314. Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

With these observations, we proceed to consider whether the right claimed by the plaintiff is secured by treaty, and, if so, whether its recognition is inconsistent with the before-mentioned acts of Congress.

Before referring to the treaty of 1880, it will be well to ascertain, from those previously concluded between the United States and China, what were the relations of trade and commerce existing between their respective peoples. By the treaty of peace, amity, and commerce, concluded in 1858, citizens of the United States, in China, peaceably attending to their affairs, were placed on a common footing of amity and good will with subjects of the latter country; entitled to receive and enjoy, for themselves and everything pertaining to them, the protection of the local authorities of government, who were required to defend them from insult or injury of any sort; those residing or sojourning at any of the ports open to foreign commerce were permitted to rent houses and places of business, or hire

sites on which they could themselves build houses, hospitals, churches and cemeteries; to frequent certain designated ports and cities, and any other port or place thereafter, by treaty with other powers or with the United States, opened to commerce; to reside with their families and trade at such places, and to proceed at pleasure with their vessels and merchandise to and from said ports or any of them; at each of said ports open to commerce, to import from abroad, and to sell, purchase and export, all merchandise of which the importation or exportation was not prohibited by the laws of China, subject to no higher duties than those paid by the most favored nation. By that treaty, also, any right, privilege or favor, connected either with navigation, commerce, political or other intercourse, thereafter granted by China to the citizens of any nation, was at once to freely inure to the benefit of the United States, its public officers, merchants, and citizens. 12 Stat. 1025, *et seq.*

In the treaty concluded July 28, 1868, the governments of the United States and China recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, or as permanent residents." They, therefore, joined in reprobating any other than an entirely voluntary emigration for those purposes. By that treaty it was, also, provided, that citizens of the United States visiting or residing in China, and Chinese subjects visiting or residing in the United States, should enjoy the same privileges, immunities, or exemptions, in respect of travel or residence, and in respect of public educational institutions, as should be accorded to the most favored nation in the country in which they should be respectively visiting or residing. 16 Stat. 739.

This brings us to the treaty concluded November 17, 1880, which refers to the prior treaties of 1858 and 1868. To that treaty the Senate gave its assent on May 5, 1881, and it was ratified by the President on the 9th of May, 1881. Its first three articles are as follows:

"ARTICLE 1. Whenever, in the opinion of the government of

the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"ARTICLE 2. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

"ARTICLE 3. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." 22 Stat. 826, 827.

It appears to the court that there can be no serious difficulty in ascertaining the object of these modifications of prior treaties. By the treaty of 1868, subjects of China were entitled, without restriction, to come to this country for purposes of curiosity, or trade, or as permanent residents. But in deference to the opinion of our government that the presence here of Chinese laborers might be injurious to the public interests,

or might endanger good order in our land, China agreed, in the treaty of 1880, to such modifications of previous treaties as would enable the United States to regulate, limit or suspend their coming or residence, without absolutely prohibiting it; such limitation or suspension to be reasonable in its character. As to certain classes of Chinese it was distinctly provided that they should be permitted to go and come of their own free will, and be accorded all the rights, privileges, immunities and exemptions that are granted to citizens and subjects of the most favored nation. Those classes were: 1. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants; 2. Chinese laborers who were in this country at the date of the treaty. Upon the exercise, by these particular classes, of the rights of free ingress and egress, no limitation in respect of time was imposed by the treaty; in other words, the enjoyment of the right to go and come was not made to depend upon how often they went out of the country, nor how long they remained away before returning. That the plaintiff in error belongs to one of these classes cannot be successfully disputed, since it is certified to us, and the fact must be so taken, that he is a Chinese laborer who was in this country on the 17th day of November, 1880. He was, therefore, entitled, by the provisions of the treaty, to return to, and remain in, the United States, unless, after his departure for Honolulu, Congress withdrew the privilege which the treaty secured, and thereby precluded any recognition of it by the judiciary of this country. Whether such has been the effect of its legislation is the subject of our next inquiry.

The act of 1882, as amended, being too long for insertion here, has been printed in the margin* and in such way as to

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* CHINESE RESTRICTION ACT.

AN ACT TO EXECUTE CERTAIN TREATY STIPULATIONS RELATING TO CHINESE, APPROVED MAY 6TH, 1882, AS AMENDED JULY 5TH, 1884.

WHEREAS, in the opinion of the Government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territories thereof; *Therefore,*

indicate the additions and alterations made by the act of 1884. The words in italics were introduced by the latter act, while those in brackets were in the original, and were stricken out by the amendatory act.

This legislation was enacted in execution of the treaty, and

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled :

SEC. 1. That from and after the [expiration of ninety days next after the] passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended ; and during such suspension, it shall not be lawful for any Chinese laborer to come *from any foreign port or place*, or having so come [after the expiration of said ninety days] to remain within the United States.

SEC. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, *or attempt to land*, or permit to be landed, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year.

SEC. 3. That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this act *is amendatory*, [and] *nor shall said sections apply to Chinese laborers*, who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned ; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place ; *Provided*, That all Chinese laborers brought on such vessel shall *not be permitted to land except in case of absolute necessity, and must* depart with the vessel on leaving port.

SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this act *is amendatory*, and in order to furnish them with the proper evidence of their right to go from and come to the United States [of their free will and accord] as provided by the *said act and the* treaty between the United States and China dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States

because, in the opinion of the Government of the United States, the coming of Chinese laborers endangered the good order of certain localities in this country. The first section, as amended, suspends their coming for ten years, and declares it to be unlawful for any Chinese laborer to come from any for-

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shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books, to be kept for that purpose, in which shall be stated the *individual, family, and tribal* name *in full, the* age, occupation, *when and where followed,* last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house ; and every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost upon application therefor, from the collector or his deputy, *in the name of said collector, and attested by said collector's seal of office,* at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the *individual, family, and tribal* name *in full,* age, occupation, *when and where followed* [last place of residence, personal description and facts of identification] of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel ; and if such Chinese laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter, *and said certificate shall be the only evidence permissible to establish his right of re-entry ;* and upon delivering of such certificate by such Chinese laborer to the collector of customs at the time of re-entry into the United States, said collector shall cause the same to be filed in the custom house and duly cancelled.

SEC. 5. That any Chinese laborer mentioned in section four of this act, being in the United States and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four of this act to be issued to such Chinese laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said Chinese laborer desires to go to issue such certificate, free of charge or cost, upon application by such Chinese laborer, and to enter the same upon registry-books to be kept by him for the purpose, as provided for in section four of this act.

eign port or place, or, having so come, to remain within the United States. The second section, as amended, makes it a misdemeanor, punishable by fine, or by fine and imprisonment, for the master of any vessel to knowingly bring within the United States on such vessel, and land, or attempt to land, or

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SEC. 6. That in order to the faithful execution of [articles one and two of the treaty in] *the provisions of* this act, [before mentioned], every Chinese person, other than a laborer, who may be entitled by said treaty [and] *or* this act to come within the United States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese Government, *or of such other foreign government of which at the time such Chinese person shall be a subject,* in each case [such identity] to be evidenced by a certificate issued [under the authority of said] *by such* government, which certificate shall be in the English language [or (if not in the English language) accompanied by a translation into English, stating such right to come] *and shall show such permission, with the name of the permitted person in his or her proper signature,* and which certificate shall state the *individual, family, and tribal* name *in full,* title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued,* and place of residence [in China] of the person to whom the certificate is issued, and that such person is entitled [conformably to the treaty in] *by* this act [mentioned] to come within the United States. *If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character and estimated value of the business carried on by him prior to and at the time of his application as aforesaid; Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant" hucksters, peddlers, or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representative of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States of the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue, it shall be his duty to refuse to indorse the same.* Such certificate *viséd as aforesaid* shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector

permit to be landed, any such laborer from any foreign port or place.

If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of

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of customs [or his deputy] of the port in the district of the United States at which the person named therein shall arrive, *and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same, to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

SEC. 7. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge any certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in the penitentiary for a term of not more than five years.

SEC. 8. That the master of any vessel arriving in the United States from any foreign port or place, shall, at the same time he delivers a manifest of the cargo, and if there be no cargo, then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matters required to be reported, and before landing or permitting to land any Chinese passengers, deliver and report to the collector of customs of the district in which such vessel shall have arrived, a separate list of all Chinese passengers taken on board of his vessel at any foreign port or place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers (and if accredited officers of the Chinese *or of any other foreign* government, travelling on the business of that government, or their servants, with a note of such facts) and the names and other particulars, as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any [willful] refusal or *willful* neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of the cargo.

SEC. 9. That before any Chinese passengers are landed from any such vessel the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law.

SEC. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.

statutes, would hold that they did not apply to Chinese laborers who, by their residence in the United States at the date of the last treaty, had acquired the right to go and come of their own free will, and to enjoy such privileges, immunities and exemptions as were accorded here to citizens and subjects of the most

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SEC. 11. That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall [knowingly] aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year.

SEC. 12. That no Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel, and any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came [by direction of the President of the United States], and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States; *and in all such cases, the person who brought or aided in bringing such person to the United States shall be liable to the government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act, or of the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States, who may not have been permitted to land from any vessel by reason of any of the provisions of this act.*

SEC. 13. That this act shall not apply to diplomatic and other officers of the Chinese, *or other* governments, travelling upon the business of that government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons.

SEC. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

SEC. 15. That *the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and* the words "Chinese laborers," wherever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

favored nation. For, since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said, in the case supposed, would be, that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure. But, even in the case of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. *Ex parte Yerger*, 8 Wall. 85, 105. In *Wood* v. *United States*, 16 Pet. 342, 362, Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy." In *State* v.

SEC. 16. *That any violation of any of the provisions of this act, or of the act of which this is amendatory, the punishment of which is not otherwise herein provided for, shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding one thousand dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.*

SEC. 17. *That nothing contained in this act shall be construed to affect any prosecution or other proceeding, criminal or civil, begun under the act of which this is amendatory; but such prosecution or other proceeding, criminal or civil, shall proceed as if this act had not been passed.*

Stoll, 17 Wall. 425, 430, the language of the court was, that "it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be." See also *Ex parte Crow Dog*, 109 U. S. 556, 570; *Arthur* v. *Homer*, 96 U. S. 137, 140; *Harford* v. *United States*, 8 Cranch, 109.

When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer. The presumption must be indulged that the broad language of these sections was intended to apply to those Chinese laborers whose coming to this country might, consistently with the treaty, be reasonably regulated, limited or suspended, and not to those who, by the express words of the same treaty, were entitled to go and come of their own free will, and enjoy such privileges and immunities as were accorded to the citizens and subjects of the most favored nation.

These views find strong support in the third and fourth sections of the act.

The third section, as it originally stood, declared "that the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel

shall arrive, the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned." It is contended that provision was made in this clause only for Chinese laborers, of the two classes described, who should produce the certificate of identification required by the fourth section of the act; leaving those who could not produce it to rest under the prohibitions of the preceding sections. But that construction is wholly inadmissible; for, apart from a violation of the treaty of 1880, which is involved in such a construction, it is inconceivable that Congress would have announced its purpose not to include in the suspension for ten years Chinese laborers who might come into the United States within ninety days immediately after the passage of the act of 1882, and, in the same act, have prohibited their entering this country unless they should produce a certificate which could have been furnished only to those who were here at the passage of that act, and left after it took effect.

But all basis for such a construction is removed by the amendment made in the third section by the act of 1884. The above clause as amended reads thus: "That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days after the passage of the act to which this act is amendatory, nor shall said sections apply to Chinese laborers who shall produce to such master, &c., the evidence hereinafter in this act required," &c. . . .

The striking out of the word "and," in the third section of the original act, and inserting the words "nor shall said sections apply to Chinese laborers," are very significant. As amended, the third section wholly precludes the idea that the right to return to this country of those who were here at the date of the treaty, but were absent when Congress legislated upon the subject of Chinese immigration, was to be encumbered with the condition, impossible to be performed, of producing a collector's certificate; for that section, as it stands, declares, without qualification, that the first and second sections shall not apply to those who were here at the date of the treaty.

If a Chinese laborer who was here at the date of the treaty, and also when the act of 1882 was passed, desired again to leave the country, his right to return was made to depend upon his producing the certificate required by that act. And this was true, also, of a Chinese laborer, not here at the date of the treaty, who, having come within ninety days next after the original act was passed, desired to depart from the United States and return at some subsequent period.

Coming to the fourth section of the act, we find evidence of the most cogent nature of the intention of Congress not to disregard that treaty.

As it stood in the act of 1882, it was in these words:

"That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and in order to furnish them with the proper evidence of their right to go from and come to the United States of their free will and accord, as provided by the treaty between the United States and China, dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books, to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom house; and every such Chinese laborer so departing from the United States shall be entitled to, and shall receive, free of any charge or cost, upon application therefor, from the collector or his deputy, at the time such list is taken, a certificate, signed by the collector or his deputy, and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the name, age,

occupation, last place of residence, personal description, and facts of identification of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel, and if such Chinese laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter; and upon delivery of such certificate by such Chinese laborer to the collector of customs at the time of re-entry in the United States, said collector shall cause the same to be filed in the custom house and duly cancelled."

This section was amended by the act of 1884 so as to require that the list made by the collector or his deputy, and entered in the registry-books kept for that purpose, as well as the certificate issued by the collector to any Chinese laborer about to depart by vessel, should show—what the original act did not require—his individual, family and tribal name in full, and when and where his occupation was followed. It was further amended so as to provide, in terms, that the certificate furnished to such laborer by the collector "shall be the only evidence permissible to establish his right of re-entry."

In that section, as in the third, a certain class of Chinese laborers is described as those who were here on the 17th of November, 1880. Why was that date fixed, unless for the purpose of giving effect to the article of the treaty, which secured to Chinese laborers, who were in this country on that particular day, the same freedom, in respect of travel and intercourse, that was accorded to the citizens and subjects of the most favored nation? Congress certainly did not overlook, much less intend to ignore, the stipulations of the treaty, or question their scope or effect; for the fourth section, referring

to Chinese laborers who were here on the seventeenth day of November, eighteen hundred and eighty, expressly recognizes the fact that the treaty of that date gave them "the right to go from and come to the United States."

Now, the argument in behalf of the government is, that, since Congress made provision for certificates to be furnished to those who were entitled to demand them, it did not intend to recognize the right to return of any Chinese laborer who, being in the United States at the date of the treaty, was not here when the act of 1882 was passed. Assuming, always, that there was a purpose, in good faith, to abide by the stipulations of the treaty, this argument necessarily implies, that, in the judgment of Congress, the treaty did not secure to any Chinese laborer the right of going and coming of his own free will, except to those in this country at the date of the treaty, who remained here continuously until the original act was passed, or who had returned by the latter date; in other words, that a Chinese laborer who was here on the 17th of November, 1880, lost the right to return, so far as that right was secured by treaty, if he left at any time—no matter for what purpose or for how brief a period—prior to, and had not returned before, the passage of the act of 1882.

But the treaty is not subject to any such interpretation. To give it that interpretation would be, in effect, to interpolate in its second article, after the words "Chinese laborers who are now in the United States," the words "and who shall continue to reside therein." The plaintiff in error left this country after the ratification of the treaty, having the right, secured by its articles, to return, of his own free will, without being subjected to burdens or regulations that materially interfere with its enjoyment. The legislative enactments in question should receive such a construction, if possible, as will save that right, while giving full effect to the intention of Congress. That result can be attained, consistently with recognized rules of interpretation. *Lex non intendit aliquid impossibile* is a familiar maxim of the law. The supposition should not be indulged that Congress, while professing to faithfully execute treaty stipulations, and recognizing the fact that they secured to a certain class

the "right to go from and come to the United States," intended to make its protection depend upon the performance of conditions which it was physically impossible to perform. Besides, said this court in *United States* v. *Kirby*, 7 Wall. 482, 486, "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." See also *Carlisle* v. *United States*, 16 Wall. 147, 153. So in *Perry* v. *Skinner*, 2 M. & W. 471, it was said: "The rule by which we are to be guided is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to absurdity or manifest injustice; and if it should, so to vary them as to avoid that which certainly could not have been the intention of the legislature. We must put a reasonable construction upon their words." *Lake Shore Railway Co.* v. *Roach*, 80 N. Y. 339; *Commonwealth* v. *Kimball*, 24 Pick. 366, 370; *Campbell's Case*, 2 Bland, 209; Sedgwick Statutory and Constitutional Law, 191. What injustice could be more marked than, by legislative enactment, to recognize the existence of a right, by treaty, to come within the limits of the United States and, at the same time, to prescribe, as the only evidence permissible to establish it, the possession of a collector's certificate, that could not possibly have been obtained by the person to whom the right belongs? Or to prevent the re-entry of a person into the United States upon the ground that he did not, upon his arrival from a foreign port, produce a certain certificate, under the hand and seal of a collector, and upon forms prescribed by the Secretary of the Treasury, which neither that nor any other officer was authorized or permitted to give prior to the departure of such person from this country? Or what incongruity is more evident than to impose upon a collector the duty of going on board of a vessel, about to sail from his district for a foreign port, and making and recording a list of its passengers, of a particular race, showing their individual, family, and tribal names in full, their age, occupation, last place of residence,

physical marks and peculiarities, when such vessel had sailed long before the law passed which imposed that duty on the collector? These questions suggest the consequences that must result, if it is held that Congress intended to abrogate the treaty with China, by imposing conditions upon the enjoyment of rights secured by it, which are impossible of performance.

But there is another view which tends to show the unsoundness of the construction upon which the government insists. It is this: If Chinese laborers who were here at the date of the treaty, or who came within ninety days next after the passage of the act of 1882, being out of the country when the act of 1884 was passed, can re-enter only upon producing the certificate required by the latter act, then Congress must have intended to exclude even those who were in this country at the time the act of 1882 was passed, and who, upon going away, received the certificate mentioned in it; for the certificate prescribed by the act of 1882 is not the certificate prescribed by that of 1884; they differ in several particulars; and yet, if the act of 1884 is to be taken literally, all Chinese laborers are excluded who do not produce the very certificate mentioned in it. The original act expressly provides that the certificate prescribed therein "shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States, upon producing and delivering the same" to the collector of the district at which he seeks to re-enter. Congress did not intend, by indirection, to withdraw from those who received and relied upon the certificate mentioned in that act the privilege of returning, simply because they did not (and could not) produce the certificate required by the amendatory act, passed during their rightful absence. Those who left the country with certificates under the original act were entitled to return upon the production of those certificates. If, then, the act of 1884 did not defeat the rights given by that of 1882, it follows that there are Chinese laborers who, having been in the United States prior to July 5, 1884, may re-enter without producing the certificate required by the act of the latter date; and so the argument that Congress intended to exclude from the

country Chinese laborers of every class who did not produce the certificate prescribed by the act of 1884, fails in respects essential to sustain the judgment below. A construction of the original and amendatory acts which saves the rights of the plaintiff in error rests upon precisely the same grounds as does a construction of the amendatory act which saves the rights of those obtaining certificates under the original act, who did not seek to re-enter the country until after the act of 1884 was passed.

There are other sections of the act of Congress upon which, it was suggested in argument, the judgment below could be sustained. Some stress is laid upon the fifth section, which provides that "any Chinese laborer mentioned in section four of this act, being in the United States and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four of this act to be issued to such Chinese laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said Chinese laborer desires to go, to issue such certificate, free of charge or cost, upon application by such Chinese laborer, and to enter the same upon registry-books to be kept by him for the purpose, as provided for in section four of this act."

The argument, based upon this section, is, that the phrase "being in the United States" indicates a purpose to exclude all Chinese laborers not in the United States at the date of the original act. In our judgment, that phrase throws light upon the true meaning of the fourth section, in this—that, as the fifth section prescribed a certificate for those "being in the United States" who desired to depart by land, so the fourth section prescribed a certificate for those being in the United States who desired to depart by water. In each case, the provision is for those who are rightfully here, and, therefore, have an opportunity to demand and receive the required certificate, and not for those who are protected by the treaty, but who, being absent from the country, when the law was enacted

making provision for a collector's certificate, could not demand and receive it. Neither section purports to defeat previously existing rights by imposing conditions upon their enjoyment which cannot be satisfied.

It is also said, in support of the judgment, that the sixth section is significant, in that it prescribes the mode for the coming to this country of Chinese persons, "other than a laborer who may be entitled by said treaty and this act to come within the United States," but fails to provide the means for the return and identification of Chinese laborers who were entitled by the treaty to return, but who were out of the country when the act of Congress was passed. But this argument, like the one just alluded to, only proves that Congress, while making provision for the coming of persons who were entitled to come, other than laborers, omitted to make special provision in reference to the latter, and, consequently, left them to stand upon their rights as secured by the treaty, and, if their right to enter the United States was questioned, to prove in some way, consistent with the general principles of law, that they belonged to the class entitled to go and come.

Some reliance was also placed upon the implication arising from that clause of the twelfth section which declares that "no Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel." We do not perceive that any argument based upon these words meets the view that the act of Congress, in respect of Chinese laborers entitled to go and come, is inapplicable to those who were here at the date of the treaty, but, by reason of absence when the act of Congress took effect, could not obtain the required certificate. If, however, the twelfth section should be held to forbid the entrance of Chinese persons of every class into this country, by land, except upon the certificate required by the fourth section, it would not follow that a Chinese laborer entitled by the treaty to go and come at pleasure, and who was out of the country when the act of Congress was passed, could not re-enter by

vessel, upon satisfactory evidence of his being here at the date of the treaty.

The entire argument in support of the judgment below proceeds upon the erroneous assumption that Congress intended to exclude all Chinese laborers of every class who were not in the United States at the time of the passage of the act of 1882, including those who, like the plaintiff in error, were here when the last treaty was concluded, but were absent at the date of the passage of that act. We have stated the main reasons which, in our opinion, forbid that interpretation of the act of Congress. To these may be added the further one, that the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States* v. *Heth*, 3 Cranch, 398, 413, this court said, that "words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. *Murray* v. *Gibson*, 15 How. 421, 423; *McEwen* v. *Den*, 24 How. 242, 244; *Harvey* v. *Tyler*, 2 Wall. 328, 347; *Sohn* v. *Waterson*, 17 Wall. 596, 599; *Twenty Per Cent. Cases*, 20 Wall. 179, 187. So far from the court being compelled, by the language of the act of Congress, to give it a retrospective operation, the plain, natural and obvious meaning of the words—interpreted with reference to the general scope and the declared purpose of the statute—utterly forbids the conclusion that there was any intention to impair or destroy rights previously granted. The Chinese laborer who, under the act of 1882, was entitled to return and re-enter the United States upon producing the certificate therein prescribed, and the Chinese laborer who, after the act of 1884 was passed, could re-enter the country only upon producing the certificate required by the latter act, is described as one "to whom the same is issued." It would be a perversion of the language used to hold that such regulations apply to Chinese laborers who had left the country with the privilege, secured by treaty,

of returning, but who, by reason of their absence when those legislative enactments took effect, could not obtain the required certificates. Statutory provisions which declare that a certificate shall be evidence, or the only evidence, of the right of the person "to whom it is issued" to re-enter the United States, cannot, upon any sound rule of interpretation, be held to apply to one to whom it could not have been issued. A Chinese laborer, to whom a certificate was issued under the original act, is entitled to re-enter only upon producing that certificate; one, to whom a certificate was issued under the act of 1884, is entitled to re-enter only upon producing such certificate; while the plaintiff in error, having left before any certificate was permitted to be issued, cannot be required to produce one before re-entering, because, having resided here on the 17th day of November, 1880, he was clearly entitled, under the express words of the treaty, to go from and return to the United States of his own free will—a privilege that would be destroyed, if its enjoyment depended upon a condition impossible to be performed. The recognition of that privilege is entirely consistent with existing legislation; for, by construing the original and amendatory acts, so far as they require the production of a collector's certificate by Chinese laborers who were in the United States on the 17th of November, 1880, as applicable only to those of that class who were here at the dates when those acts, respectively, took effect, no previously acquired rights are violated, and full effect is given to the expressed intention of Congress to faithfully meet our treaty obligations. Thus, the legislation of Congress and the stipulations of the treaty may stand together.

In accordance with these views, it is adjudged that the plaintiff in error is entitled to enter and remain in the United States. The first of the certified questions is, therefore, answered in the negative, and the second and third in the affirmative.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Field dissenting.

I am unable to agree with my associates in their construction

of the act of May 6, 1882, as amended by the act of July 5, 1884, restricting the immigration into this country of Chinese laborers. That construction appears to me to be in conflict with the language of the act, and to require the elimination of entire clauses and the interpolation of new ones. It renders nugatory whole provisions which were inserted with sedulous care. The change thus produced in the operation of the act is justified on the theory that to give it any other construction would bring it into conflict with the treaty; and that we are not at liberty to suppose that Congress intended by its legislation to disregard any treaty stipulations.

The circuit judge, in his opinion, assumes that the treaty of 1880 allows Chinese laborers, then in the United States, freedom to depart and return without reference to their subsequent residence in the country; and that this freedom is assured to them whether they afterwards abandon or continue their residence. Proceeding on this assumption, as though it were impregnable, the assertion is made, with great positiveness and frequent repetition, that the act of Congress, construed according to the natural meaning of its terms, violates that treaty and our plighted faith; and the enormity of such legislation is dwelt upon with much warmth of expression. The majority of this court, adopting a similar construction of the treaty, narrow the meaning of the act so as measurably to frustrate its intended operation. Whereas, if the treaty as to such laborers be construed, as I think it should be, to apply to those then here who afterwards continue their residence in the country, and who may, during such residence, desire to be temporarily absent, there is no conflict between it and the act of Congress. Both are then in perfect harmony, the imputation of bad faith is without a plausible pretext, and the citations in the opinion of the circuit judge, and of this court, as to the necessity of construing acts so as not to lead to injustice, oppression or absurd consequences, have no application.

The petitioner, a native of China, and a laborer, though here when the treaty of 1880 was concluded, left the country in June, 1881, and was in the Hawaiian Islands over three years before he desired to return. Chinese laborers do not travel for

pleasure, and during that time he had acquired a residence in those islands as fully as he ever had in the United States. But, according to the opinion of the court, this fact is of no significance. He could reside there twenty years and then return, notwithstanding the act of Congress. I cannot construe the treaty as conferring any such unrestricted right, or as applying to any other laborers than those who afterwards continued their residence here.

If, however, the act of Congress be in conflict with the treaty upon the immigration of Chinese laborers, it must control as being the last expression of the sovereign will of the country. And while I agree with all that is said in the opinion of the court as to the sanctity of the public faith, I must be permitted to suggest that, if the legislative department sees fit for any reason to refuse, upon a subject within its control, compliance with the stipulations of a treaty, or to abrogate them entirely, it is not for this court or any other court to call in question the validity or wisdom of its action, and impute unworthy motives to it. It should be presumed that good and sufficient reasons controlled and justified its conduct. If the nation with which the treaty is made objects to the legislation, it may complain to the executive head of our government, and take such measures as it may deem advisable for its interests. But whether it has just cause of complaint, or whether, in view of its action, adverse legislation on our part be or be not justified, is not a matter for judicial cognizance or consideration. A treaty is in its nature a contract between two or more nations, and is so considered by writers on public law; and by the Constitution it is placed on the same footing and made of like obligation as a law of the United States. Both are declared in that instrument to be the supreme law of the land, and no paramount authority is given to either over the other.

Some treaties operate in whole or in part by their own force, and some require legislation to carry their stipulations into effect. If that legislation impose duties to be discharged in the future, it may be repealed or modified at the pleasure of Congress. If the treaty relates to a subject within the powers of Congress and operates by its own force, it can only be regarded

by the courts as equivalent to a legislative act. Congress may, as with an ordinary statute, modify its provisions, or supersede them altogether. The immigration of foreigners to this country, and the conditions upon which they shall be permitted to come or remain, are proper subjects both of legislation and of treaty stipulation. The power of Congress, however, over the subject can neither be taken away nor impaired by any treaty.

As said by Mr. Justice Curtis, in *Taylor* v. *Morton*, 2 Curtis, 454, 459: "To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so is prerogative, of which no nation can be deprived without deeply affecting its independence. That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to Congress. That, inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than Congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects which the Constitution has placed under that legislative power." And the learned justice holds, that whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, is not a judicial question; that the power to determine these matters has not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; that they belong to diplomacy and legislation, and not to the administration

of the laws. And he concludes, as a necessary consequence of these views, that if the power to determine those matters is vested in Congress, it is wholly immaterial to inquire whether, by the act assailed, it has departed from the treaty or not, or whether such departure were accidental or designed, and if the latter, whether the reasons therefor were good or bad. As said by Attorney-General Crittenden, in his opinion furnished to the head of the Treasury Department respecting claims under the treaty with Spain ceding Florida, with which an act of Congress was supposed to conflict, the "Constitution does not say that Congress shall pass no law inconsistent with a treaty, and it would have been a strange anomaly if it had imposed any such prohibition. There may be cases of treaties so injurious, or which may become so by change of circumstances, that it may be the right and duty of the government to renounce or disregard them. Every government must judge and determine for itself the proper occasion for the exercise of such a power; and such a power, I suppose, is impliedly reserved by every party to a treaty, and I hope and believe belongs inalienably to the government of the United States. It is true that such a power may be abused, so may the treaty-making power and all other powers. But for our security against such abuse, we *may* and *must* rely on the integrity, wisdom and good faith of our government." 5 Opinions Atty's Gen. 345. This power was exercised by Congress in 1798, when it declared that the United States were of right freed and exonerated from the stipulations of the treaties and consular convention previously concluded with France, and that they should not thereafter be regarded as obligatory on the government or citizens of the United States. 1 Stat. 578. But, what is more important than these citations as to the weight to be given to an act of Congress when in conflict with a preceding treaty, this court has this day rendered an authoritative decision on the subject. In several cases, brought to recover from the collector of the port of New York moneys received by him as duties on passengers landing there from foreign ports, not being citizens of the United States, at the rate of fifty cents for each of them, under the act of Congress of August 3, 1882, to regulate immigration,

it was objected that the act violated provisions contained in treaties of our government with foreign nations, but the court replied that, "so far as the provisions in that act may be found in conflict with any treaty, they must prevail in all the judicial courts of this country." And after a careful consideration of the subject, the court reached this conclusion, and held that, "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." *Head Money Cases*, post 580. See also the case of *The Cherokee Tobacco*, 11 Wall. 616, and the case of *Ah Lung, the Chinese Laborer from Hong-Kong*, 9 Sawyer.

While, therefore, the courts will always endeavor to bring legislation into harmony with treaty stipulations, and not presume that it was intended by the legislative department to disregard them, yet an act of Congress must be construed according to its manifest intent, and neither limited nor enlarged by ingenious reasoning or fanciful notions of a purpose not declared on its face.

Before proceeding to examine in detail the act of Congress in question, a few words may be said as to the causes which led to its enactment. Upon the acquisition of California and the discovery of gold, people from all parts of the world came to the country in great numbers, and among them Chinese laborers. They found ready employment; they were industrious and docile, and generally peaceable. They proved to be valuable domestic servants, and were useful in constructing roads, draining marshes, cultivating fields, and, generally, wherever out-door labor was required. For some time they excited little opposition, except when seeking to work in the mines. But as their numbers increased they began to engage in various trades and mechanical pursuits, and soon came into competition, not only with white laborers in the field, but with white artisans and mechanics. They interfered in many ways with the industries and business of the State. Very few of them had families, not one in five hundred, and they had a wonderful capacity to live in narrow quarters without injury

to their health, and were generally content with small gains and the simplest fare. They were perfectly satisfied with what would hardly furnish a scanty subsistence to our laborers and artisans. Successful competition with them was, therefore, impossible, for our laborers are not content, and never should be, with a bare livelihood for their work. They demand something more, which will give them the comforts of a home, and enable them to support and educate their children. But this is not possible of attainment if they are obliged to compete with Chinese laborers and artisans under the conditions mentioned; and it so proved in California. Irritation and discontent naturally followed, and frequent conflicts between them and our people disturbed the peace of the community in many portions of the State.

By the treaty concluded in July, 1868, generally known as the Burlingame Treaty, the contracting parties declare that they "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." And, also, that "citizens of the United States, visiting or residing in China, shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens and subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." Arts. V. and VI., 16 Stat. 740.

But, notwithstanding these favorable provisions, opening the whole of our country to them, and extending to them the privileges, immunities and exemptions of citizens or subjects of the most favored nation, they have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the laws and customs which

they brought from China. Our institutions have made no impression on them during the more than thirty years they have been in the country. They have their own tribunals to which they voluntarily submit, and seek to live in a manner similar to that of China. They do not and will not assimilate with our people; and their dying wish is that their bodies may be taken to China for burial.

But this is not all. The treaty is fair on its face. It stipulates for like privileges, immunities and exemptions on both sides, to our people going to China and to its people coming here. But the stipulations to our people are utterly illusive and deceptive. No American citizen can enjoy in China, except at certain designated ports, any valuable privileges, immunities or exemptions. He can trade at those ports, but nowhere else. He cannot go into the interior of the country and buy or sell there or engage in manufactures of any kind. A residence there would be unsafe, and the crowded millions of her people render it impossible for him to engage in business of any kind among them. The stipulations of the treaty, so far as the residence of the citizens or subjects of one country in the other and the trade which would follow such residence are concerned, are therefore one-sided. Reciprocity in benefits between the two countries in that respect has never existed. There is not and never has been any "mutual advantage" in the migration or emigration of the citizens or subjects, respectively, from one country to the other which the treaty, in "cordially recognizing," assumes to exist. Suggestions of any such mutuality were deceptive and false from the outset. The want of it was called to the attention of our government in 1878 by a communication to the State Department from our Minister in China. "A few words," says the Minister, "are needed to indicate the lack of reciprocity between us. I think there are no opportunities of residence or of enterprise from which the Chinese among us are debarred. They can go where they will and do what they will in all our broad domain. But it is not so here. Our countrymen may reside in a few cities only, and they may engage in no enterprise outside of the ordinary interchange of commodities, and their transportation

between defined points. Opportunities exist to develop mines, to establish furnaces and factories, to construct roads, canals, railroads and telegraphs, to operate these, and steam and other vessels on many routes now not open to them; but from all these and many other important branches of enterprise we are effectually and perhaps hopelessly shut out."

And this is not all. By the treaty of 1868 the contracting parties declare their reprobation of any other than "an entirely voluntary emigration," and they agree to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects to the United States without their free and voluntary consent. In the face of this explicit provision large numbers of them, more than one-half of all who have come to the United States, have been brought under what is termed the contract system; that is, a contract for their labor. In one sense they come freely, because they come pursuant to contract, but they are not the free immigrants whose coming the treaty contemplates, and for whose protection the treaty provides. They are for the time the bond thralls of the contractor—his coolie slaves. The United States had already legislated to prevent the transportation by their citizens of coolies from China to any foreign port; but no law has ever been passed by China to prevent its subjects, thus bound, from being taken to the United States. Act of February 19, 1862, 12 Stat. 340.

In view of these facts—that the Chinese cannot assimilate with our people, but continue a distinct race amongst us, with institutions, customs and laws entirely variant from ours; that the larger portion of persons termed Chinese laborers were imported under the labor-contract system; that no law to prevent their importation under this system had ever been passed by China; that competition with them tended to degrade labor, and thus to drive our laborers from large fields of industry; that the treaty was one-sided in the benefits it conferred as to residence and trade by the citizens or subjects of one country in the other, the condition of the people of China rendering any reciprocity in such benefits impossible—it is not surprising that there went up from the whole Pacific Coast an earnest appeal

to Congress to restrain the further immigration of Chinese. It came not only from that class who toil with their hands, and thus felt keenly the pressure of the competition with coolie labor, but from all classes. Thoughtful persons who were exempt from race prejudices saw, in the facilities of transportation between the two countries, the certainty, at no distant day, that, from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.

It was objected to the legislation sought, that the treaty of 1868 stood in the way, and that whilst it remained unmodified such legislation would be a breach of faith to China, and give her just ground of complaint. I was formerly of that opinion, and so expressed myself in some judicial decisions, the want of reciprocity in the benefits stipulated not being called to my attention, or being overlooked at the time, *Case of Chinese Merchant*, 7 Saw., 546, 549; but subsequent reflection has convinced me that my views on this subject require modification. Be that as it may, many jurists of eminence have not hesitated to affirm that such legislation would not have been the subject of just reproach by any one acquainted with the failure of reciprocal benefits to our people in the operation of the treaty, in consideration of which alone the treaty was adopted. The first treaty with China, negotiated in 1844 by Mr. Cushing, and the treaty with that country negotiated by Mr. Reed, in 1858, had not only declared that there should be peace and friendship between the two nations and their people, but stipulated for commercial intercourse at certain designated ports in China, and for protection to citizens of the United States there, while peaceably attending to their affairs. 8 Stat. 592; 12 Ib. 1023. It was in the treaty of 1868, the Burlingame Treaty as it is called, that the two nations recognized the mutual advantages of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents;

and stipulated that each should enjoy, in the country of the other, the privileges, immunities and exemptions, in respect to residence and trade, which might be thus enjoyed by citizens or subjects of the most favored nation. Yet, as already stated, such freedom of trade or residence is not allowed to American citizens in China, and, from her crowded population, never can be. The stipulation for reciprocal benefits, in this way, has never been performed by the Chinese government; and has always been incapable of enforcement. The consideration, therefore, for allowing free emigration from China to this country has failed, and, it may be affirmed with much justice, that by reason of this failure there would have been no breach of faith to China had the stipulation on our part been disregarded by the legislation of Congress. If the treaty had stipulated for the like admission to each country of the goods of the other, and China excluded our goods, or her condition was such that they could not be landed, it would seem that no one could pretend that the stipulation on our part to receive her goods would continue obligatory. It cannot make any difference that the stipulations relate to emigrants instead of goods. So of any other mutual stipulations; when on one side they are not observed, or become incapable of enforcement, they cease to be binding on the other. And surely it could never have been contemplated that an unlimited immigration of Chinese, with all the privileges of subjects of the most favored nation, should be continued without our receiving corresponding benefits for which the treaty stipulated.

The present Secretary of State, in a recent dispatch to our minister in England respecting the Clayton-Bulwer Treaty, calls attention to a provision which he states that Great Britain has not kept, adding that, if she "has violated and continues to violate that provision, the treaty is, of course, voidable at the pleasure of the United States." Indeed, history furnishes many instances where one nation has claimed a release from a treaty because the other party has disregarded it, or the conditions which existed at its date have essentially changed, and in so claiming and acting no reproaches of bad faith were incurred or made. Undoubtedly, as said by Mr.

Justice Curtis, the withdrawal of a nation from the execution of a treaty is a matter of great delicacy and gravity, and not to be lightly done. Usually notice beforehand is given as the course of which the other can least complain. Yet it is a matter resting entirely with the legislative and executive departments.

In response to the urgent and persistent appeals of the Pacific Coast for restrictive legislation, and in deference to those who were of opinion that, without a modification of the treaty, such legislation would be a breach of faith, commissioners were appointed, to proceed to China and there negotiate for such modification. The supplementary treaty of November, 1880, was the result. It declared in its first article that—

"Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

In its second article it declared that—

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges and immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

As thus seen, by the first article, China not only agrees, not-

withstanding the stipulations of former treaties, that the government of the United States may regulate, limit, or suspend the coming of Chinese laborers whenever in its judgment the interests of our country or of any part thereof may require such action, and that the legislation for such regulation, limitation, or suspension is committed to its discretion, with a proviso that the legislation shall be reasonable, and that the immigrants shall not be maltreated or abused. The reasonableness and necessity of the legislation enacted is confided to its judgment.

The second article, which provides that Chinese laborers then in the United States shall be allowed freedom of ingress and egress, could have been intended to apply only to such laborers as might continue their residence in the United States, not to those who might subsequently leave the country without any intention to return. Its manifest design was to allow such persons then here to leave the country for a temporary absence and return. The same reasons which could be supposed to induce legislation against further immigration of laborers apply, and with equal if not aggravated force, to the return of those who have once abandoned their residence here. The opinion of the court proceeds on the supposition that those here at the date of the treaty, having subsequently left the country, have the right to return at any time in the indefinite future, though they may have abandoned their residence here and acquired one elsewhere. This view of the rights of such laborers, and the necessity of subordinating the provisions of the act of Congress to the maintenance of such supposed rights, is, in my judgment, and I say it with deference, the source of error in the opinion and conclusion of the court. The complaining party here, as already stated, had been absent from the United States over three years and in the Sandwich Islands, when he sought to return, and in that time he had acquired a residence there as fully as he ever had in the United States.

Neither does the second article prevent the United States from prescribing regulations for the identification of the Chinese laborer here at the date mentioned, and insisting upon a com-

pliance with them as a condition of his right to re-enter the country after once leaving it. A European nation requiring passports from foreigners seeking to enter its territory, and a certificate of identification if residing therein, was never held to violate stipulations for free intercourse or free residence. Nor does the article preclude the enactment of regulations to identify Chinese subjects other than laborers, if it be found that this last class attempt the evasion of the requirement as to their own identification by seeking to personate other classes, such as merchants or students.

Soon after the ratification of the treaty of 1880 restrictive legislation was attempted, and a bill passed the two houses of Congress, but failed to become a law. On the 6th of May, 1882, another act passed by Congress received the Executive sanction. 22 Stat. 58. This act—the one under consideration—is entitled "An Act to execute certain treaty stipulations relating to Chinese," and, in my judgment, it is authorized by the treaty, and, whether so authorized or not, cannot be judicially annulled upon any theory that Congress went beyond the requirements of good faith in its enactment. It consists of fifteen sections. The first declares that after ninety days from the passage of the act, and for the period of ten years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come, to remain within the United States. The second makes it a misdemeanor, punishable by fine, to which imprisonment may be added, for the master of any vessel knowingly to bring within the United States from a foreign country and land any such Chinese laborer. The third then provides that these two sections shall not apply to Chinese laborers who were in the United States September 17, 1880, or who came within ninety days after the passage of the act. The majority of the court, by their construction, add the words: "If those here September 17, 1880, have previously left the United States, but shall apply to those subsequently leaving." That is to say, in their view, the sections do not apply to those who may have been here at the date of the treaty, if they had left the country before the passage of the

act, but do apply if they afterwards left. Those who have left, says the court, may come at any time in the indefinite future without regard to the act. But the third section draws no such distinction in its exception; and it is impossible, from its language, to exempt from any subsequent requirement those who had left before the passage of the act, without extending it to those who left afterwards; and it will not be pretended that the following sections do not require of the latter a certificate of identification. It is not necessary, in my judgment, to interpolate any words to reach the intention of Congress. The fourth section gives interpretation to the language of the third. It declares that, for the purpose of identifying the laborers who were here on the 17th of November, 1880, or came within the ninety days mentioned, and to furnish them with "the proper evidence" of their right to go from and come to the United States, the "collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom house;" and each laborer thus departing shall be entitled to receive, from the collector or his deputy, a certificate containing such particulars, corresponding with the registry, as may serve to identify him. "The certificate herein provided for," says the section, "shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter."

The plain purport of the act, as it seems to me, was to exclude all Chinese laborers except those who came at certain designated periods and continued their residence in the coun-

try, and, if they should leave and be desirous of returning, to require them to obtain a proper certificate of identification. By this construction, all the provisions of the act are made harmonious; without it, they are contradictory and absurd.

The fourth section has no meaning unless applied to those excepted laborers mentioned in the third section, for it refers to them by name, and they are only excepted within its conditions from the general prohibition of the first section. The third section declares that the first two—those which contained the general prohibition—shall not apply to certain laborers, but it does not declare that the remaining sections shall not apply to them, and if they do apply, they impose their conditions. By the construction of the majority, the fourth section is surplusage and should be stricken from the act.

The language of the third section in the amended act of 1884 differs slightly from that used in the act of 1882. In the original act the third section declares that the first two sections shall not apply to Chinese laborers who were in the United States on the 17th of November, 1880, or who shall have come before the expiration of ninety days after the passage of the act, and who shall produce the required certificate. The amendatory act has, instead of "*and* who shall produce," these words, "*nor* shall said sections apply to Chinese laborers who shall produce" the certificate. From this change of language, which appears from the debates to have been incorporated during the discussion of the act in the House, without any supposition by the friends of the measure that it, in any respect, changed its general features, it is contended that a distinction is made between laborers here at the dates mentioned and those who might obtain a certificate, and that the subsequent requirements of the act apply to one class and not the other. But this position has no basis upon which to rest, for no laborers other than those here on the dates mentioned could obtain a certificate, and when we turn to the fourth section we find its language embracing all of them; none are excepted from the necessity of securing that document. There is no expression anywhere in the act of an intention to deal with a class of Chinese laborers less than the whole body who were excepted

from the general prohibition. Not a word looks to any such purpose; and it can be extracted from the act only by force of a construction which falls in the law of interpretation under no recognized head.

The construction which I have suggested, preserves the act with all its intended benefits. Other sections than those I have cited corroborate and strengthen it. Thus, the eighth section declares that the master of any vessel arriving in the United States shall, "*before landing or permitting to land, any Chinese passengers*, deliver and report to the collector of customs of the district in which such vessel shall have arrived, a separate list of all Chinese passengers taken on board of his vessel at any foreign port or place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers (and, if accredited officers of the Chinese or of any other foreign government, travelling on the business of that government, or their servants, with a note of such facts) and the names and other particulars, *as shown by their respective certificates.*" This shows clearly that any Chinaman on board such vessel, not being an officer of the government of China, is expected to have a certificate; for the names and description of all Chinese passengers, not being officials, are to be "shown by their respective certificates." Then, the ninth section provides "that, before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers, *comparing the certificates with the list and the passengers*, and no passenger shall be allowed to land in the United States from such vessel in violation of law." The twelfth section also declares "that no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel." Should we limit the designation of persons mentioned in this section to laborers, no conceivable reason can be stated why a certificate of identification should be required from them when entering the United States by land, which does not equally apply to them when entering the United States by vessel.

If the construction I give works hardship to any persons, it is

for Congress, not this court, to afford the remedy. This court has no dispensing power over the provisions of an act of Congress. It is itself only the servant of the law, bound to obey, not to evade or make it. The act of May 6, 1882, requires, in my judgment, a certificate for their admission from all Chinese laborers coming to the United States, whether they have been in the country before or not. If they have been here and left before the passage of the act they are necessarily excluded, for the act makes no exception in their favor. The amendatory act of 1884 seems to me to remove any doubt as to the necessity of the certificate, if any existed under the act of 1882. Under the construction adopted in the Circuit Court, before the amendatory act, parol evidence had been allowed in a multitude of cases where previous residence was alleged, and the District and Circuit Courts were blocked up by them to the great inconvenience of suitors. This fact, and the suspicious character in many instances of the testimony by reason of the loose notions entertained by the witnesses as to the obligation of an oath, led to the general expression of a desire for further legislation restricting the evidence receivable. This desire led to the passage of the amendatory act of 1884. The Committee of the House of Representatives for Foreign Affairs, which reported the act, accompanied it with a report in which they said that: "The manifold evasions, as well as attempted evasions of the act that have occurred since its passage, through the broad, actual, and possible interpretations of the words 'merchant' and 'traveller,' *together with the notorious capabilities of the lower classes of Chinese for perjury*, have not only flooded our federal courts on the Pacific Coast with cases which, being quasi-criminal, are entitled to precedence over other and more important business," but show that the act of 1882 "has failed to meet the demands which called it into existence." To obviate the difficulties attending the enforcement of that act from the causes stated, the amendatory act of 1884 declared that the certificate which the laborer must obtain "shall be the only evidence permissible to establish his right of re-entry into the United States." By it the door is effectually closed, or would be closed but for the decision of the court in

this case, to all parol evidence and the perjuries which have heretofore characterized its reception. But for this decision, nothing could take the place of the certificate or dispense with it; and I see only trouble resulting from the opposite conclusion. All the bitterness which has heretofore existed on the Pacific Coast on the subject of the immigration of Chinese laborers will be renewed and intensified, and our courts there will be crowded with applicants to land, who never before saw our shores, and yet will produce a multitude of witnesses to establish their former residence, whose testimony cannot be refuted and yet cannot be rejected. I can only express the hope, in view of the difficulty, if not impossibility, of enforcing the exclusion of Chinese laborers intended by the act, if parol testimony from them is receivable, that Congress will, at an early day, speak on the subject in terms which will admit of no doubt as to their meaning.

Bradley, J.

I concur with Mr. Justice Field in dissenting from the judgment of the court in this case. It seems to me that both the act of 1882 and the act of 1884, when carefully examined, require that a Chinese laborer should present the certificate which those laws prescribe in order to be entitled to the privilege of landing or coming into the territory of the United States.

By the treaty with China, adopted November 17, 1880 (but not proclaimed until October, 1881), it was agreed that the United States might limit or suspend the coming of Chinese laborers into, or their residence in, the United States: but it was provided that those who were then in the country should be allowed to go and come of their own free will and accord. The act of May 6, 1882, prohibited their coming into the country for ten years after the expiration of ninety days from that date; but exempted from the prohibition those who were in the United States at the date of the treaty (November 17, 1880), or who should have come into the same before the expiration of ninety days from the passage of the act, *and should produce* the evidence required by the act, of being in the excepted class. This evidence was a certificate of identification (analogous to a pass-

port) to be given to any laborer leaving the country and desirous of returning, by the collector of the port from which he sailed. Without such a certificate he was not permitted to return to the United States. Of course, those who had already left the country before the law was passed could not have such certificates, and their condition is what produces the controversy. From the supposed hardship of their case the Circuit Courts of the United States gave a construction to the law which let them come in on parol proof of their former residence here. This was calculated to produce great abuses, for Chinese of the lower class have little regard for the solemnity of an oath. Congress passed another act July 5, 1884, amendatory of the first act, by which it was declared (sec. 4) that the "said certificate shall be the only evidence permissible to establish his right of re-entry" (referring to the person who should receive such a certificate); and that masters of vessels arriving at any port with Chinese on board, should, before they would be permitted to land, deliver to the collector a list exhibiting their names and other particulars as shown by their respective certificates. But the exemption clause of this act (sec. 3), declaring who should be exempted from the prohibition to come into the United States, by some inadvertence was expressed in the disjunctive, namely, that the act should not apply to those who were in the United States on the 17th of November, 1880, or who should have come into the same before the expiration of ninety days from the passage of the act of 1882, *nor to those who should produce the certificate* before mentioned. The whole tenor of the act shows that this was an inadvertent expression, and that it should have been (as in the act of 1882), "*and who should produce* the certificate, &c.," which, by the familiar rule of construction for changing "or" into "and," and *vice versa*, is admissible, and in this case is required to prevent a palpable incongruity. When those are exempted who were here in November, 1880, or came here before the expiration of ninety days from the passage of the act of 1882, it would be incongruous to add, as an additional and separate class, those who should present a certificate; for no others could get a certificate. This incongruity, as well as the general tenor of the act, make

it clear that the clause of exemption should be read conjunctively as in the act of 1882. And, taking the whole act together, it seems to me perfectly clear that it requires a certificate in all cases. By the 12th section it is declared that no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate required of those seeking to land from a vessel; showing that no exceptions were to be made; but that every one coming into the country, in whatever way, or by whatever route, must have a certificate.

It may be that this view of the law makes it conflict with the treaty; though Justice Field has shown strong reasons to the contrary; but whether it does so, or not, I think it is the true construction; and the rule is now settled that Congress may, by law, overrule a treaty stipulation; although, of course, it should not be done without strong reasons for it; and an act of Congress should not be construed as having that effect unless such be its plain meaning. Thinking, as I do, that the act in question cannot be fairly construed in a different sense from that which I have indicated, I cannot concur in the judgment of the court.

HEAD MONEY CASES.

EDYE and Another *v.* ROBERTSON, Collector.

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

CUNARD STEAMSHIP COMPANY *v.* SAME.

SAME *v.* SAME.

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

Argued November 19, 20, 1884.—Decided December 8, 1884.

The act of Congress of August 3, 1882, "to regulate immigration," which imposes upon the owners of steam or sailing vessels who shall bring passengers from a foreign port into a port of the United States, a duty of fifty

Statement of Facts.

cents for every such passenger not a citizen of this country, is a valid exercise of the power to regulate commerce with foreign nations.

Though the previous cases in this court on that subject related to State statutes only, they held those statutes void, on the ground that authority to enact them was vested exclusively in Congress by the Constitution, and necessarily decided that when Congress did pass such a statute, which it has done in this case, it would be valid.

The contribution levied on the shipowner by this statute, is designed to mitigate the evils incident to immigration from abroad, by raising a fund for that purpose; and it is not, in the sense of the Constitution, a tax subject to the limitations imposed by that instrument on the general taxing power of Congress.

A tax is uniform, within the meaning of the constitutional provision on that subject, when it operates with the same effect in all places where the subject of it is found, and is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States.

A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interest of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this, judicial courts have nothing to do.

But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which, in cases otherwise cognizable in such courts, furnish rules of decision. The Constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried.

But in this respect, so far as the provisions of a treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification, or repeal.

These suits were brought to recover back sums collected at various times as duties on immigrants arriving in the United States, under the provision of the act of August 3, 1882, 23 Stat. 214, "that there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States." Protests were filed against each payment, and all other steps required as foundations for the actions were taken. In the Edye Case there was a trial, jury being waived, a finding of facts, a judgment, and exceptions. 18 Fed. Rep. 135. In the Cunard Cases judgment was entered in favor of the collector

on demurrer to the complaints. The causes were brought here on writs of error.

Mr. George DeForest Lord for Cunard Steamship Company. —The act imposes two classes of duties on the Secretary. 1st. With regard to convicts, &c. 2d. With regard to emigrants. The money when collected is to be applied to the needs of such of the second class as arrive in steam or sail vessels, in each case being spent only at the port where raised. The power for such legislation must be found, if at all in the grant, either of power to levy taxes, &c., or of power to regulate commerce. The grant of power to levy taxes indicates the purposes for which the money raised shall be used. Whether construed literally or strictly, all agree that it must be expended for general welfare. If the money raised is to be used for the benefit of a few individuals, in a limited locality, the act authorizing it to be raised is not within the constitutional grant of power to levy taxes. As to the power to regulate commerce, &c., the following propositions may be taken as settled. 1. Commerce includes navigation as well as traffic, and extends to the transportation of passengers equally with merchandise. *Gibbons* v. *Ogden*, 9 Wheat. 1; *The Passenger Cases*, 7 How. 283; *Henderson* v. *Mayor of New York*, 92 U. S. 259. 2. The power to regulate commerce includes a power to determine the conditions upon which it is to be carried on, to encourage, or even to entirely prohibit it, including of course every mode of "regulating" it which lies intermediate between those extremes. 3. The authorized regulation of commerce may be accomplished indirectly by the adjustment of the duties from which a national revenue is derived, as well as directly by positive enactments enforced by appropriate penalties. 4. But the commerce which Congress has power to regulate must be either "with foreign nations, or among the several States, or with the Indian tribes." Each transaction which goes to make up this commerce must have a beginning, and an end. The transactions embraced in foreign "commerce," have their beginning in the departure of persons or property from a foreign country, and end only when those persons become mingled

with the common inhabitants, and when the property becomes mingled with the mass of other property of the State to which they are severally brought. *Brown* v. *Maryland*, 12 Wheat. 419, 441; *Passenger Cases*, above cited; *United States* v. *Gould*, 8 Am. Law Reg. O. S. 525; *United States* v. *Haun*, 8 Am. Law Reg. O. S. 663. It cannot be maintained that the money required is a license fee; not only because it is styled in the act a "duty" and not a "license fee," but also because it is inconsistent with the idea of a license, being imposed, not for the purpose of regulating the traffic, but to raise money for particular expenditures. The "duty" imposed is not a regulation of commerce. The title of the act cannot make it a regulation of immigration. *People* v. *Compagnie Transatlantique*, 107 U. S. 59. The duty is not imposed in aid of those branches of the act which aim to regulate the immigration, but for the care and relief of the immigrant after the voyage is over, and landing effected. This use of the money is outside of the purposes for which power is conferred upon Congress to impose taxes for the regulation of commerce. It has indeed been decided that similar taxes imposed by the States interfere with the exclusive power given to Congress to regulate commerce. *Passenger Cases*, 7 How. 283; *Henderson* v. *Mayor*, above cited; *People* v. *Compagnie Transatlantique*, above cited. But it does not follow that Congress may, under its power to regulate commerce, tax to raise money for purposes not included within the taxing power. Nor can the act be sustained under the power to levy taxes to provide for the general welfare; because, in its scope and purpose it has nothing to do with the general welfare. Lastly, the Constitution requires that all duties shall be uniform throughout the United States, that is, that they shall be uniform in character, and that they shall apply uniformly. A tax is not uniform in character when it discriminates between individuals or classes engaged in the trade or profession taxed. Cooley on Taxation, 138; *Police Jury* v. *Nougues*, 11 La. Ann. 739; *Knowlton* v. *Rock County Supervisors*, 9 Wisc. 410. This law discriminates between those who carry on the business in vessels, and those who do so by rail or otherwise. The tax is not territo-

rially uniform, because it discriminates against the seaboard States.

Mr. Edwards Pierrepont and *Mr. Philip J. Joachimsen* for Edye & Another.—Congress has no power to establish eleemosynary and police regulations within the several States. An emigrant, arriving at New York, becomes at once under the protection of State laws. Emigration is not a "business" to be regulated by federal law. It is the voluntary act of the emigrant, and is completed the moment he arrives. After again stating some of the objections presented by Mr. Lord, counsel continued: The tax in question is either a tax on the "person" or a "duty" on a "commercial object." The court below holds it to be "a tax on the owner of the vessel, made a lien on his vessel, because he brings alien passengers in his vessel. It is a tax on the business he carries on." The act of Congress calls it "a duty" . . . for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States. The Secretary of the Treasury calls it a "capitation tax." In his instructions of June 27, 1884, the court below called it "head money." As head money or capitation tax it is not laid according to the rule prescribed. It is, undoubtedly, a direct personal tax. The prohibitory language of the Constitution is as follows: "No capitation or other direct tax shall be laid, unless in proportion to the census." . . . This tax, according to the opinion below, is not to be considered in the "sense" of a capitation tax. If not to be held in that sense, it is embraced under the head of "or other direct tax." That the tax is really on the person of the passenger, and is not a mere license fee, is demonstrable. It is to be paid by the owner or consignee for each and every passenger. In *United States* v. *Railroad Co.*, 17 Wall. 322, a tax nominally imposed on the railroad company was held to be a tax on the bondholder or creditor, and not on the corporation: that the corporation was made use of as but a convenient means of collecting the tax. In *Crandall* v. *State of Nevada*, 6 Wall. 35, this court held that a special tax on railroad and

stage companies for every passenger carried by them, is a tax on the passenger, . . . and is not a simple tax on the business of the companies. In *Henderson* v. *Mayor, &c., of New York*, 92 U. S. 259, this court held that a like tax, under a State statute is, in effect, a tax on the passenger. The imposition of head money on free men is contrary to the first principles of this government. It is void because levied upon or for the human body. It is in the record that the tonnage duty imposed by law on our vessels had been paid. That payment gave us the right to trade for all purposes whatever. The act also is in conflict with rights secured by treaties. In their brief the counsel cite the treaties with Belgium, of July 17, 1858; Denmark, April 26, 1826; Great Britain, November 19, 1794, July 3, 1815; Netherlands, October 8, 1782, August 8, 1852; Prussia, May 1, 1828; France, June 24, 1822; Sweden and Norway, July 4, 1827. *Taylor* v. *Morton*, 2 Curtis, 454, and *Cherokee Tobacco Case*, 11 Wall. 616, hold that a treaty obligation may be superseded by a statute. We point out that this court had no opportunity to pass upon the ruling in the first case, and that the second was decided by a divided court. See 1 Kent Com. 177; *United States* v. *Schooner Peggy*, 1 Cranch, 103; *The Chinese Merchants*, 13 Fed. Rep. 605; *United States* v. *Douglas*, 17 Fed. Rep. 634.

We claim that children, though brought in the ship, are not passengers. The term "passenger" is defined in the dictionary as follows: "*Passenger.* A traveller; one who is upon the road; a wayfarer; one who hires in any vehicle the liberty of travelling." These children, who are not *sui juris*—are not able to take care of themselves—cannot be said to be "travellers" or "wayfarers," or as being "upon the road," and certainly not persons who "hire in any vehicle the liberty of travelling," because they cannot make any contract of hiring. The tax is upon "passengers." The description of a "passenger," in a legal sense, as contradistinguished from the "person," is settled by the first, fourth and fifth sections of the Passenger Act of 1882, 22 Stat. p. 184; in section 4th it says: "Mothers with infants and young children shall be furnished the necessary quantity of wholesome milk, or condensed milk,

for the sustenance of the latter." In section 5th it provides that: "The service of a surgeon shall be promptly given to any of the passengers, or to any infant or young child of any such passengers, who may need his services." And in the first section of that act it is expressly provided that it shall not be lawful for the master of a steamship wherein emigrant passengers, or passengers other than cabin passengers, are brought into the United States, to bring such passengers, unless the compartments, &c., thereinafter mentioned, shall have been provided. Then, that for each and every passenger there shall be 100 cubic feet, or 120 cubic feet, according to the location; and that in computing the number of such passengers carried or brought in any vessel, children under one year of age shall not be included; and two children, between one and eight years of age, shall be counted as one passenger.

In contemporaneous acts on the same subject, a definition of a qualification in one, controls all others *in pari materia.*

Mr. Solicitor General for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

These cases all involve the same questions of law, and have been argued before this court together.

The case at the head of the list presents all the facts in the form of an agreed statement signed by counsel, and it therefore brings the questions before us very fully. The other two were decided by the Circuit Court on demurrer to the declaration.

They will be disposed of here in one opinion, which will have reference to the case as made by the record in *Edye & Another* v. *Robertson.*

The suit is brought to recover from Robertson the sum of money received by him, as collector of the port of New York, from plaintiffs, on account of their landing in that port passengers from foreign ports, not citizens of the United States, at the rate of fifty cents for each of such passengers, under the act of Congress of August 3, 1882, entitled "An Act to regulate immigration."

The petition of plaintiffs and the agreed facts, which are

also made the finding of the court to which the case was submitted without a jury, are the same with regard to each of many arrivals of vessels of the plaintiffs, except as to the name of the vessel and the number and age of the passengers. The statement as to the arrival first named, which is here given, will be sufficient for them all, for the purposes of this opinion.

The following are admitted to be the facts in this action:

"I. That the plaintiffs are partners in trade in the city of New York under the firm name of Funch, Edye & Co., and carry on the business of transporting passengers and freight upon the high seas between Holland and the United States of America as consignees and agents.

"That on the 2d day of October, 1882, there arrived, consigned to the plaintiffs, the Dutch ship Leerdam, owned by certain citizens or subjects of the Kingdom of Holland, and belonging to the nationality of Holland, at the port of New York. She had sailed from the foreign port of Rotterdam, in Holland, bound to New York, and carried 382 persons not citizens of the United States.

"That among said 382 persons, 20 were severally under the age of one year, and 59 were severally between the ages of one year and eight years.

"That upon the arrival of said steamship Leerdam within the collection district of New York, the master thereof gave, in pursuance to section nine of the passenger act of 1882, and delivered to the custom-house officer, who first came on board the vessel and made demand therefor, a correct list, signed by the master, of all the passengers taken on board of said Leerdam at said Rotterdam, specifying separately the names of the cabin passengers, their age, sex, calling, and the country of which they are citizens, and also the name, age, sex, calling, and native country of each emigrant passenger or passengers other than cabin passengers, and their intended destination or location, and in all other respects complying with said ninth section, and a duplicate of the aforesaid list of passengers, verified by the oath of the master, was, with the manifest of the cargo, delivered by the master to the defendant as col-

lector of customs of the port of New York on the entry of said vessel.

"That it appears from the said list of passengers and duplicate that the said 382 persons were each and every one subjects of Holland or other foreign powers in treaty of peace, amity, and commerce with the United States.

"That the said passenger manifest also states the total number of passengers, and shows that 20 of them were under one year of age, and 59 between the ages of one year and eight years.

"That said collector, before allowing complete entry of said vessel, as collector decided, on the 12th day of October, 1882, that the plaintiffs must pay a duty of one hundred and ninety-one dollars for said passengers, being fifty cents for each of said 382 passengers.

"That by the regulations of the Treasury Department the non-payment of said 191 dollars would have permitted the defendant to refuse the complete entry of the vessel, or to refuse to give her a clearance from the port of New York to her home port, and such imposition would have created an apparent lien on said vessel for said sum of 191 dollars.

"On the defendants making such demand the plaintiffs paid the same and protested against the payment thereof.

"That a copy of the protest in regard to said Leerdam is annexed to the complaint, marked No. 1, and is a correct copy of the protest.

"That on the same day the plaintiffs duly appealed to the Secretary of the Treasury from such decision of the collector, and that the paper marked Appeal No. 2, annexed to the complaint, is a copy of said appeal.

"On the 18th of October, 1882, the Secretary of the Treasury sustained the action of the defendant, and this action is brought within ninety days after the rendering of such decision.

"That the payment set forth in the complaint herein was levied and collected by defendant, and the same was paid under and in pursuance of an act of Congress, entitled 'An Act to regulate Immigration,' approved August 3, 1882."

On the facts as thus agreed and as found by the Circuit Court, a judgment was rendered in favor of defendant, which we are called upon to review.

There is no complaint by plaintiffs that the defendant violated this act in any respect but one, namely, that it did not authorize him to demand anything for the twenty children under one year old, and for the fifty-nine who were between the ages of one year and eight years.

The supposed exception of this class of passengers does not arise out of any language found in this act to regulate immigration, nor any policy on which it is founded, but it is based by counsel on a provision of an act approved one day earlier than this, entitled "An Act to regulate the carriage of passengers by sea." This provision limits the number of passengers which the vessel may carry by the number of cubic feet of space in which they are to be carried, and it declares that, in making this calculation, children of the ages mentioned need not be counted. In reference to the space they will occupy this principle is reasonable. But, as regards the purpose of the immigration act to raise a fund for the sick, the poor, and the helpless immigrants, children are as likely to require its aid as adults, probably more so. They are certainly within the definition of the word passenger, when otherwise within the purview of the act. This branch of the case requires no further consideration.

The other errors assigned, however numerous or in whatever language presented, all rest on the proposition that the act of Congress requiring the collector to demand and receive from the master, owner, or consignee of each vessel arriving from a foreign port, fifty cents for every passenger whom he brings into a port of the United States who is not a citizen, is without warrant in the Constitution and is void.

The substance of the act is found in its first section, namely:

"An Act to Regulate Immigration.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be levied, collected, and paid a duty of fifty cents

for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States. The said duty shall be paid to the collector of customs of the port to which such passenger shall come, or if there be no collector at such port, then to the collector of customs nearest thereto, by the master, owner, agent, or consignee of every such vessel, within twenty-four hours after the entry thereof into such port. The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect." 22 Stat. 214.

The act further authorizes the Secretary to use the aid of any State organization or officer for carrying into effect the beneficent objects of this law, by distributing the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it, under rules and regulations to be prescribed by him. It directs that such officers shall go on board vessels arriving from abroad, and if, on examination, they shall find any convict, lunatic, idiot, or any person unable to take care of himself or herself, without becoming a public charge, they shall report to the collector, and such person shall not be permitted to land.

It is also enacted that convicts, except for political offences, shall be returned to the nations to which they belong. And the Secretary is directed to prepare rules for the protection of the immigrant who needs it, and for the return of those who are not permitted to land.

This act of Congress is similar in its essential features to many statutes enacted by States of the Union for the protection of their own citizens, and for the good of the immigrants who land at seaports within their borders.

That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to

the protection of the people in whose midst they are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the States. That decision did not rest in any case on the ground that the State and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the States and the general government, has conferred this power on the latter to the exclusion of the former. We are now asked to decide that it does not exist in Congress, which is to hold that it does not exist at all—that the framers of the Constitution have so worded that remarkable instrument, that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers, and diseased persons, without making any provision to preserve them from starvation, and its concomitant sufferings, even for the first few days after they have left the vessel.

This court is not only asked to decide this, but it is asked to overrule its decision, several times made with unanimity, that the power *does* reside in Congress, is conferred upon that body by the express language of the Constitution, and the attention of Congress directed to the duty which arises from that language to pass the very law which is here in question.

That these statutes are regulations of commerce—of commerce with foreign nations—is conceded in the argument in this case; and that they constitute a regulation of that class which belongs exclusively to Congress is held in all the cases in this court. It is upon these propositions that the court has decided in all these cases that the State laws are void. Let us examine those decisions for a moment.

In the *Passenger Cases*, so called, the report of which occupies the pages of 7 Howard from page 283 to 573, mostly with opinions of the judges, the order of the court is that "it is the

opinion of this court that the statute law of New York, by which the health commissioner of the city of New York is declared entitled to demand and receive from the master of every vessel from a foreign port that should arrive in the port of said city the sum of one dollar for each steerage passenger brought in such vessel, is repugnant to the Constitution and laws of the United States, and therefore void." An examination of the opinions of the judges shows that if the majority agreed upon any one reason for this order, it was because the law was a regulation of commerce, the power over which that Constitution had placed exclusively in Congress. The same examination will show that several judges denied this, because they held that this power belonged to the class which the States might exercise until it was assumed by Congress. It is very clear that, if any such act of Congress had existed then as the one now before us, the decision of the court would have been nearer to unanimity.

In the case of *Henderson* v. *The Mayor of New York*, 92 U. S. 259, the whole subject is reviewed, and, in the light of the division in this court in the *Passenger Cases*, it is considered, on principle, as if for the first time. In that case, after the statute of New York had been modified in such a manner as was supposed to remove the objections held good against it in the *Passenger Cases*, the question of its constitutional validity was again brought before this court, when it was held void by the unanimous judgment of all its members. And this was upon the distinct ground that it was a regulation of commerce solely within the power of Congress.

"As already indicated," says the court, "the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the right 'to regulate commerce with foreign nations.'"

The court then, referring to the transportation of passengers from European ports to those of the United States, says: "It has become a part of our commerce with foreign nations, of vast interest to this country as well as to the immigrants who come among us, to find a welcome and a home within our bor-

ders." "Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it, is a law regulating this branch of commerce?"

The court adds: "We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, State or national; that, by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled." And for this reason the statute of New York was held void.

In the case of the *Commissioners of Immigration* v. *North German Lloyd*, 92 U. S. 259, a similar statute of Louisiana was held void for the same reason. And in the case of *Chy Lung* v. *Freeman*, 92 U. S. 275, decided at the same term, the statute of California on the same subject was also held void, because, in the language of the head note to the report, it "invades the right of Congress to regulate commerce with foreign nations."

In the case of *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59, where the State of New York, having again modified her statute, it was again held void: the court said: "It has been so repeatedly decided by this court that such a tax as this is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress" (referring to the cases just cited), "that there is little to say beyond affirming the judgment of the Circuit Court, which was based on those decisions."

It cannot be said that these cases do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the State statutes were void only because Congress, and not the States, was authorized by the Constitution to pass them, and for the reason that Congress could enact such laws, and for that reason alone were the acts of the State held void. It was, therefore, of the essence of the decision which held the

State statutes invalid, that a similar statute by Congress would be valid.

We are not disposed to reconsider those cases, or to resort to other reasons for holding that they were well decided. Nor do we feel that further argument in support of them is needed.

But counsel for plaintiffs, assuming that Congress, in the enactment of this law, is exercising the taxing power conferred by the first clause of section 8 of article I. of the Constitution, and can derive no aid in support of its action from any other grant of power in that instrument, argues that all the restraints and qualifications found there in regard to any form of taxation are limitations upon the exercise of the power in this case. The clause is in the following language:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and the general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In this view it is objected that the tax is not levied to provide for the common defence and general welfare of the United States, and that it is not uniform throughout the United States.

The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. "It shall be uniform throughout the United States." Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it?

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provision of the Constitution, that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of

another," because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all *ports* alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States. It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. *State Railroad Tax Cases*, 92 U. S. 575, 612. Here there is substantial uniformity within the meaning and purpose of the Constitution.

If it were necessary to prove that the imposition of this contribution on owners of ships is made for the general welfare of the United States, it would not be difficult to show that it is so, and particularly that it is among the means which Congress may deem necessary and proper for that purpose; and beyond this we are not permitted to inquire.

But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. The title of the act, "An Act to regulate immigration," is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources.

It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction, who has the means to protect himself and knows well how to do it, and whose obligations in the premises need the aid of the statute for their enforcement. The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the

meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed.

If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple.

So, also, in the case of the *Packet Co.* v. *Keokuk*, 95 U. S. 80, the city of Keokuk having by ordinance imposed a wharfage fee or tax for the use of a wharf owned by the city, the amount of which was regulated by the tonnage of the vessel, this was held not to be a tonnage tax within the meaning of the constitutional provision that "no State shall, without the consent of Congress, lay any duty of tonnage." The reason of this is, that, though it was a burden, or tax, in some sense, and measured by the tonnage of the vessel, it was but a charge for services rendered, or for conveniences furnished by the city, and was not a tonnage tax within the meaning of the Constitution. This principle was re-affirmed in the case of *Packet Co.* v. *St. Louis*, 100 U. S. 423.

We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business.

Another objection to the validity of this act of Congress, is that it violates provisions contained in numerous treaties of our government with friendly nations. And several of the articles of these treaties are annexed to the careful brief of counsel. We are not satisfied that this act of Congress violates any of these treaties, on any just construction of them. Though laws similar to this have long been enforced by the State of New York in the great metropolis of foreign trade, where four-fifths of these passengers have been landed, no complaint has been made by any foreign nation to ours, of the violation of treaty obligations by the enforcement of those laws.

But we do not place the defence of the act of Congress against this objection upon that suggestion.

We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country. We had supposed that the question here raised was set at rest in this court by the decision in the case of *The Cherokee Tobacco*, 11 Wall. 616. It is true, as suggested by counsel, that three judges of the court did not sit in the case, and two others dissented. But six judges took part in the decision, and the two who dissented placed that dissent upon the ground that Congress did not *intend* that the tax on tobacco should extend to the Cherokee tribe. They referred to the existence of the treaty which would be violated if the statute was so construed as persuasive against such a construction, but they nowhere intimated that, if the statute was correctly construed by the court, it was void because it conflicted with the treaty, which they would have done if they had held that view. On the point now in controversy it was therefore the opinion of all the judges who heard the case. See *United States* v. *McBratney*, 104 U. S. 621–3.

The precise question involved here, namely, a supposed conflict between an act of Congress imposing a customs duty, and a treaty with Russia on that subject, in force when the act was passed, came before the Circuit Court for the District of Massachusetts in 1855. It received the consideration of that eminent jurist, Mr. Justice Curtis of this court, who in a very learned

opinion exhausted the sources of argument on the subject, holding that if there were such conflict the act of Congress must prevail in a judicial forum. *Taylor* v. *Morton*, 2 Curtis, 454. And Mr. Justice Field, in a very recent case in the Ninth Circuit, that of *Ah Lung*, 18 Fed. Rep. 28, on a writ of *habeas corpus*, has delivered an opinion sustaining the same doctrine in reference to a statute regulating the immigration of Chinamen into this country. In the *Clinton Bridge Case*, Woolworth, 150, 156, the writer of this opinion expressed the same views as did Judge Woodruff, on full consideration, in *Ropes* v. *Clinch*, 8 Blatchford, 304, and Judge Wallace, in the same circuit, in *Bartram* v. *Robertson*, 15 Fed. Rep. 212.

It is very difficult to understand how any different doctrine can be sustained.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private

citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

Other objections are made to this statute. Some of these relate, not to the power of Congress to pass the act, but to the expediency or justice of the measure, of which Congress, and not the courts, are the sole judges—such as its unequal operation on persons not paupers or criminals, and its effect in compelling the ultimate payment of the sum demanded for each passenger by that passenger himself. Also, that the money is to be drawn from the Treasury without an appropriation by Congress. The act itself makes the appropriation, and even if this be not warranted by the Constitution, it does not make void the demand for contribution, which may yet be ap-

propriated by Congress, if that be necessary, by another statute.

It is enough to say that, Congress having the power to pass a law regulating immigration as a part of commerce of this country with foreign nations, we see nothing in the statute by which it has here exercised that power, forbidden by any other part of the Constitution.

The judgment of the Circuit Court in all the cases is

Affirmed.

MATTHEWS *v.* WARNER & Another.

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

Argued December 9, 10, 1884.—Decided December 22, 1884.

On the facts in this case it appears that the plaintiff had no real ownership, actual control, or lawful right to the bonds in suit.

The facts which make the case are stated in the opinion of the court.

Mr. William A. Abbott, for appellant.

Mr. E. R. Hoar and *Mr. J. B. Warner*, for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court for the District of Massachusetts, dismissing the bill of appellant, who was plaintiff below. See 6 Fed. Rep. 461.

The bill alleges that the plaintiff is the owner of one hundred and fifty bonds of $1,000 each of the Memphis and Little Rock Railroad Company, and fifty similar bonds of the South Carolina Central Railroad Company, which have wrongfully come to the possession of defendants; that these bonds are negotiable by delivery, and that defendants are about to sell them at public auction, or otherwise, and she prays an injunction to prevent this sale and for other equitable relief.

Defendants deny any ownership or interest of plaintiff in the bonds, and allege that they are holders of them for a valuable consideration, and set out the transaction by which they obtained the bonds. This answer raises several questions which we do not think necessary to consider, and a large volume of testimony is found in the case which, for the same reason, we do not propose to review here.

The defendants are trustees under an assignment made by Thomas Upham for the benefit of his creditors. There passed to them by the assignment a bond for $250,000, made by Edward Matthews, the husband of plaintiff, and a mortgage on valuable real estate in the city of New York to secure it. These were made payable to Nathan Matthews, brother of Edward, and by him assigned to Upham as security for a loan or loans made by Upham to Nathan Matthews.

It seems to be clear that this assignment was made by the consent of Edward or by his directions. This was in May, 1875. Some time prior to March, 1877, Edward Matthews, who had become embarrassed, desired to take up this mortgage, and entered into negotiations for that purpose with defendants, who agreed to an exchange of the bond and mortgage for the railroad bonds which are the subject of this suit. They accordingly sent Joseph B. Warner, their legal adviser, from Boston, where they resided, with the bond and mortgage, and the exchange was made by him as their agent, receiving the bonds in question at Mr. Matthews' office in the city of New York. This exchange took place on the 6th day of March, 1877. It appears that the 150 Memphis and Little Rock Company bonds were on that day, and had been for some time previous, in possession of Morton, Bliss & Co., bankers, as collateral security for the debt of Edward Matthews, who had placed them there.

From the very vague and unsatisfactory testimony of Mr. Brander Matthews, son of plaintiff, and of her husband, Edward Matthews, it appears that, at some time prior to the date of this transaction, but whether a month or a year he cannot say, Brander Matthews went with his mother to the office of the Safe Deposit Company and secured a box for his

mother's use, of which she took one key and he another. On this 6th day of March, without consulting his mother, he went to this box and took out 200 bonds of the South Carolina Central Railroad Company, and going from thence to the office of Morton, Bliss & Co. he exchanged 150 of these bonds for the Memphis and Little Rock Company's bonds, and brought them with the remaining 50 bonds of the South Carolina Company to his father's office, and in his presence delivered them to Mr. Warner.

An instrument in writing was there drawn up showing the terms of the exchange and the purpose for which the bonds were pledged. This instrument is signed Caleb H. Warner and Charles F. Smith, by Joseph B. Warner, their attorney; Nathan Matthews, by W. H. Williams, his attorney, and by Edward Matthews.

Mr. Brander Matthews testifies that he had no authority from his mother for the use he made of the bonds, nor does he believe she knew anything about it. Mr. Edward Matthews supports him in this. It is, however, apparent, that in regard to these bonds, and to others placed in the box and removed from it from time to time, that the mother was rarely, if ever, consulted. Mr. Edward Matthews testifies that these bonds had at one time been his bonds, and he says they became his wife's property by virtue of assignments which he had made of them to Watson Matthews, his brother, in trust for Mrs. Matthews.

Two papers are produced which purport to assign to Watson Matthews the equity of redemption and right and interest of Edward Matthews to a large list of bonds and other securities held by parties to whom Edward Matthews had pledged them for his own debts. One of them is dated April 22, 1876, and the other May 13, 1876. There is no satisfactory evidence of the delivery of either of these papers to Mrs. Matthews or to Watson Matthews. Edward Matthews says they were placed with other papers in Mrs. Matthews' box in the safe deposit vault. There is no evidence that Mrs. Matthews ever had either of these papers, or any of the bonds described in them, in her manual possession. No evidence that she ever went to the box or opened it herself to put anything in it or take anything

out. The instruments speak of the assignments as security for a debt owing by Edward Matthews to his wife. No evidence is given of the origin of this debt; nor that Mrs. Matthews ever had any separate estate of her own, or anything to loan her husband. They must have been married a long time, as Brander Matthews, the son, was over twenty-three years old at the time of these transactions.

It also appears that Watson Matthews was the brother of Edward Matthews, and both he and Brander Matthews occupied as offices the same rooms in which Edward Matthews did business.

It is significant also that the bill in this case is sworn to by one of the solicitors on his belief, and her name is signed by them and not by herself.

The only act which she is ever said to have done or performed in person, asserting a claim to these bonds, is a notice, to which her name is appended, to the defendants, about a month after the exchange of the bond and mortgage for the railroad bonds, in which she says they are her bonds, and forbids them to sell them. A witness, the clerk of Matthews, says the signature, he thinks, was written by Mr. Matthews. And it is admitted that the letter was dictated by him and written in his office.

The plaintiff, who, if she had any just claim to these bonds, could best have explained how that claim originated, who could have told what money or property she loaned her husband, or how he became her debtor, is not sworn as a witness in the case.

It looks very much to us as if the box at the safe deposit vault, with a key in the possession of the son, who occupied the same office with the father, and in the light of other evidence in the case, was a contrivance by which the husband could use the bonds as his own when he desired, and assert them to be the property of his wife when that was more desirable.

We are of opinion that plaintiff never had any real ownership or actual control or any lawful right to the bonds in suit.

The decree of the Circuit Court dismissing the bill is affirmed for this reason, without examining other grounds of defence to the suit.

Statement of Facts.

BOND & Another *v.* DUSTIN.

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

Argued December 3, 1884.—Decided December 22, 1884.

In an action at law, submitted to the decision of the Circuit Court by the parties waiving a trial by jury, in which the record does not show the filing of the stipulation in writing required by section 649 of the Revised Statutes, this court, upon bill of exceptions and writ of error, cannot review rulings upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence; but may determine whether the declaration is sufficient to support the judgment.

The filing of a stipulation in writing, waiving a jury, under section 649 of the Revised Statutes, is not sufficiently shown by a statement in the record, or in the bill of exceptions, that "the issue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial, by agreement of parties, by the court, without the intervention of a jury."

A motion in arrest of judgment can only be maintained for a defect apparent upon the record, and the evidence is no part of the record for this purpose.

A statute of a State, providing that a verdict returned on several counts shall not be set aside or reversed if one count is sufficient, governs proceedings in cases tried in the Federal courts within that State, and is applicable to judgments lawfully rendered without a verdict.

This was a writ of error to reverse a judgment of the Circuit Court of the United States for the Southern District of Illinois for the defendant in error in an action of assumpsit brought by him against the plaintiffs in error, and tried by that court without a jury.

The declaration contained two special counts on bills of exchange, the one for $2,500 and the other for $4,000, drawn upon the defendants by one Falconer, their agent, at their instance and for their benefit, and indorsed by the payees to the plaintiff; as well as common counts in the sum of $10,000 for money lent, money paid, money had and received, interest for the use of money due, and upon an account stated. The defendant pleaded *non assumpsit*, and denied the signatures of the instruments set forth in the first two counts.

The record stated that the parties came by their attorneys "and the issue joined by consent is tried by the court, a jury

being waived;" and that the court, having heard the evidence and arguments, "finds the issue for the plaintiff, and assesses his damages at the sum of $7,173.42; whereupon the defendants enter their motion for a new trial and in arrest of judgment, which, being heard by the court, is overruled," and judgment rendered for the plaintiff for that sum and costs.

The court allowed a bill of exceptions, which began with the recital, "the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury;" and which stated all the evidence introduced by either party; the objections taken by the defendants to the admission of some of the evidence introduced by the plaintiff; the finding and judgment of the court; a motion of the defendants for a new trial, because the court heard incompetent testimony against the defendants' objection, and because the judgment was against the law and the evidence; the overruling of that motion; the subsequent making and overruling of a motion in arrest of judgment; and that the defendants excepted to the admission of the evidence objected to, and to the overruling of the two motions.

The errors assigned and argued were to the admission of evidence at the trial; to the overruling of the motion in arrest of judgment; and to "giving judgment against the plaintiffs in error upon the contracts alleged and proved, because upon the pleadings and evidence it did not appear that the court had jurisdiction to hear and determine an action brought by the defendant in error on said contracts, or any of the same."

Mr. Nicholas P. Bond for plaintiffs in error.

Mr. H. S. Greene for defendant in error submitted on his brief.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The first question to be determined is how far this court, upon this record, has authority to consider the alleged errors.

By the act of March 3, 1865, ch. 86, § 4, re-enacted in the Revised Statutes, it is provided that issues of fact in civil

cases may be tried and determined by the Circuit Court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury; that the finding of the court upon the facts shall have the same effect as the verdict of a jury; and that its rulings in the progress of the trial, when excepted to at the time and presented by bill of exceptions, may be reviewed by this court upon error or appeal. 13 Stat. 501; Rev. Stat. §§ 649, 700.

Before the passage of this statute, it had been settled by repeated decisions that in any action at law in which the parties waived a trial by jury and submitted the facts to the determination of the Circuit Court upon the evidence, its judgment was valid; but that this court had no authority to revise its opinion upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, and therefore, when no other error appeared on the record, must affirm the judgment. *Guild* v. *Frontin*, 18 How. 135; *Kelsey* v. *Forsyth*, 21 How. 85; *Campbell* v. *Boyreau*, 21 How. 223. The reason for this, as stated by Chief Justice Taney in *Campbell* v. *Boyreau*, was that "by the established and familiar rules and principles which govern common-law proceedings, no question of law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment, in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts and referring the questions of law to the court." 21 How. 226. Even in actions duly referred by rule of court to an arbitrator, only rulings and decisions in matter of law after the return of the award were reviewable. *Thornton* v. *Carson*, 7 Cranch, 596, 601; *Alexandria Canal* v. *Swann*, 5 How. 83; *York & Cumberland Railroad* v. *Myers*, 18 How. 246; *Heckers* v. *Fowler*, 2 Wall. 123.

Since the passage of this statute, it is equally well settled by a series of decisions that this court cannot consider the correctness of rulings at the trial of an action by the Circuit Court without a jury, unless the record shows such a waiver of a jury

as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. *Flanders* v. *Tweed*, 9 Wall. 425; *Kearney* v. *Case*, 12 Wall. 275; *Gilman* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, 614; *Madison County* v. *Warren*, 106 U. S. 622; *Alexander County* v. *Kimball*, 106 U. S. 623, note. In *Flanders* v. *Tweed*, Mr. Justice Nelson quoted the passage just cited from the opinion of Chief Justice Taney in *Campbell* v. *Boyreau*, and said that when a trial by jury had been waived, but there was no stipulation in writing, no finding of the facts, and no question upon the pleadings, the judgment must, according to the course of proceeding in previous cases, be affirmed, unless under very special circumstances this court otherwise ordered. 9 Wall. 429, 431.

The most appropriate evidence of a compliance with the statute is a copy of the stipulation in writing filed with the clerk. But the existence of the condition upon which a review is allowed is sufficiently shown by a statement, in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing. *Kearney* v. *Case*, 12 Wall. 283, 284; *Dickinson* v. *Planters' Bank*, 16 Wall. 250. So it has been held that a written consent of the parties, after a trial by jury has begun, to withdraw a juror and refer the case to a referee, in accordance with a statute of the State, authorizing this course, is a sufficient stipulation in writing waiving a jury; and that when the court has authority to refer a case upon consent in writing only, an order expressed to be made "by consent of parties," that the case be referred, necessarily implies that such consent was in writing. *Boogher* v. *Insurance Co.*, 103 U. S. 90. See also *United States* v. *Harris*, 106 U. S. 629, 634, 635. And since the statute, as before, a judgment upon an agreed statement of facts or case stated, signed by the parties or their counsel, and entered of record, leaving no question of fact to be tried, and presenting nothing but a question of law, may be reviewed on error. *Supervisors* v. *Kennicott*, 103 U. S. 554; *United States* v. *Eliason*, 16 Pet. 291; *Burr* v. *Des Moines Co.*, 1 Wall. 99; *Campbell* v. *Boyreau*, above cited.

Opinion of the Court.

The record before us contains nothing to show that there was any stipulation in writing waiving a jury. The Circuit Court had authority to try and determine the case, whether the waiver was written or oral. In the finding of facts and in the judgment there is no statement upon the subject. The only evidence of a waiver of a jury is in the statement in the record that when the case came on for trial "the issue joined by consent is tried by the court, a jury being waived;" and in the recital at the beginning of the bill of exceptions, "the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury." The case cannot be distinguished, in any particular favorable to the plaintiffs in error, from those of *Madison County* v. *Warren* and *Alexander County* v. *Kimball*, above cited, the latest adjudications upon the subject, both of which came up from the same court as the present case. In one of those cases, the statement in the record was "the parties having stipulated to submit the case for trial by the court without the intervention of a jury;" and, in the bill of exceptions, "said cause being tried by the court without a jury, by agreement of parties." In the other case, the statement in the record was in the very same words as in the case at bar; and in the bill of exceptions was in these words: "upon the trial of this cause before the Hon. S. H. Treat, sitting as Circuit Judge, a jury being waived by both parties."

The necessary conclusion is that this court has no authority to consider the exceptions to the admission of evidence at the trial.

The attempt to sustain the motion in arrest of judgment, by an argument that the evidence was insufficient to warrant a recovery in this action, fails for the same reason, as well as because a motion in arrest of judgment can only be maintained for a defect apparent upon the face of the record, and the evidence is no part of the record for this purpose. *Carter* v. *Bennett*, 15 How. 354.

The plaintiffs in error further contend that neither of the special counts sets forth any cause of action, and that the finding and judgment, being general, and not limited to the common counts, should therefore be set aside. This objection, so

far as it touches the sufficiency of the declaration to support the judgment, is fairly presented for the determination of this court, within the rule laid down by Chief Justice Taney in *Campbell* v. *Boyreau*, and by Mr. Justice Nelson in *Flanders* v. *Tweed*, as already stated.

But, by the law applicable to this case, the objection cannot be sustained. By the common law, indeed, a general verdict and judgment upon several counts in a civil action must be reversed on writ of error if only one of the counts was bad. But Lord Mansfield "exceedingly lamented that ever so inconvenient and ill founded a rule should have been established," and added, "what makes this rule appear more absurd is that it does not hold in the case of criminal prosecutions." *Grant* v. *Astle*, 2 Doug. 722, 730; *Snyder* v. *United States*, *ante*, 216. In Illinois it has been changed by statute, providing that "whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict. Illinois Rev. Stat. 1874, ch. 110, § 58. That statute governs proceedings in cases tried in the Federal courts within that State. Rev. Stat. § 914; *Townsend* v. *Jemison*, 7 How. 706, 722; *Sawin* v. *Kenny*, 93 U. S. 289. And the rule thereby established must be applied to judgments lawfully rendered without a verdict. As the common counts in this declaration are indisputably good, the sufficiency of the special counts need not be considered.

Judgment affirmed.

MEMPHIS & LITTLE ROCK RAILROAD COMPANY *v.* RAILROAD COMMISSIONERS.

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

Submitted November 25, 1884.—Decided December 22, 1884.

A statute exempting a corporation from taxation confers the privilege only on the corporation specially referred to, and the right will not pass to its successor unless the intent of the statute to that effect is clear and express.

Statement of Facts.

Morgan v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; and *Louisville & Nashville Railroad Company* v. *Palmes*, 109 U. S. 244, affirmed.

The franchise to be a corporation is not a subject of sale and transfer, unless made so by a statute, which provides a mode for exercising it.

A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway: the latter may be mortgaged, without the former, and may pass to a purchaser at a foreclosure sale.

A mortgage of the charter of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation: if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to laws, constitutional and otherwise, existing at the time of the reorganization.

This was a bill in equity filed in the Chancery Court of Pulaski County, Arkansas, seeking to enjoin the Board of Railroad Commissioners of the State from appraising, for the purposes of taxation, any part of the property of the plaintiff in error, on the ground that it is exempted from taxation by a contract with the State contained in its charter of incorporation. The Supreme Court of the State, on appeal, affirmed the decree of the Chancery Court dismissing the bill. That decree of the Supreme Court was brought here by writ of error, for review, on the allegation that it enforced a law of the State impairing the obligation of a contract in violation of the rights of the plaintiff in error under the Constitution of the United States.

The question arises and is to be determined upon the following case:

The Memphis and Little Rock Railroad Company was chartered by an act of the General Assembly of the State of Arkansas, approved January 11, 1853. This act authorized the formation of a company to be a body corporate for the purpose of establishing communication by a railroad between the city of Memphis in Tennessee and Little Rock in Arkansas, and commissioners were named therein to open books for subscriptions to its capital stock. This was fixed for the purpose of organization at $400,000, to be increased to $2,000,000 at the pleasure of the company. When the necessary amount of capital stock had been subscribed, the subscribers were authorized

to organize by the election of a board of directors. The 9th section of the act is as follows:

"SEC. 9. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with anything necessary to give it full operation and effect, either by opening books for new stock or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done, in either case, shall be prescribed by the stockholders at a general meeting," &c. Laws of Arkansas, 1852–3, 132–3.

It also contains the following:

"SEC. 28. The capital stock of said company shall be exempt from taxation until the road pays a dividend of six per cent., and the road, with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from and after the completion of said road." Ib. 136.

The company was organized under this act, and afterwards, in order to borrow money for the prosecution of the enterprise, issued its bonds to the amount $1,300,000, dated May 1, 1860, having thirty years to run, with interest at eight per cent. per annum, and, to secure the payment of the same, executed and delivered a mortgage to Tate, Brinkley and Watkins, as trustees for the bondholders, whereby it conveyed to them, in trust, the Memphis and Little Rock Railroad, its road-bed, right of way, and all works and rolling stock of or belonging to the company, "together with the charter by which said company was incorporated and under which it is organized, and all the rights and privileges and franchises thereof," and also all the lands, &c., belonging to said company.

Subject thereto, a second mortgage was made by the company on March 1, 1871, conveying all its property and franchises to Henry F. Vail, in trust for the holders of bonds secured thereby, amounting to $1,000,000. Default having been made by the company in the payment of interest on this loan, Vail, the trustee, in execution of the power conferred in the mortgage, sold and conveyed the mortgaged property, the

title to which became vested in Stillman Witt and his associate bondholders, who organized the Memphis and Little Rock Railway Company, to which, on November 17, 1873, the said property was conveyed. This railway company, on December 1, 1873, issued its bonds to the amount of $2,600,000, and, to secure the same, by a deed of that date, conveyed all the franchises, privileges and property so acquired by it to trustees, of whom Pierson, Matthews and Dow became successors, in trust for the bondholders. The Memphis and Little Rock Railroad Company, the original corporation, made default in the payment of interest accruing upon the bonds secured by the mortgage of May 1, 1860, and its successor, the Memphis and Little Rock Railway Company also made default in the payment of interest maturing on the bonds secured by the deed of December 1, 1873. Afterwards, on November 12, 1876, a bill in chancery was filed, in the Circuit Court of the United States for the Eastern District of Arkansas, by the trustees against the two companies, to foreclose those mortgages, in which suit a final decree was rendered ordering a sale of the property described in the same, embracing the property and franchises of the said companies, and the charter of the Memphis and Little Rock Railroad Company; and a sale thereof was made and confirmed, and a conveyance of the same executed to Pierson, Matthews and Dow, in trust for the holders of the bonds of the Memphis and Little Rock Railway Company, secured by the deed of trust executed by that company. On April 28, 1877, the holders of these bonds executed certain articles of association, by which, after reciting the premises, they organized themselves into a company, claiming to become a corporation, under the name of "The Memphis and Little Rock Railroad Company as re-organized," under and by virtue of the provisions of the act of January 11, 1853, for the incorporation of the original company; and afterwards, on April 30, 1877, Pierson, Matthews and Dow conveyed to said company the property and franchises, including the charter of January 11, 1853; and thereupon the bill proceeds :

"Complainant submits that, having thus duly purchased said charter of the Memphis and Little Rock Railroad Company

under the power therein contained, and having organized thereunder, it is the owner and holder thereof, and that it has and is entitled to all the privileges and benefits in said act of the General Assembly mentioned and set forth, among others to the contract contained in said section 28, by which the road, with all the franchises and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from and after the date of the completion of said road. Complainant further states that said road was not completed till the 15th day of November, 1874, and that the time of the exemption thereafter from taxation has not expired. It further states that the defendant herein first mentioned, acting as a Board of Railroad Commissioners for this State, have demanded from the complainant a detailed inventory of all the rolling stock belonging to the company, and the valuation thereof, as provided in section 48 of an act of the General Assembly of the State of Arkansas, approved March 31, 1883, entitled 'An Act to revise and amend the revenue laws of the State of Arkansas,' and have also demanded from the complainant a statement or schedule showing the length of the main and all the side tracks, switches and turn-outs in each county in which the road is located, and the value of all improvements, stations and structures, including the railroad track, as provided in section 46 of the same act.

"Complainant being willing, so far as it may without injury to itself, to comply with the laws of this said State, has, in compliance with the demand made upon it, made and returned said schedule to the said board, accompanying the same with a protest against any of the property in said schedule contained being assessed for taxation, in which protest complainant stated the grounds upon which said property was exempt from taxation.

"Complainant states and submits that all this property contained in the said schedules, [copies] of which it herewith files, marked 'I' and 'J,' and all the property described in said sections 46 and 48 of said act, are the identical property which is exempt from taxation by the contract in said charter contained."

Statement of Facts.

On December 9, 1874, an act was passed by the General Assembly of Arkansas, whereby the purchasers of a railroad of any corporation of the State, and their associates, acquiring title thereto by virtue of a judicial sale, or of a sale under a power contained in a mortgage or deed of trust, were authorized to organize themselves into a body corporate, vested with all the corporate rights, liberties, privileges, immunities, powers and franchises of and concerning the railroad so sold, not in conflict with the provisions of the Constitution of the State, as fully as the same were held, exercised and enjoyed by the corporation before such sale. A certificate of such organization was required to be filed in the office of the Secretary of State within six months, specifying certain particulars. Laws of Arkansas, 1874–5, p. 57. Prior to the passage of that act there seems to have been no statute authorizing the formation of such corporations, or prescribing a mode for their organization.

In 1853, when the Memphis and Little Rock Railroad Company was chartered and organized as a corporation, the Constitution of Arkansas then in force permitted the enactment of special acts of incorporation, and without any restriction upon the power to exempt corporations and their property from taxation. In 1868 a new Constitution was adopted by the people of the State, which provided (art. 5, sec. 48), that, "the General Assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. . . . The property of corporations, now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals;" and in art. 10, sec. 2, that, "laws shall be passed taxing by a uniform rate all moneys, credits, investment in bonds, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money."

It was decided by the Supreme Court of Arkansas in the case of *Oliver* v. *Memphis and Little Rock Railroad Co.*, 30 Ark. 128, that the 28th section of the act of January 11, 1853, incorporating that company, already quoted, was a contract be-

tween it and the State, which could not be impaired by these provisions of the State Constitution, because it was protected by the Constitution of the United States.

On October 13, 1874, the present Constitution of Arkansas was adopted and took effect. Among its provisions are these: That the General Assembly shall pass no special act conferring corporate powers (art. 12, sec. 2); that corporations may be formed under general laws, which laws may, from time to time, be altered or repealed (art. 12, sec. 6); that all property subject to taxation shall be taxed according to its value; that the following property shall be exempt from taxation: public property used exclusively for public purposes, churches used as such, cemeteries used exclusively as such, school buildings and apparatus, libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity (art. 16, sec. 5); that all laws exempting property from taxation, other than as above provided, shall be void (art. 16, sec. 6); that the power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party (art. 16, sec. 7); and that the General Assembly shall not remit the forfeiture of the charter of any corporation then existing, or alter or amend the same, or pass any general or special law for the benefit of such corporation, except upon condition that such corporation should thereafter hold its charter subject to the provisions of the Constitution (art. 17, sec. 8).

It was in April, 1877, that the plaintiff in error was organized as a corporation deriving its authority for that purpose, as it claimed, under the special act of January 11, 1853. On behalf of the defendant in error, it is claimed that the plaintiff in error had no power to organize as a corporation, except as enabled by the act of December 9, 1874.

Mr. B. C. Brown for plaintiff in error.—Under the statutes of Arkansas the pleadings amount to an admission that the original charter contained an exemption from taxation, that there was authority to mortgage that charter, that it was mortgaged, that the mortgage was foreclosed, and that the mortgaged

charter was acquired by the plaintiff in error under the foreclosure sale. We admit that a corporation takes only so much as is granted in express words, or by fair implication; that an exemption from taxation is not to be presumed; that the party claiming the exemption must show his right. But there is another proposition—which the court overlooked—that a status or right shown to have been once established or existing is presumed to continue, and it is for him who alleges that it has ended or changed to show when and how the end or change occurred. It is conceded that the property held by plaintiff and now sought to be taxed was at one time exempt. This was established by the Supreme Court of the State itself, in *The State* v. *Oliver*, 30 Ark. 129. Before this cause was instituted, both the Supreme Court of Arkansas and this court had held that "a State can no more impair the obligation of a contract by adopting a Constitution than by passing a law." *Jacoway*, v. *Denton*, 25 Ark. 625; *White* v. *Hart*, 13 Wall. 646. The contract here was that the company created by the act of 1853 might "mortgage its charter." Not mortgage the "franchise." Not mortgage the "right to build and operate a railroad." Not mortgage the "exemption from taxation," but mortgage the charter. The words "charter," and "act of incorporation" are used "convertibly," and mean the same thing. *Humphrey* v. *Pegues*, 16 Wall. 244. The grant of a power grants everything necessary to give it beneficial effect; *United States* v. *Fisher*, 2 Cranch, 358; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Fletcher* v. *Oliver*, 25 Ark. 289, 299; *N. W. Fertilizing Co.* v. *Hyde Park*, 70 Ill. 634. The power to pledge the franchises and rights of a corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise, and upon which its real value depends. *Phillips* v. *Winslow*, 18 B. Mon. 431. Either the whole charter passed or nothing. There is no middle ground. The exemption from taxation was not separable from the body of the charter. This court has held that, with legislative permission, any privilege or immunity may pass. *Humphrey* v. *Pegues*, cited above; *Tomlinson* v. *Branch*, 15 Wall. 460; *Pacific Railroad Co.* v. *McGuire*, 20 Wall. 36. In

the cases of *Morgan* v. *Louisiana*, 93 U. S. 217, and *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244, relied upon by the other side, there was no such permission.

Mr. U. M. Rose, for defendants in error.

Mr. Justice Matthews delivered the opinion of the court. He recited the facts as above stated, and continued:

The case of the plaintiff in error rests entirely upon the words of the ninth section of the act of incorporation of the Memphis and Little Rock Railroad Company of January 11, 1853, by which it was empowered to borrow money "on the credit of the company and on the mortgage of its charter and works." It is argued that these words confer power upon the company to convey to its bondholders, by way of mortgage and on foreclosure, to purchasers absolutely, all the property of the company, and all its franchises, including the franchise of becoming and being a corporation, in the sense of acquiring the right to organize as such under the act as successor to, and substitute for, the original company, precisely as if the act had named them as corporators and endowed them with the corporate faculty. And this being assumed, it is thence inferred that the exemption contained in section 28 of the act applies to the substituted corporation as though no change of corporate existence had taken place; and thus, it is insisted, the case is taken out of rule of decision established in *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417, and *Louisville & Nashville Railroad Company* v. *Palmes*, 109 U. S. 244. According to the principle of those decisions, the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the

exact and express requirement of the grants, construed *strictissimi juris*.

It is not claimed that the assignment of the charter, by way of mortgage and subsequent judicial sale, constituted the purchasers to be the identical corporation that the mortgagor had been; for that would involve an assumption of its obligations and debts as well as an acquisition of its privileges and exemptions; but, it is insisted, that it resulted in another corporation in lieu of the original one, entitled to all the provisions of the charter, by relation to its date, as though it had been originally organized under it.

But such a construction of the words authorizing a mortgage of the charter and works of the company, is, in our opinion, beyond the intention of the law and altogether inadmissible.

There is no express grant of corporate existence to any new body. At the time when this charter was granted, in 1853, there was no general law in existence in Arkansas authorizing the formation of corporations. All such grants were by special act. Neither was there any law authorizing the purchasers of railroads at judicial sale under mortgages of the property and franchises of the company, to organize themselves into corporate bodies, such as was first passed in 1874. There is not in the act of January 11, 1853, for the incorporation of the Memphis and Little Rock Railroad Company, any reference to such a right, as vested in the mortgage bondholders or other purchasers at a sale under a foreclosure of the mortgage, nor is there any mode or machinery prescribed in the act for such an organization. The desired conclusion rests entirely on the inference deduced from the mortgage of the charter, and is an attempt to create a corporation by a judicial implication. But, as was said by this court in *Central Railroad and Banking Co.* v. *Georgia*, 92 U. S. 665, 670, "it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it."

The application of this rule is not avoided by the claim that the present is not the case of an original creation of a corporate body, but the transfer, by assignment of a previously existing charter, and of the right to exist as a corporation under it.

The difference is one of words merely. The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment. "The franchise to be a corporation," said Hoar, J., in *Commonwealth* v. *Smith*, 10 Allen, 448, 455, "clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible." In *Hall* v. *Sullivan Railroad Co.*, 21 Law Reporter, 138 (2 Redfield's Am. Railway Cases, 621; 1 Brunner's Collected Cases, 613), Mr. Justice Curtis said: "The franchise to be a corporation, is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected." No such positive provision is contained in the act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the act itself or in any other statute prior to that of December 9, 1874.

The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what becomes of the old one? If it abides for the purpose of responding to obligations not satisfied by the

sale, or of owning property not covered by the mortgage nor embraced in the sale, as it may well do, and as it must if such debts or property exist, then there will be two corporations co-existing under the same charter. For, "after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment, the rights of the corporators and of third persons may require that the corporation be considered as still existing." *Coe* v. *Columbus, Piqua & Indiana Railroad Co.*, 10 Ohio St. 372, 386, per Gholson, J.

If, as required by the argument for the plaintiff in error, we regard and treat the franchise of being a corporation as an incorporeal hereditament, and an estate capable of passing between parties by deed, or of being charged by way of mortgage and of being sold under a power or by virtue of judicial process, the logical consequences will be found to involve insuperable difficulties and contradictions. In the present case, for example, after the execution of the first mortgage, we should have the railroad company continuing as a corporation *in esse*, and the trustees for the bondholders, or their beneficiaries, or assigns, a corporation *in posse;* and, after condition broken, the company would hold the title to its own existence as a mere equity of redemption. That equity it makes the subject of a second mortgage, and, in default, the beneficiaries under the power of sale became purchasers of the franchise, and organize themselves, by virtue of it, into the Memphis and Little Rock Railway Company. The latter can hardly claim the status of a corporation at law, as the legal title to the franchise of being a corporation had never passed to it, on the supposition that it might pass by a private grant; and, if a corporation at all, it could only be regarded as the creature of equity, according to the analogy of equitable estates, a nondescript class hitherto unknown in any system of law relating to the subject. It finally was displaced by the judicial sale, under which the plaintiff in error organized as successor to both. In the mean time, the original corporation has never been dissolved, and, for all purposes not covered by the mort-

gage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. A conception which leads to such incongruities must be essentially erroneous.

If we concede to the argument for the plaintiff in error the position, that the language used, which authorizes the mortgage of the charter, may be taken in a literal sense, still the assignment would transfer it, in the very state in which it might be at the date of the transfer. But at that date the only corporation which the charter provided for had already been organized. The only powers conferred upon corporators to that end had already been exercised and exhausted. The bondholders under the mortgage, and their assignees, the purchasers at the sale, therefore took, and could take, nothing else than the charter, so far as it remained unexecuted, with such franchises and powers as were capable of future enjoyment and activity, and not such as, having already spent their force by having been fully exerted, could not be revived by a conveyance. This would include, by the necessity of the case, the franchise to organize a corporation, which can only be exerted once for all; for the simple act of organization exhausts the authority, and having once been effected, is legally incapable of repetition.

It is a mistake, however, to suppose that the mortgage and sale of a charter by a corporation, in any proper sense which can be legally imputed to the words, necessarily conveys every power and authority conferred by it, so far, at least, as to vest a title in them, as franchises, irrevocable by reason of the obligation of a contract. In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal.

Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter

of law and not of contract. At least, it would be construed as conferring only a right to organize as a corporation, according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in the sense of that clause of the Constitution of the United States which prohibits State legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect as of that date, and subject to such laws as may then be in force. Such a contract, so far as it seems to assume that form, is a provision merely that, at the time, or on the happening of the event specified, the parties designated may become a corporation according to the laws that may then be actually in force. The stipulation, whatever be its form, must be construed as subject and subordinate to the paramount policy of the State, and to the sovereign prerogative of deciding, in the mean time, what shall constitute the essential characteristics of corporate existence. The State does not part with the franchise until it passes to the organized corporation; and, when it is thus imparted, it must be what the government is then authorized to grant and does actually confer.

It is immaterial that the form of the transaction is that of a mortgage, sale, or other transfer *inter partes* of the franchise to be a corporation. "The real transaction, in all such cases of transfer, sale, or conveyance," as was said by the Supreme Court of Ohio in the case of *The State* v. *Sherman*, 22 Ohio St. 411, 428, "in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect, is the grant of a new charter

couched in few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

It is, of course, the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of *Railroad Co.* v. *Georgia*, 98 U. S. 359. The franchise to be a corporation remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the State, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing.

Our conclusions, then, are, that the exemption from taxation contained in the 28th section of the act of January 11, 1853, was intended to apply only to the Memphis and Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway and the right to make profit therefrom; and that the appellant, not having become a corporate body until after the restrictions in the Constitution of 1874 took effect, was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation.

The decree of the Supreme Court of Arkansas is accordingly

Affirmed.

Syllabus.

UNION METALLIC CARTRIDGE COMPANY *v.* UNITED STATES CARTRIDGE COMPANY.

UNITED STATES CARTRIDGE COMPANY *v.* UNION METALLIC CARTRIDGE COMPANY.

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

Argued December 5, 8, 9, 1884.—Decided December 22, 1884.

Letters patent No. 27,094 were issued to Ethan Allen, February 14, 1860, for 14 years, for an "improvement in machine for making percussion cartridge cases." The patent was reissued in two divisions, No. 1,948 and No. 1,949, May 9, 1865. No. 1,948 embraced that part of the invention which concerned the mechanism for striking up the hollow rim at one stroke. The original patent and drawings showed such mechanism to be a moving die and a fixed bunter. In No. 1,948, the description was altered so as to state that the bunter might be carried against the die; and its two claims each contained the words "substantially as described." An extension of No. 1,948 having been applied for, it was opposed, on the ground that such arrangement of a fixed die and a moving bunter was a new invention, interpolated into the reissue. The Commissioner of Patents so held, and required such new matter to be disclaimed, as a condition precedent to the extension. A disclaimer was filed disclaiming the movable bunter as of the invention of Allen. No. 1,948 was then extended by a certificate which stated that a disclaimer had been filed to that part of the invention embraced in such new matter. In a suit in equity afterwards brought on No. 1,948, against machines having a fixed die and a moving bunter, for infringements committed both before and after the extension: *Held*, That the effect of the disclaimer was to exclude those machines from the scope of any claim in No. 1,948, without reference to the question whether they contained mechanical equivalents for the moving die and the fixed bunter.

Allen had not, before the granting of the original patent, made any machine in which the die was fixed and the bunter movable; and it was never lawful to cover, by the claims of a reissue, an improvement made after the granting of the original patent.

Under § 54 of the act of July 8, 1870, ch. 230, 16 Stat. 205, a disclaimer could be made only by a patentee who had claimed more than that of which he was the original or first inventor or discoverer, and he could make a disclaimer only of such parts of the thing patented as he should not choose to claim or hold by virtue of the patent.

In so disclaiming or limiting a claim, descriptive matter on which the disclaimed claim was based might be erased; but, if there was merely a de-

fective or insufficient description, the only mode of correcting it was by a reissue.

The decision in *Leggett* v. *Avery*, 101 U. S. 256, cited and applied.

An acquiescence and disclaimer, on a decision requiring the disclaimer as a condition precedent to an extension, are as operative to prevent the afterwards insisting on a recovery on the invention disclaimed, as to prevent a subsequent reissue to claim what was so disclaimed.

Letters patent of the United States, No. 27,094, were issued to Ethan Allen, February 14, 1860, for 14 years, for an "improvement in machine for making percussion cartridge cases." A reissue of this patent was granted, in two divisions, No. 1,948 and No. 1,949, May 9, 1865, the application for the reissue having been filed April 7, 1865. The specification of No. 27,094 set forth two improvements: (1) an arrangement or mechanism to trim the open end of the case of the cap-cartridge, to make the articles all alike and true; (2) striking up or forming the swelled end to form the recess for the priming, as shown at Z, from that of Y, at one stroke, in distinction from spinning them. There were two claims in No. 27,094: (1) the trimming mechanism; (2) striking or forming the hollow rim at one stroke or operation. In reissuing the patent, the trimming mechanism was made the subject of No. 1,949, and the other improvement (the subject-matter of claim 2 of No. 27,094), was made the subject of No. 1,948. This suit was brought for the infringement of No. 1,948 alone. So much of the specification and claims of No. 27,094 as related to the subject of No. 1,948, is copied below on the left hand, and the specification and claims of No. 1,948 are copied below on the right hand, the parts of each not found in the other being in italic:

Original. No. 27,094.

"Be it known that I, Ethan Allen, of the city and county of Worcester, State of Massachusetts, have invented certain new and useful improvements in machinery for making loaded

Re-issue. No. 1,948.

"Be it known that I, Ethan Allen, of the city and county of Worcester and State of Massachusetts, have invented certain new and useful improvements in machinery for making

caps or cap-cartridges; and I hereby declare the following to be a full, clear and exact description of the construction and operation of the same, reference being had to the accompanying drawings, in which *Fig.* 1 is a top view or plan, and Fig. 2 a side view; *the same letters indicating the same parts in both.*

My improvements relate to the construction or formation of the case of *the cap* cartridge *in the form shown at Z, or nearly so*, and consist . . . in *striking up* or *forming* the swelled end to form the recess for the priming, as shown at Z, from that of Y, at one stroke, in distinction from spinning them, as has heretofore been done.

The construction of my improvements, as shown in the drawings, is as follows: J *is* the driving pulley *to receive motion, and its shaft* is provided with *cranks or eccentrics at each end*, to which the *rods H and* H′ *connect, the shaft turning in suitable bearings in the frame or base K.* . . . F is a slide receiving motion by H′ and moving in *the* ways G, G, carrying the mandrel B, which passes

loaded caps or cap-cartridges; and I hereby declare the following to be a full, clear and exact description of the construction and operation of the same, reference being had to the accompanying drawings, in which *Figure* 1 is a top view or plan, and Fig. 2 *is* a side view, *and pertains to a machine which is the subject of another reissue of these letters patent.*

My improvements relate to the construction or formation of the case of *a metallic* cartridge, and consist in *an arrangement of mechanism for forming* or *striking up* the swelled end to form the recess for the priming, as shown at Z, from that of Y, at one stroke *or operation*, in distinction from spinning them, as has heretofore been done.

The construction of my improvements, as shown in the drawings, is as follows: *K is the base of the machine;* J, the driving pulley, *which* is provided with *a crank or eccentric*, to which the *rod* H′ *is connected;* F is a slide receiving motion by H′, and moving in ways G, G, carrying the mandrel B, which passes through the die D; *the die D* has a spring to keep or move it back

through the *movable* die D, *which* has a spring to keep or move it back towards F, and *an enlargement* in *its centre*, to facilitate placing the case *A'* to be taken by B. *The end of D next to E has a hole fitting on the outside of the case A'.* E is a die with an *adjusting* screw. *Y is a case as it comes from the press, and* Z *shows the same after being trimmed and set, or, in other words, gone through the following operation, to wit:* . . .

It" (the case or shell) "*is placed in D or A' to be* taken on B and carried *forward* until *its* end projects (sufficiently to form its rim) *out of D*, when F, meeting D, carries it with *A'* in that position up against E, which flattens the end, and forms the hollow rim, as shown in section at Z, Fig. 2; and, the motion of J continuing, the parts all return to their respective places, ready for another, which, during the same time, has been *prepared* as before described towards F, and *a hopper-like opening* in *the upper side* to facilitate placing the case *A*, to be taken by B *and carried into the die D. The mandrel B has a shoulder, a sufficient distance from the end to allow it to enter the cartridge shell just the right distance, and leave enough metal to be pulled into the head of the cartridge. The die D is just the right size to be filled by the shell A when pressed into it by the punch or mandrel B.* E is a die with an *adjustable* screw, *and the case may be carried against it to form the head or rim, or that may be carried against the die D by similar mechanism to F and H'; Z is a case or shell after being headed, forming the cavity for the fulminating powder.*

The operation is as follows, viz., motion, being given to pulley J, is communicated through H' to F and B, and the cases or shells are placed in the recess or in an inclined tube, which feeds them to the punch B. The shell is taken on *the punch* B, and carried *through the die* D until *the* end projects sufficiently to form its rim, when F, meeting D, carries it with *A* in that position up against E, which flattens the end, and forms the hollow rim, as shown

scribed; *the finished case dropping* between the dies D and E, *or, if sticking in D, is punched out by the first motion of the next one and falls out of its way.*

Having thus fully described my invention, what I claim therein as new and desire to secure by letters patent is . . .

Second. I claim striking or forming the hollow rim at one stroke or operation, as above set forth and described."

in section at Z, Fig. 2; and, the motion of J continuing, the parts all return to their respective places, ready for another *shell*, which, during the same time, has been *placed in position* as before described, *and the punch B, taking on another shell, is carried into the die D, and presses out the one before headed, which drops* between the dies D and E, *when the operation is repeated as before.*

I claim the mandrel which carries the cartridge shell, in combination with the die D, which admits the same, and against which the closed end of the cartridge shell is headed, substantially as described.

Second. I claim the die D, constructed and operating for the heading of cartridge shells, substantially as described."

The following were drawings of the original and of the reissue:

Statement of Facts.

Fig. 1.

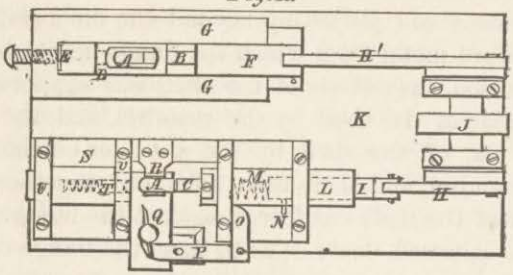
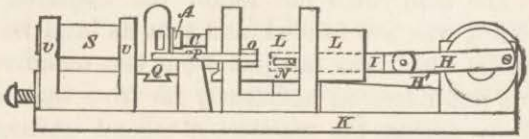


Fig. 2.



The Allen machine, as organized for heading, and making a flange upon, cartridge shells, consisted, mainly, of a mandrel, a die, and a bunter, which were combined together in order to operate. The mandrel was a rod with a shoulder upon it, the rod beyond the shoulder being of such diameter as to enter the cartridge shell, which was to be headed, with a pretty close fit, and the shoulder being at right angles to the rod, and formed to support the edge of the shell at the open end of the cartridge, during the operation of heading. The die was a block of metal with a hole in it, of just the size of the outside of the shell; and the axes of the die and mandrel were in the same line. The bunter was a piece of metal so located that it was opposite one end of the die. The machine was also provided with a gutter, which was a prolongation of the hole in the die, but open on top, into which shells were to be introduced prior to being acted upon by the machine. When an unheaded shell was placed in this gutter, with the mandrel as far retracted from the die as possible, the mandrel advanced, in-

serted itself into the shell, and shoved the shell into the die with its closed end projecting beyond the die a sufficient distance to afford metal from which the flange might be formed. In this position, the outside of the shell was supported by the die, the inside of the shell by the mandrel, and the edges at the open end of the shell by the shoulder on the mandrel. The die, mandrel, and shell then advanced together, and the closed end of the shell was forced against the bunter, the shell being thus squeezed down so as to form the flange of the cartridge. The mandrel then retreated, and, as it retreated, slipped out of the shell, leaving the headed shell in the die, and, when the mandrel was fully out of the shell, the die was in its old position. The shell could not follow the mandrel, owing to the fact that it was now headed, and that its head was on that side of the die which was farthest from the mandrel. After the mandrel had retreated sufficiently far from that end of the die which was nearest the mandrel, a second unflanged shell might be placed in the gutter. The mandrel then advanced and entered the shell as before, and the advance of this shell on the end of the mandrel drove out the shell which had just been headed and was sticking in the die. After this second shell had been driven far enough into the die, it was headed as the first shell was, and was, in turn, pushed out by a third shell; and so on in succession. In the operation of the machine, the shell was forced into one end of the die and expelled at the other end, so that the shell moved in the same line and in the same direction from the time it was first acted upon by the mandrel until it was completely expelled from the die. The end of the die farthest from the mandrel was the anvil or rest against which the shell was headed, by the conjoint action of the die and the bunter, the flange being formed fully at the time when the die and bunter were as near as possible the one to the other.

The description in the original patent of the mechanism for striking up or forming at one stroke the swelled end to form the recess for the priming, described the die D as movable, and as being carried with the case or shell, and the mandrel B, in it, against the stationary die E. This is the description to

which the second claim of the original patent referred when it claimed "striking or forming the hollow rim at one stroke or operation, as above set forth and described." The drawings represented that arrangement and no other.

In the reissue, it was stated that the case or shell might be carried against the die E to form the rim, or the die E might be carried against the die D by similar mechanism to the slide F and the rod H'. It was also stated that the cases or shells were placed in the recess or gutter, or in an inclined tube, which fed them to the punch or mandrel B. Nothing was said in the specification of the original patent about carrying the die E against the die D, or about feeding the cases or shells by an inclined tube.

Allen having died, Sarah E. Allen was duly appointed his executrix, in February, 1871. In November, 1873, she applied to the Commissioner of Patents for an extension of No. 1,948 and of No. 1,949. The application was opposed by E. Remington & Sons. Much testimony was taken on both sides. The day of hearing was February 4, 1874. The Commissioner of Patents decided to grant the extension, and rendered the following decision, 5 Off. Gaz. 147:

"This is an application by the executrix of the estate of Ethan Allen, for the extension of reissued patents Nos. 1,948 and 1,949, granted May 9, 1865. The original patent was granted to Ethan Allen, February 14, 1860, and comprehended a combined apparatus for trimming the open ends, and then heading the closed ends, of blanks for forming metallic cartridge shells. These operations are each performed automatically, but independently, by different portions of the machinery. Reissue No. 1,948 comprehends the mechanism for heading the shell, and No. 1,949 that for trimming it. No testimony is presented relating to the latter, and it may be dismissed from consideration. Some interpolations of new matter appear in the former, but they have been disclaimed, rendering the scope of the patent unequivocally that of the invention originally described and illustrated in drawing and model. The device in question consists of a hollow recessed sliding die, a reciprocating mandrel, having a shoulder permitting it to enter a shell

the proper distance for heading, and a stationary bunter, organized into a machine which operates as follows: The mandrel being withdrawn into the back portion of the die, which serves merely as a guide for it, a shell with its open end to the rear is placed in the recess of the die, in the path of the mandrel. As the mandrel advances, it enters the shell, and carries it into the die until its closed end projects a little in front for heading. At this point the stock of the mandrel strikes the rear of the die and carries it forward until the projecting end of the shell strikes a fixed anvil and is headed. The mandrel and die then retreat, carrying the headed shell, the die being forced back by a spring to its original position, and the mandrel continuing until it has withdrawn from the shell and passed the feeding recess. The headed shell remains in the die until it is forced out by the advance of the next shell. This is the machine patented, and the claims of the patent are as follows: '1. The mandrel which carries the cartridge shell, in combination with the die D, which admits the same, and against which the closed end of the cartridge shell is headed, substantially as described. 2. The die D, constructed and operating for the heading of cartridge shells, substantially as described.' This was the first successful organized automatic machine for heading cartridge shells. It has undergone various improvements, however, and, as built, and (according to the testimony of the witness Cook) used by the inventor, it is not now in use. It, however, furnished the essential principle of construction which has been maintained in all succeeding heading machines of its class. The hollow die and reciprocating mandrel to receive and carry forward the shell to be headed, and at the same time force out the preceding headed shell, are the chief elements of the machines which have produced the vast quantity of shells that have come into the market since the date of this invention. The rear or guide portion of the die is omitted in the present machines; and, instead of a recess in the die, a special feeding device is employed; also, instead of advancing the die against the anvil, it is now made stationary and the anvil is advanced, the die spring being transferred to it. Whether this latter modification, which is the

principal one, and is admitted to effect materially superior results in heading the larger sizes of shells, is in legal contemplation an equivalent construction mechanically improved, or a substantive invention, has been the subject of much contention in this application. I am, however, so entirely convinced that the matter introduced into the reissue, describing the holding die as stationary, and the bunter as movable, was new matter describing a substantially different invention from the original, possessing different functions, that I have required, as a condition precedent to extension, that this new matter, together with that of the inclined tube for feeding, should be absolutely disclaimed. With such disclaimer, the patent is extended."

With a view to the extension, the following disclaimer was filed on the 4th of February, 1874:

"*To the Commissioner of Patents:*

Whereas reissued letters patent of the United States were, on the ninth day of May, A.D. 1865, granted to Ethan Allen, of Worcester, in the county of Worcester, State of Massachusetts, numbered 1,948; and whereas the Union Metallic Cartridge Company are now the sole owners of said reissued letters patent; and whereas Sarah E. Allen, of said Worcester, as the executrix of the goods and estate of said Ethan Allen, is the sole owner of any extended term of said letters patent which may hereafter be granted; and whereas the Union Metallic Cartridge Company aforesaid have an equitable interest in the extended term of said letters patent: Now, therefore, the said Union Metallic Cartridge Company and the said Sarah E. Allen, executrix, as aforesaid, respectfully show to the Honorable Commissioner of Patents, that, through inadvertence, accident, or mistake, the words 'or that may be carried against the die D by similar mechanism to F and H'' were inserted in the descriptive part of said reissued letters patent No. 1,948, which words were not in the descriptive part of the original letters patent of said Ethan Allen; and thereupon your petitioners disclaim the said movable die E as being of the invention of said Ethan Allen, except in so far as the same,

by fair construction, may be deemed the mechanical equivalent of the die E described and shown in said original letters patent and the drawing thereof: And whereas the said reissued letters patent No. 1,948, in the descriptive part thereof, contain the words 'or in an inclined tube,' which words are not found in the descriptive part of the original letters patent of said Ethan Allen, but said words were introduced into the specification of said reissued letters patent by inadvertence, accident, or mistake, your petitioners disclaim such inclined tube as being of the invention of the said Allen.

SARAH E. ALLEN, *Executrix.*
UNION METALLIC CARTRIDGE CO.,
M. HARTLEY, *President.*"

The following additional disclaimer was filed on the 13th of February, 1874:

"*To the Honorable the Commissioner of Patents:*

Whereas reissued letters patent of the United States were, on the ninth day of May, A.D. 1865, granted to Ethan Allen, of Worcester, in the county of Worcester, and State of Massachusetts, numbered 1,948; and whereas the Union Metallic Cartridge Company, of Bridgeport, State of Connecticut, are now the sole owners of said reissued letters patent; and whereas Sarah E. Allen, of said Worcester, as the executrix of the goods and estate of said Ethan Allen, is the sole owner of any extended term of said letters patent which may be granted: Now, therefore, the Union Metallic Cartridge Company and Sarah E. Allen, executrix, as aforesaid, respectfully show to the Honorable Commissioner of Patents, that, through inadvertence, accident, or mistake, the words 'or that may be carried against the die D by similar mechanism to F and H'' were inserted in the descriptive part of said reissued letters patent No. 1,948, which words were not in the descriptive part of the original letters patent of said Ethan Allen; and thereupon your petitioners disclaim the said movable die E (called a bunter) as being of the invention of said Ethan Allen, thus leaving the description of said die E the same as shown in the

original letters patent and the drawings thereof: And whereas the said reissued letters patent numbered 1,948, in the descriptive part thereof, contain the words 'or in an inclined tube,' which words are not found in the descriptive part of the original letters patent of said Ethan Allen, but said words were introduced into the specification of said reissued letters patent by inadvertence, accident, or mistake, your petitioners disclaim said inclined tube as being of the invention of said Ethan Allen. This disclaimer is absolute, and is filed as an additional disclaimer to that filed February 4, A.D. 1874, in which certain reservations were made.

UNION METALLIC CARTRIDGE CO.,
M. HARTLEY, *President.*
SARAH E. ALLEN, *Executrix.*

New York, February 9, 1874."

The certificate of extension of No. 1,948 was as follows:

"Whereas, upon the petition of Sarah E. Allen, of Worcester, Massachusetts, executrix of the estate of Ethan Allen, deceased, for the extension of the patent granted to said Ethan Allen February 14, 1860, and reissued May 9, 1865, numbered 1,948, for 'machine for making cartridge cases,' the undersigned, in accordance with the act of Congress approved the 8th day of July, 1870, entitled 'An Act to revise, consolidate, and amend the statutes relating to patents and copyrights,' (the said Sarah E. Allen, executrix, having filed a 'disclaimer' to that part of the invention embraced in the following words: 'or that may be carried against the die D by similar mechanism to F and H';' also the words 'or in an inclined tube,') did, on this thirteenth day of February, 1874, decide that said patent ought to be extended: Now, therefore, I, Mortimer D. Leggett, Commissioner of Patents, by virtue of the power vested in me by said act of Congress, do renew and extend the said patent, and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, viz., from the fourteenth day of February, 1874; which certificate being duly entered of record

in the Patent Office, the said patent has now the same effect in law as though the same had been originally granted for the term of twenty-one years.

In testimony whereof, I have caused the seal of the Patent Office to be hereunto affixed this thirteenth day of February, 1874, and of the Independence of the United States the ninety-eighth.

[SEAL.] M. D. LEGGETT, *Commissioner.*"

Sarah E. Allen, executrix, having, on the 21st of February, 1874, assigned her title to the extended term of No. 1,948, to the Union Metallic Cartridge Company, it brought this suit in equity against the United States Cartridge Company, on the 18th of March, 1874, for the infringement of No. 1,948. The bill alleged an assignment by the executrix to the plaintiff, of her title to No. 1,948, on the 10th of February, 1871; an assignment by the plaintiff to her, on the 7th of February, 1874, of all of its title to No. 1,948; the extension; and the assignment of the extended term. The assignments above mentioned were duly proved. The bill made no reference to any disclaimer.

The machine of the defendant had the die D stationary and the die E, or bunter, movable, and it had an inclined tube for feeding. The die D, the mandrel B, and the bunter E were, as tools, the same as those in the plaintiff's machine. The mandrel entered the shell, pushed it into the die D, supported it on the inside while it was being headed, and the unheaded shell expelled the headed shell from the die D, as in the plaintiff's machine. The die D supported the outside of the shell while it was being headed, and the end of that die acted as an anvil against which the flange was formed by the joint operation of such anvil and the bunter, as in the plaintiff's machine. The flange was fully formed at the time when the end of the die D and the bunter were as close together as the operation of the machine would permit them to be, which was true, also, of the plaintiff's machine. In the defendant's machine, as in the plaintiff's, the unheaded shell entered at one end of the die D, and was expelled from the other end, and moved always in

the same direction with relation to the die D, from the time that the mandrel first took charge of it, until, after being headed, it was expelled from the die. But, in the defendant's machine the die D stood still and the bunter moved towards it to head the shell, while the drawings of No. 27,094 and of No. 1,948 showed a stationary bunter, and the die D moving towards it, to head the shell.

The answer denied that the reissue was lawful, and averred that the original patent was surrendered to claim inventions not made by Allen; that the reissue No. 1,948 was not for the same invention as was the original patent; that, as the reissue was void, the extension, also, was void; that the commissioner granted the extension only on the express condition precedent, that certain new matter unlawfully introduced into the reissue (as decided by him), should be absolutely disclaimed, and that only upon such disclaimer should the patent be extended; and that said condition had not been complied with. It denied infringement.

Proofs having been taken, the case was heard before Judge Shepley, and he decided it in favor of the plaintiff, on the 13th of April, 1877, and entered a decree holding No. 1,948 to be valid, and to have been infringed, and awarded an account of profits and damages, before a master, from February 10, 1871, except as to the period from February 7, 1874, to February 21, 1874, and a perpetual injunction restraining the defendant from making, using or vending "machines for heading cartridge shells, having a die, mandrel and bunter," excepting five machines specially named, the question as to the use of which was reserved till the master should make his report. The decision of Judge Shepley, 2 Bann. & A., 593, and 11 Off. Gaz. 1113, said: "In the machine admitted to be used by the defendant are found substantially the same die, mandrel and bunter, operating in the same manner to form the flanged head of the cartridge and to expel the shell after being headed, except that in defendant's machine the bunter moves toward the die to head the shell, while in the Allen machine the die moves toward the bunter to head the shell. The fact, as proved, that, especially in the case of cartridges of larger sizes, there

is an advantage in having the die stationary, while the bunter moves toward it, is not sufficient alone to show that this latter form of the machine is not an equivalent of the other, all the elements of the combination existing alike in both, and acting alike in combination. It is contended on the part of the defendant, that the action of the Commissioner of Patents, in requiring a disclaimer of so much of the reissued patent as claimed in specific terms the use of the movable bunter and the stationary die, as an equivalent for the movable die and the fixed bunter, before granting an extension, is conclusive upon the complainant, but we do not so regard it. The patentee, without describing equivalents, is entitled to use equivalents, and to treat the use of equivalents by others as an infringement, and this, upon the evidence in the record, appears to be a clear case of such a use."

The master made a report as to profits, to which exceptions were filed by both parties. On the hearing of the exceptions the case was reheard before Judge Lowell on the question as to whether the original decree should be reversed. He rendered a decision, 7 Fed. Rep. 344, in which he said: "Allen's original patent described a machine organized to move a 'die' against a 'bunter,' and, by their contact, to form a flange or head upon the metallic cartridge, which was carried by the die. The defendant's machine brought a movable bunter against a fixed die. This was an improved form of the machine, and was, perhaps, a patentable improvement; but it was the same machine, and was an undoubted infringement. This improvement was invented by Allen himself, but, after he had obtained his patent, and when he asked for a reissue, he inserted in his description of the mechanism this modified and improved form. The Commissioner required him to disclaim this part of his description, as a condition precedent to granting the reissue. Judge Shepley held that the disclaimer did not prevent the patentee from enjoining the use of machines having this improvement. It is now argued, and, certainly, with much force, that *Leggett* v. *Avery*, 101 U. S. 256, holds the patentee to this disclaimer, as an estoppel. I appreciate the argument, but do not consider myself bound to reverse

Judge Shepley's decision, which I should not feel at liberty to do unless my mind were entirely satisfied that he was wrong. No one can doubt that, if a patentee obtains a patent upon his solemn admission of certain facts, he shall never thereafter be permitted to controvert them. This is *Leggett* v. *Avery*. Judge Shepley, though giving his opinion before that case was decided, could not have overlooked this point. I understand him to decide, that the admission in this case was not of a fact of invention, but of the propriety of inserting a certain clause in the descriptive part of the specification, and, if this were not so, still, if the patentee's invention and his patent rightly included this form, as an equivalent, it was a mere nullity, like an admission of law, to confess that it did not include it. This is the idea shortly expressed by Judge Shepley; and I do not see any necessary conflict between it and the decision of the Supreme Court."

The exceptions of both parties were overruled, and a decree was entered for the plaintiff for $40,367.26, profits to April 23, 1877, without damages. From this decree both parties appealed to this court, but the plaintiff waived its appeal, at the bar.

Mr. F. P. Fish and *Mr. B. F. Butler* for appellants.

Mr. Edmund Wetmore and *Mr. Causten Browne* for appellees.

Mr. Justice Blatchford delivered the opinion of the court. He recited the facts as above stated, and continued:

Many questions were discussed at the hearing which we deem it unnecessary to consider, because we are of opinion that the disclaimer made has the effect to so limit the construction of the claims of the reissue that the defendant's machine cannot be held to infringe those claims. The opposition to the extension proceeded, among other things, on the ground that reissue No. 1,948 was so worded as to cover a machine having a stationary die and a movable bunter—one not within the language or the scope of the original patent, not indicated

therein as the invention of Allen, and not described, and a substantially new and different invention. That the Commissioner intended that the extension should not be granted unless there should be a disclaimer of all claim to have No. 1,948 cover a machine with a stationary die and a movable bunter, and that the second disclaimer filed was such a disclaimer, and that the patent extended cannot be held to be one which covers, by any claim, the defendant's machine, is, we think, entirely clear.

The Commissioner, in his decision, says, that the "interpolations of new matter" in No. 1,948 "have been disclaimed," and that such disclaimer renders "the scope of the patent unequivocally that of the invention originally described and illustrated in drawing and model." The disclaimer is referred to as limiting the scope of the patent, that is, the extent of its claims, and as reducing such scope and extent to what the drawings and model illustrated, namely, a movable die and a stationary bunter, to the exclusion of a stationary die and a movable bunter. The Commissioner adds, that it had been the subject of much contention, in the application for the extension, whether the modification, of having a stationary die and a movable anvil, which, he says, it was admitted, effected materially superior results in heading the larger sizes of shells, was, in legal contemplation, an equivalent construction mechanically improved, or a substantive invention; and that he is so entirely convinced that the matter introduced into the reissue, describing the holding die as stationary, and the bunter as movable, was new matter describing a substantially different invention from the original, possessing different functions, that he had required, as a condition precedent to extension, that this new matter should be absolutely disclaimed. The new matter introduced into the reissue in respect to the moving of the bunter or die E, was introduced into the descriptive part, by inserting the words, "or that" (the die E) "may be carried against the die D by similar mechanism to F and H′," but it was also introduced into the two claims, by the use of the words "substantially as described," in those claims.

This reissue took place under § 13 of the act of July 4,

1836, ch. 357, 5 Stat. 122, which provided for a surrender and the issuing of a new patent "for the same invention," "in accordance with the patentee's corrected description and specification." This provision was repeated in § 53 of the act of July 8, 1870, ch. 230, 16 Stat. 205, now § 4916 of the Revised Statutes, with the additional enactment that "no new matter shall be introduced into the specification." But where new matter was, even before the act of 1870, introduced into the description, and in such manner as to enlarge the claim, and cause the patent to be not "for the same invention," the reissue was invalid to the extent that it was not for the same invention.

It is quite clear that Allen had not, before the granting of the original patent, made any machine in which the die D was stationary and the bunter movable. If that arrangement was a "new improvement of the original invention," and was invented by Allen, and after the date of the original patent, he could, under § 13 of the act of 1836, have had a "description and specification" of it "annexed to the original description and specification," on like proceedings as in the case of an original application, and it would have had "the same effect, in law," from "the time of its being annexed and recorded," "as though it had been embraced in the original description and specification;" or he could have applied for a new patent for the improvement. Such last named provision of § 13 of the act of 1836 was repealed by the act of 1870, and was not re-enacted therein, nor is it found in the Revised Statutes. But it was never lawful to cover, by the claims of a reissue, an improvement made after the granting of the original patent.

The statute in force in regard to disclaimers, when the disclaimers were filed in this case, was § 54 of the act of 1870, which provided, "that whenever, through inadvertence, accident or mistake, and without any fradulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether

of the whole or any sectional interest therein, may, on payment of the duty required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent; said disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent Office, and it shall thereafter be considered as part of the original specification, to the extent of the interest possessed by the claimant and by those claiming under him after the record thereof." This word "claimant" is an evident error, for "disclaimant," as "disclaimant" is the word used in § 7 of the act of March 3, 1837, ch. 45, 5 Stat. 193, which was the first statute providing for a disclaimer. This error is perpetuated in § 4917 of the Revised Statutes.

It is a patentee who "has claimed more than that of which he was the original or first inventor or discoverer," and only "such patentee," or his assigns, who can make a disclaimer; and the disclaimer can be a disclaimer only "of such parts of the thing patented as he shall not choose to claim or hold by virtue of the patent or assignment." A disclaimer can be made only when something has been claimed of which the patentee was not the original or first inventor, and when it is intended to limit a claim in respect to the thing so not originally or first invented. It is true, that, in so disclaiming or limiting a claim, descriptive matter on which the disclaimed claim is based, may, as incidental, be erased, in aid of, or as ancillary to, the disclaimer. But the statute expressly limits a disclaimer to a rejection of something before claimed as new or as invented, when it was not new or invented, and which the patentee or his assignee no longer chooses to claim or hold. It is true, that this same end may be reached by a reissue, when the patentee has claimed as his own invention more than he had a right to claim as new, but, if a claim is not to be rejected or limited, but there is merely "a defective or insufficient specification," that is, description, as distinguished from a claim, the only mode of correcting it was and is by a reissue.

It is apparent that the Commissioner, when he said that the disclaimer affected "the scope of the patent," and that the

matter introduced into the reissue was "new matter, describing a substantially different invention from the original, possessing different functions," and that he had required it to be absolutely disclaimed, "as a condition precedent to extension," meant that he had required such new matter, that is, the arrangement of a stationary die and a movable bunter, to be disclaimed, as an invention of Allen, covered by the reissue.

What was done was in accordance with this view. In the first disclaimer, that of February 4th, 1874, it is said, that by inadvertence, accident, or mistake, the words "or that may be carried against the die D by similar mechanism to F and H′" were inserted in the descriptive part of No. 1,948, and were not in the descriptive part of the original patent. Thereupon, the petitioners disclaim, not such descriptive words, as a description merely, but they disclaim "the movable die E as being of the invention of" Allen, but with this limitation or reservation, "except in so far as the same, by fair construction, may be deemed the mechanical equivalent of the die E described and shown" in the original patent and its drawings. It was sought to reserve the question of the mechanical equivalency of the stationary die and movable bunter with the movable die and stationary bunter, and not have the disclaimer absolutely reach and cover the former, but still leave the claims to cover it. But this was evidently not satisfactory to the Commissioner, and he required a further disclaimer. So, the one of February 13, 1874, was filed, which states, on its face, that it "is absolute, and is filed as an additional disclaimer" to the first one, "in which certain reservations were made." In this second disclaimer, the language as to the inserted words is the same as in the first, and the statement of disclaimer is, that the "petitioners disclaim the said movable die E (called a bunter) as being of the invention" of Allen, "thus leaving the description of said die E the same as shown in the" original patent and drawings. The reservation was expunged. The effect of the disclaimer was to limit the claims of the reissue to a machine with the stationary die E, shown in the original patent and drawings, and to prevent their any longer covering, even if they had before covered, a movable die E, or bunter.

Such was the effect of the disclaimer on the reissue, without reference to the extension. But, the certificate of extension itself states, that the executrix had "filed a disclaimer to that part of the invention embraced in the following words: 'or that may be carried against the die D by similar mechanism to F and H','" and what is extended is No. 1,948, with such disclaimer. After an extension has been obtained on the condition precedent of making such disclaimer, the disclaimer cannot be held inoperative as respects the extended term.

We regard this case as falling within the principles laid down in *Leggett* v. *Avery*, 101 U. S. 256. There the original patent was issued in October, 1860. It was surrendered and reissued in June, 1869, and extended in October, 1874. As a condition of obtaining the extension, the patentee disclaimed the specific claims which the defendants in the suit were charged with infringing, the extension having been opposed, and the Commissioner having refused to grant it unless the patentee would abandon all but one of the six claims of the reissue, there having been but one claim in the original patent. This was done, and the extension was granted for only one of the six claims, which one the defendants had not infringed. Three days after the extension was granted a reissue was applied for, including substantially the claims which had been thus disclaimed. The reissue was granted, two of the claims in it being for substantially the same inventions which had been so disclaimed before the extension, and for different inventions from the invention secured by the patent as extended. A reference to the record of the case in this court shows, that the Commissioner decided that the extension would be granted provided the disclaimer should be filed, and that the disclaimer concluded with the words "reserving right to reissue in proper form." This court held, that the Commissioner erred in allowing, in the second reissue, claims which had been expressly disclaimed, because the validity of such claims had been considered and decided with the acquiescence and express disclaimer of the patentee; and that this was a fatal objection to the validity of the second reissue.

The acquiescence and disclaimer must be regarded as equally

operative to prevent those who hold the reissue in suit, whether in respect to the time before or after the extension, from being heard to allege that persons who use machines with a stationary die D and a movable bunter E infringe the claims of the reissue. The disclaimer was one of the fact of invention. It could not lawfully be anything but a disclaimer of the fact, either of original invention, or of first invention. It was not merely the expunging of a descriptive part of the specification, involving only the propriety of inserting such descriptive part in the specification, but it was a disclaimer of all claim based on such descriptive part, because the claims were made to cover such descriptive part, by the words "substantially as described," in the two claims. The question of fact is not open now as to whether Allen invented at any time the stationary die D and movable bunter E, or as to whether it was, or is, or could be, a mechanical equivalent for the movable die D and stationary bunter E, because those questions are concluded by the disclaimer.

It is conceded by the plaintiff, that, if by the operation of the disclaimer, it is estopped to say that a stationary die D and a movable bunter E are the equivalent of the movable die D and the stationary bunter E, the defendant does not infringe.

The decree of the Circuit Court is reversed, with costs to the United States Cartridge Company, on both appeals, and the case is remanded to that court, with direction to dismiss the bill, with costs.

UNITED STATES *v.* GREAT FALLS MANUFACTURING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

Argued December 1, 1884.—Decided December 22, 1884.

Where property to which the United States asserts no title, is taken by their officers or agents, pursuant to an act of Congress, as private property, for the public use, the government is under an implied obligation to make just compensation to the owner.

Statement of Facts.

Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the owner's claim for compensation is one arising out of implied contract, within the meaning of the statute defining the jurisdiction of the Court of Claims, although there may have been no formal proceedings for the condemnation of the property to public use.

The owner may waive any objection he might be entitled to make, based upon the want of such formal proceedings, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, may demand just compensation for the property.

This was an appeal from a judgment in favor of the Great Falls Manufacturing Company, a corporation of the State of Virginia, for the sum of $15,692 as compensation for all past and future use and occupation by the United States of certain land, water rights and privileges claimed by that company, and all consequential damages which it may legally assert by reason of the execution of a certain one of the plans adopted by the government for supplying the cities of Washington and Georgetown with water.

The case made by the finding of facts is, in substance, as will be now stated:

On the 31st of August, 1852, Congress appropriated $5,000 to enable the President to cause the necessary surveys and estimates to be made for the best means of supplying those cities with good and wholesome water. 10 Stat. 92, ch. 108. In execution of that act, President Fillmore transmitted to Congress the report of General Totten, of the Corps of Engineers, recommending the construction of an aqueduct from the Great Falls of the Potomac, situated in the State of Maryland, about sixteen miles distant from Washington. The Great Falls form a series of rapids extending for about one-half or three-fourths of a mile, in the course of which the river falls about seventy feet; from which to the tide-level at Washington there is a further fall of about seventy feet. Just above these rapids is Conn's Island, lying near the Maryland shore, and distant about 1,400 feet from the Virginia shore. At its head, extending up the stream, are several small islands called the Cyclades, separated from each other and Conn's Island by narrow channels. On the Virginia side, is a body of land known as

the Toulson Tract, extending along the river from a point opposite the middle of Conn's Island to a point below the Great Falls, and running back a distance of about half a mile. A considerable portion of it is elevated ground, well adapted to the construction of mills and manufactories, which may be supplied with water power from the river, and by canals, races or other artificial water ways. Before the construction by the government of the dam and other works to be presently referred to, Conn's Island divided the Potomac River into two unequal channels, about ninety-eight per cent. of the water passing through the Virginia channel, and two per cent. through the Maryland channel, at low stages; the total flow at low water being estimated at about 1;065 cubic feet per second, or 700,000,000 gallons daily. Of these lands, water rights and privileges, the Great Falls Manufacturing Company claimed to be the owner, at and prior to the before-mentioned appropriation of $5,000.

On the 3d of March, 1853, Congress appropriated, "to be expended under the direction of the President of the United States, for the purpose of bringing water into the city of Washington upon such plans and from such places as he may approve, one hundred thousand dollars: *provided*, that if the plan adopted by the President should require water to be drawn from any source within the limits of Maryland, the assent of the legislature of that State should first be obtained." 10 Stat. 206, ch. 97.

On the 3d of May, 1853, the legislature of Maryland passed an act giving her assent to the purchase by the United States of such lands and to the construction of such dams, reservoirs, buildings and other works, within her limits, as might be required under any plan adopted by the President for supplying Washington with water. That act provided that, if the United States could not agree with the owners for the purchase of land, earth, timber, stone or gravel required for the construction of such works, or in case the owner thereof should be a *feme covert* or under age, *non compos mentis*, or a non-resident, "it shall, nevertheless, be lawful for the United States to enter upon such lands and to take and use such materials, after hav-

ing first made payment or tendered payment for the same at the valuation assessed thereon," in the manner prescribed in that act; also, that before the act should take effect, the United States "shall agree to such conditions as the Chesapeake and Ohio Canal Company may consider necessary to secure the canal from injury in carrying into effect any plan that may be adopted for supplying the city of Washington with water as aforesaid."

Then followed certain appropriations by Congress for the purpose of executing the said plan: $250,000 "for continuing the work on the Washington Aqueduct," act of March 3, 1855, ch. 175, 10 Stat. 664; $250,000, or so much thereof as was necessary, "for paying existing liabilities for the Washington Aqueduct, and preserving the work already done from injury," act of August 16, 1856, ch. 129, 11 Stat. 86; and $1,000,000 "for continuing the Washington Aqueduct," act of March 3, 1857, ch. 108, 11 Stat. 225.

By an act entitled "An Act to acquire certain lands needed for the Washington Aqueduct, in the District of Columbia," approved April 8, 1858, 11 Stat. 263, ch. 14, it was, among other things, provided:

"Whereas it is represented that the works of the Washington aqueduct, in the District of Columbia, are delayed in consequence of the proprietors' refusal, in some cases, to sell lands required for its construction at reasonable prices, and because in other cases the title to the said land is imperfect, or is vested in minors or persons non compos mentis, or in a feme covert, or [in persons] out of the District of Columbia; and whereas it is necessary for the making of said aqueduct, reservoirs, dams, ponds, feeders, and other works, that a provision should be made for condemning a quantity of land for the purpose: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall and may be lawful for the United States, or its approved agent, to agree with the owners of any land in the District of Columbia through which said aqueduct is intended to pass for the purchase or use and occupation thereof; and in case of dis-

agreement, or in case the owner thereof shall be a feme covert, under age, non compos, or out of the District of Columbia, on application to a judge of the circuit court of said District, the said judge shall issue his warrant, under his hand, to the marshal of the said District to summon a jury." . . .

The rest of the act was limited to mere details.

On the 12th of June, 1858, the further sums of $800,000, and so much of the $250,000 as was not used under the act of August 18, 1856, were appropriated "for the completion of the Washington Aqueduct." 11 Stat. 323, ch. 154. Thereafter, on the 27th of July, 1858, proceedings were commenced by the United States, before a justice of the peace in Maryland, for the assessment of the damages which the dam of the Washington Aqueduct proposed to be constructed at the Great Falls should cause to the appellee, of which the latter had due notice. The damages were assessed at $150,000; but, in November of the same year, the inquisition, upon the application of the United States, was set aside by the Circuit Court of Montgomery County, Maryland, and another one was ordered. But there was no further prosecution of these proceedings.

By an act approved March 3, 1859, 11 Stat. 435, ch. 84, the dams, aqueducts, water-gates, reservoirs, and all improvements connected therewith, constructed or to be constructed by the United States for the conveyance of water from the Potomac River, above the Great Falls, to the cities of Washington and Georgetown, were directed to be placed by the President "under the immediate care, management, and superintendence of a properly qualified officer of the United States Corps of Engineers to be appointed by him, who shall act under the Department of the Interior," &c.—his decision "to be subject only to appeal to the Secretary of the Interior."

On the 25th of June, 1860, Congress appropriated the sum of $500,000 for the aqueduct, "to be expended according to the plans and estimates of Captain Meigs and under his superintendence." 12 Stat. 106, ch. 211.

On the 20th of November, 1862, articles of agreement were executed between the Secretary of the Interior, in the name of

the United States, and the Great Falls Manufacturing Company, wherein was recited the claim of the latter for compensation for the use by the former of certain lands and water rights at the Great Falls, the cost that would ensue to both parties from any further delay in the settlement of their differences, and the anxiety of the government to prosecute the work in question; and whereby such claim was referred to arbitrators, one of whom was the late Benjamin R. Curtis, with power to examine into, decide upon, and award such compensation, if any, as the claimant may be entitled to for the use and occupation of said land and water rights, and all consequential damages that the company might legally claim by reason of the execution of the several plans adopted by the government in the location and construction of the dams and other works of the Washington Aqueduct. Pursuant to this agreement, the United States and the claimant appeared by counsel before the arbitrators, witnesses were examined, and documentary evidence was submitted by the respective parties.

At the hearing, the Great Falls Manufacturing Company filed with the arbitrators a specific description of the lands to which they asserted title, and which they claimed would be affected by the improvements made, or proposed to be made. The United States filed the specifications of their proposed plans of operations, being four in number. The arbitrators made an award in writing on the 28th of February, 1863, all the costs and expenses of which, including $12,000, the amount of compensation charged by them, were paid by the Secretary of the Interior out of the appropriations for the completion of the Washington Aqueduct. By the award it was determined that the amounts to which the company was entitled, as compensation and damages for the use and occupation by the United States of the land, water rights and privileges claimed by it, were as follows: If the first plan of improvements was carried into execution, $63,766; if the second $50,000; if the third, $77,200; if the fourth, $15,692. The fourth plan involved the construction of a dam of masonry from the Maryland shore to Conn's Island, and gave the United States the right to deepen the channel on the Maryland side of Conn's Island near its

head, so as to supply the aqueduct with whatever quantity of water the dams would yield.

The claimants presented to the arbitrators title deeds and proofs showing a valid title in it to the Toulson Tract, Conn's Island, and the Cyclades. Objections were presented and urged on behalf of the United States, but the arbitrators held the title of claimants to be valid and satisfactory. No other title than that of claimant was asserted.

The conduit through which the water supply of the city of Washington is drawn was completed on the 5th of December, 1863.

On the 4th of July, 1864, Congress appropriated the sum of $150,000 "for the purpose of constructing *the dam of solid masonry across the Maryland branch of the Potomac River, near the Great Falls*, and for constructing the conduit around the receiving reservoir, and for paying *existing liabilities* and expenses, engineering, superintendence and repairs of said aqueduct." 13 Stat. 384, ch. 244.

On the 30th of July, 1864, the United States entered into a contract for the construction of that dam, and, proceeding to construct it, took possession of so much of Conn's Island as was required for the purpose of securing the dam and making a permanent abutment for it. And on July 28, 1866, the further sum of $51,687 was appropriated "to complete the dam in the Potomac River at the head of the aqueduct, from the shore to Conn's Island, with cut stone." 14 Stat. 316. The dam so constructed was about 1,176 feet long. It extended from a point on the Maryland shore, just below the feeder or mouth of the aqueduct, across the channel between Falls Island and Conn's Island, to its abutment on the latter island, closing the Maryland channel of the river entirely across. It was constructed substantially in conformity with the fourth of the alternative plans presented to the arbitrators by the United States. Conn's Island, in connection with the Maryland shore and the dam, formed such a basin as was necessary for the purpose of supplying the aqueduct, having its upper end open to receive the flow of the water as needed. There was no other island or natural formation which could be utilized for forming a

suitable basin without carrying the aqueduct much farther up the river. So that if that island was not used it would be necessary to incur the expense of a larger aqueduct and to carry the dam across to the Virginia shore, either above or below the island, or build some structure to take the place of the island. From any point below the rapids the elevation was insufficient to admit of the distribution of water by aqueduct; but there was sufficient elevation for that purpose from any point above them. The uses of the aqueduct required the entire flow of the water in the Maryland channel in the low stages of the river. The water drawn through it was distributed in the cities of Washington and Georgetown for the use of the government in its buildings, navy yard, fountains, &c., and for the municipal and domestic uses of the said cities and their inhabitants. The cost of the present dam was $77,250, while that of the aqueduct was nearly $4,000,000.

It was also found as a fact that the value of the water for the uses to which this was applied was derived from its elevation, which would admit of its flow or descent through the city; and when found at sufficient elevation to admit of being distributed by its natural flow, it possessed great value, and was paid for by cities, when taken from the control of private owners, according to its value.

Upon this state of facts, the Court of Claims found, as a conclusion of law, that the claimants were entitled to the judgment from which the present appeal was prosecuted. See 16 C. Cl. 160.

Mr. Solicitor-General and *Mr. John S. Blair* for appellant.— Neither the President, nor the Secretary of the Interior was authorized by any statute to contract for lands required for the dam; that the words of the statutes conferring a power to contract are limited to land required for the aqueduct proper. But even if such authority existed, the statutes conferred upon the President or Secretary no power to bind his own official discretion as to price, &c., by delegating that discretion substantially to third persons. He might have taken information, through Mr. Curtis and the other referees, or in any other way,

and might pay for such information; but he had no power to substitute their judgment for his own. The award, therefore, if it can be called an award, did not bind the Secretary or, consequently, the United States. No matter what its words were, a subsequent positive assent thereto by the Secretary was necessary to give it the force of an agreement. *Ut res magis valeat*, the award in this case is to be read as being merely information to the Secretary upon the question of value. That this was indeed the actual understanding of both parties at the time of the delivery of the award, is suggested by the very recent date of the amended claim.—Under the acts, the decision of the Attorney-General upon the title was necessary, before the claimant could recover. The claim of the defendant in error proceeds upon the theory of a contract of purchase and sale. It is submitted that if this had been a contract between private parties, the onus of producing and showing valid title would rest upon the vendor, and therefore would have to be alleged and proved in any suit depending upon the existence of such title; and also that in a suit for the price, an actual delivery of title-deeds, or the doing of something equivalent to delivery (tender, or the like), is indispensable. Also, that in conveyances to the United States, there is by statute no equivalent for a title pronounced valid by the Attorney-General; and, a circumstance which perhaps adds no legal force to the above proposition, although otherwise it is impressive, these parties expressly recognized that principle. The United States cannot be compelled to accept of an estate by estoppel, whether by judgment or otherwise; supposing (what is not admitted) that this record is competent to convey that. They require and should have a title good against the world, not merely against the claimant.

Mr. Benjamin F. Butler (*Mr. Charles F. Peck* was with him) for appellee.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated, and continued:

The articles of agreement of November 20, 1862, between

the Secretary of the Interior and the Great Falls Manufacturing Company, made ample provision for the protection of the public interests; for, the right was reserved to the party dissatisfied, to proceed by suit in equity in the proper court of this District, for the purpose of having the award set aside or changed, and of obtaining such a decree, subject to review by this court, as was just and equitable. There is no doubt of the good faith of the effort of the parties to accommodate their differences, or that it was of the highest importance to the government that the obstacles should be removed to the successful completion of the work, upon which large sums had been expended. In the opinion of the court below, and in the arguments of counsel, the authority of the Secretary of the Interior to make the government a party to that agreement is discussed. But, in the view we take, it is unnecessary to determine that question. Our decision may be satisfactorily placed on other grounds.

From the report and documents transmitted to Congress by President Fillmore, it appears that, in the judgment of the Engineer Department, the best mode of supplying the cities of Washington and Georgetown with wholesome water, was by an aqueduct from the Great Falls of the Potomac; also, that such a plan necessarily involved the construction of a dam at that point in the river. Ex. Doc. (Senate) No. 48, pp. 2, 35, 48, 32d Cong. 2d Sess. By the annual report, under date of December 4, 1863, of Mr. Usher, Secretary of the Interior, Congress was informed that "certain parties having from time to time made claim to heavy damages for the diversion of the water from the Potomac River," his immediate predecessor, "with a view to settle and end this claim, entered into an agreement of arbitration with the claimants." The parties referred to were the present claimants, as appears by the agreement of arbitration, by the official documents submitted to Congress, and by the proceedings in the courts of Maryland for an assessment of the damages which the proposed dam should cause to the Great Falls Manufacturing Company. The Secretary said: "Pursuant to this agreement, the arbitrators met from time to time, and finally submitted their award, by which they adjudged in

favor of the claimants upon each and all of the plans and modes submitted to them, being three [four] in number, for the construction of the dam across the Potomac, and also $12,000 for their own fees as arbitrators, and $761.84 for the expenses of arbitration. The sums being large, I did not feel justified in applying the existing appropriation for the completion of the aqueduct to the payment thereof, preferring to submit the whole matter to Congress for its determination. It appears from the report of the experienced engineer in charge of the work, as must be obvious to every observer, that an ample supply of water for the use of the cities of Washington and Georgetown, for many years to come, can be obtained from the Potomac by the erection *of a tight dam, extending from the Maryland shore to Conn's Island*, to a height which will give a head of six feet in the aqueduct, and yield a daily supply of 65,000,000 gallons," etc. After expressing the opinion that such a dam could not work injury to the proprietors of the water rights claimed at the Great Falls, the Secretary recommended that a reasonable sum be appropriated to pay the expenses of the arbitration, and that the cost previously estimated of a dam across the main channel be diminished to that of the proposed dam over the east channel.

In conformity with that recommendation, Congress, by the act of July 4, 1864, made the appropriation of $150,000 for the purpose of constructing the proposed dam of solid masonry, and for paying the existing liabilities and the expenses connected with the engineering, superintendence, and repairs of the aqueduct. Immediately thereafter a contract was made for the construction of that dam. In his next annual report, under date of December 5, 1864, the Secretary informed Congress that the work upon the dam and the aqueduct required the expenditure of the additional sum of $51,945. For that amount an appropriation was promptly made. With the Secretary's report was transmitted to Congress that of the engineer in charge, who stated that "the question of land damages and water rights at the Great Falls still remains unsettled." The dam was completed to its present height in 1867, and is used as an indispensable part of the system by which the cities

of Washington and Georgetown have been supplied with water. Beyond doubt, the land and the water rights and privileges in question have for nearly twenty years been held and used by officers and agents of the government, without any compensation whatever having been made therefor to the claimant. By what authority have they appropriated to public use the property of the claimant? The answer to this question will determine whether the present demand of the claimant arises out of an implied contract, and, therefore, enforceable by suit against the United States in the Court of Claims.

It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for, the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 U. S. 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to

be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded "upon any contract, express or implied, with the government of the United States."

This case is materially different from *Langford* v. *United States*, 101 U. S. 341. That was an action in the Court of Claims against the United States to recover for the use and occupation of certain lands and buildings to which the claimant asserted title. It there appeared that, throughout the whole period of such occupation and use, the title of the claimant was disputed by the government, and that possession was taken and held by its agents in virtue of a title asserted to be in the United States. The jurisdiction of the Court of Claims was attempted to be sustained upon the ground that the government, in taking and using the property of an individual, against his consent and by force, could not, under the relations between it and the citizen, commit a tort, but was under an implied obligation, created by the Constitution, to pay for the property, or for the use of the property so taken. This proposition was held to be untenable under the facts of that case, for the reason that, while individual officers of the government might be guilty of a tort, if the property so held by them was in fact private property, yet, if the government never recognized the property as private property, taken by its agents for public use, it could not be held liable for its value as upon implied contract. In the same case it was said: "We are not prepared to deny that when the government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house, or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value. It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the government,

acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing."

The question thus reserved from decision is substantially the one now presented. In the present case there were, it is true, no statutory proceedings for the condemnation of the claimant's property rights. Such proceedings, as has been stated, were instituted by the United States in one of the courts of Maryland, in which the property rights of the claimant were expressly recognized. But they were abandoned. One reason, perhaps, for such abandonment was that, in the judgment of the officers of the United States, a fair assessment of damages could not be had in the mode prescribed by the Maryland statute. Be this as it may, it is clear, from the record, that the government did not assert title in itself to this property, at the time it was taken.

Having abandoned the proceedings of condemnation, the proper officers of the government, in conformity with the acts of Congress, constructed the dam from the Maryland shore to Conn's Island, the doing of which necessarily involved the occupation and use of the property, as contemplated in what was called the fourth plan for bringing water from the Great Falls to Washington and Georgetown. In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation.

In reference to the title which the government will acquire, as the result of this suit, there would seem to be no difficulty. The finding of the court is that the claimant exhibited to the

arbitrators a valid title to the lands in question. It does not appear that the company has ever parted with that title; and the finding is that no title except that of the claimant is asserted.

What has been said is sufficient to dispose of the case, and requires *An affirmance of the judgment. It is so ordered.*

TORRENT ARMS LUMBER COMPANY *v.* RODGERS.

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

Argued November 25, 1884.—Decided December 22, 1884.

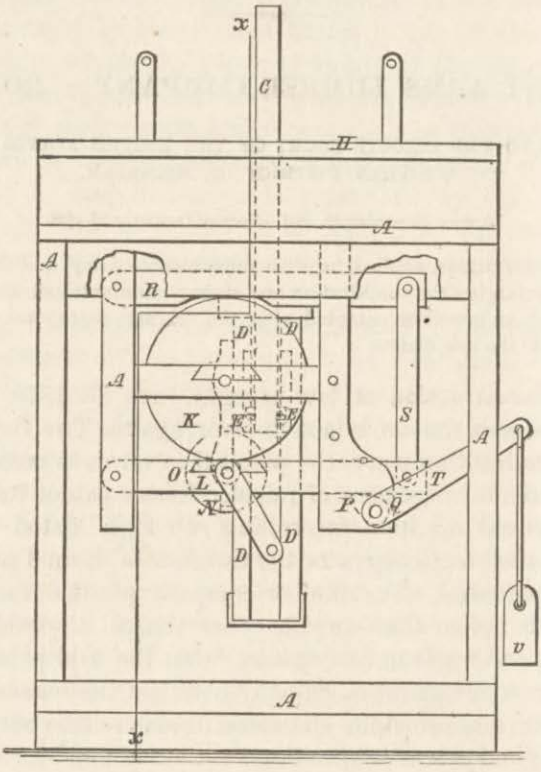
A reissue of a patent, applied for with unreasonable delay, and for the purpose of enlarging the specification and claims, in order to include within the monopoly an invention patented after the original patent was granted, is void as to the new claims.

This was an action at law brought June 25, 1879, by Alexander Rodgers, the defendant in error, against The Torrent and Arms Lumber Company, the plaintiff in error, to recover damages for the infringement of reissued letters patent for "a new and improved machine for rolling saw-logs," dated July 15, 1873, granted to Rodgers as the assignee of Esau Tarrant, the original patentee. The lumber company pleaded the general issue, with notice that, among other things, it would give in evidence, and insist in its defence, "that the said patentee and his assignee, the plaintiff, unjustly obtained the reissued patent for matters and principles embraced in such reissue not included in the original patent or specification therefor, and for what was in fact invented by another, to wit, John Torrent, of the city of Muskegon, who was using reasonable diligence in adapting and perfecting the same;" that John Torrent "made his application for a patent therefor on January 29, 1873, and his patent was granted August 12, 1873, and the plaintiff and his assignee had knowledge prior to the application for such reissue of the aforesaid application for patent by the said John

Torrent, and the said principles so patented by the said John Torrent had (by him) been used at the city of Muskegon, aforesaid, by said John Torrent and others."

Upon the trial in the Circuit Court, Rodgers, to maintain the issue on his part, introduced in evidence the original letters patent, dated August 25, 1868, granted to Esau Tarrant for "a

Fig. 1.



new and improved machine for rolling saw-logs," the assignment of said letters patent by the patentee to Rodgers, and the reissued letters patent granted to Rodgers as the assignee of Torrent, applied for June 25, 1873, and issued and dated July 15, 1873.

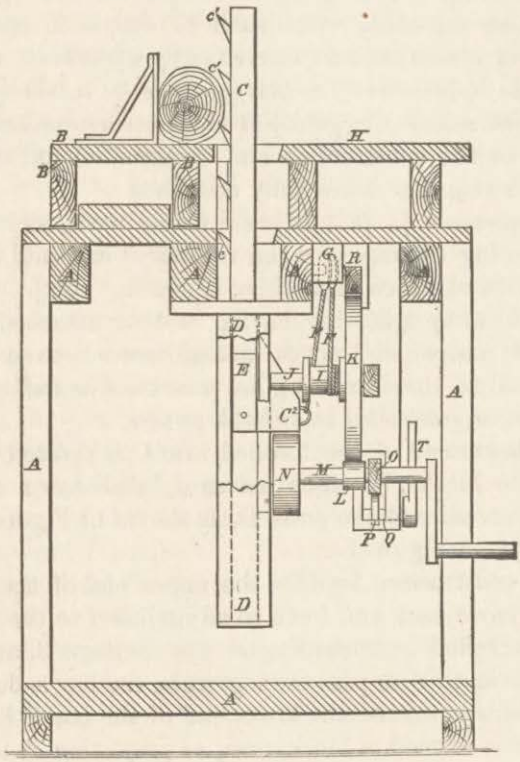
The specification and claims of the original and reissued patents were both illustrated by the annexed drawings.

Statement of Facts.

The original specification is here reproduced, so as to show the changes made in the reissue. The parts in italics are found in the reissue and not in the original, and the parts enclosed in brackets are found in the original and not in the reissue:

"Be it known that I, Esau Tarrant, of Muskegon, in the county of Muskegon and State of Michigan, have invented a

Fig. 2.



new and improved machine for *turning* [rolling saw] logs; 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 which it appertains* to make and use the same; reference being had to the accompanying drawings forming [a] part of this specification:

Statement of Facts.

"Figure 1 is a side view of my improved machine, parts of the frame being broken away to show the construction.

"Figure 2 is a detail sectional view of the same taken through the line *x*, *x*, *of* Figure 1.

"Similar letters of reference indicate corresponding parts *in the different figures of the drawing.*

"My invention has for its object to furnish an improved device for turning or rolling logs *to or* upon the carriage of circular or other saw-mills, which shall be simple in construction, effective in operation, and conveniently operated; and it consists in *the application for that purpose of a toothed-bar connected with means for giving it the necessary movement; and further, in* the construction and combination of the various parts, as hereinafter more fully described.

"A represents [a part of] the frame work, and B [represents] the log carriage of *a* [an ordinary] saw-mill [about the construction of which parts there is nothing new].

"C is *a* [an upright] bar having teeth c^1 attached to its forward side, and which [moves up and down between the posts D, attached to the frame A], *has a vertical as well as horizontal movement, controlled by suitable guides.*

"The lower end of the toothed arm C is pivoted to and between two blocks E, which moves up and down in grooves in the inner sides of the posts D, as shown in Figure 2, and in dotted lines in Figure 1.

"This construction enables the upper end of the [upright] bar C to move back and forth to adjust itself to the size of the log to be rolled or turned upon the carriage B, and also to enable the teeth c^1 to pass the log when the bar is descending.

"To the rear side of the lower end of the bar C is attached, or upon it is formed, a block, arm, or projection c^2, to which is attached the end of the rope or chain F, by means of which the said [upright] bar C is raised to turn the log.

"This manner of attaching the hoisting chain forces the upper end of the said bar C forward, causing the teeth c^1 to take a *firm* [firmer] hold upon the log to be rolled.

"The chain or rope F passes over a pulley G, secured in *a* proper position [immediately] beneath a log deck H, and

thence down to the barrel or drum I *upon* [of] the shaft J, to which *one* [its] end *of it* is securely attached.

"*Upon* [To] the shaft J is *also* attached the large friction pulley K, to which motion is given by the small friction pulley L, *secured upon* [attached to] the shaft M, to which shaft is also attached the pulley N, by means of which motion is communicated to the apparatus from the driving power of the mill.

"One end of the shaft M works in stationary bearings attached to or connected with the frame of the mill, and its other end works in bearings *secured upon* [attached to] the bridge-tree O, one end of which is pivoted to the frame A, and the other [end of which] rests upon the cam P, of the cam-shaft Q, so that by means of said cam-shaft the bridge-tree O may be raised or lowered to bring the friction-pulley L into or remove it from contact with the friction-pulley K.

"R is a brake-bar which may be made of wood or other suitable material. One end of *this* [the] brake-bar [R] is pivoted to the frame A or [to] some other suitable support, and its other end is connected with *one* [the] end of the bridge-tree O by the bar S, so that as the friction-pulley L is moved away from the [friction] pulley K the brake may be applied to the friction-pulley K, either to hold the bar C stationary or to allow it to descend with any desired rapidity.

"To one end of the cam-shaft Q is attached a lever or arm T, having a weight U suspended from its end, which may be regulated so as to hold the friction-pulley L against the [friction] pulley K with any desired force.

"The lever or arm T may be operated to throw the friction-pulley L into or out of gear with the friction-pulley K, by means of levers or cords, as may be desired or *found most* convenient.

"Having thus described my invention, [what] I claim as new and desire to secure by letters patent [is]—

"*1. The toothed-bar herein described operating substantially in the manner and for the purpose specified.*

"[1] *2.* The toothed-bar C, pivoted at its lower end between the blocks E, which are adapted to slide in vertical grooves formed in the posts D, whereby the said bar C is rendered ver-

tically movable and capable of adjustment to suit logs of different sizes, substantially as herein set forth [and shown].

"*3.* The *combination* [arrangement] of the pivoted brake R, connection S, and pivoted bridge-tree O, [in which is formed the outer bearing for shaft *m*], substantially as herein shown and described, [whereby pulley L is removed from contact with pulley K, and the brake brought into contact with the latter and vice versa simultaneously, as herein set forth.]

"[2] *4.* The combination with [and arrangement with relation to] the bar C, of the cord or chain F, pulley G, shaft J, drum I, friction-pulleys K L, and adjustable shaft M, [all] *substantially* as set forth [and shown].

"[4] *5.* The *combination* [arrangement] of the cam *P* and shaft [P] Q and weighted arm T, with [relation to] the connected brake and bridge-tree, to operate as and for the purpose described."

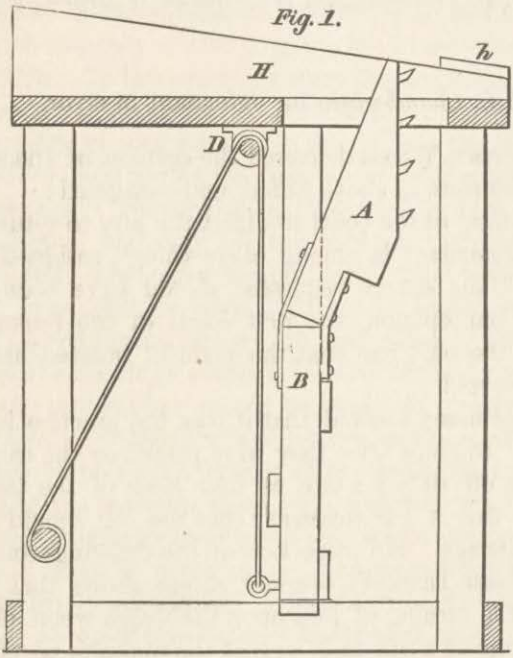
It appeared by the bill of exceptions that the only claim of the reissued patent upon which the plaintiff relied, or which was considered under the instructions of the court to the jury, was the first claim. The plaintiff relied simply upon the infringement of the toothed-bar and its mode of operation. He did not allege infringement of any combination claim, or of the device, or any of its parts, by which the movement of the toothed-bar was produced.

The plaintiff also introduced evidence tending to show, as he claimed, infringement by the defendant of the first claim of the reissued patent, and evidence tending to show the damages sustained by him by reason of such infringement.

The defendant, to sustain his defences, introduced in evidence letters patent "for certain improvements in log-turners" issued to John Torrent, dated August 12, 1873, upon his application therefor filed January 29, 1873. In this patent a wedge-shaped toothed-bar is shown hinged at its lower end to an upright shaft, in order that it might adjust itself in proper position to take hold of a log and roll it to and on the carriage of a saw-mill. The apparatus was shown in combination with inclined ways upon the log-deck, provided with a stop to hold back the logs which lay side by side in a series on the log-deck, and it was intended

that the log-turning device should separate the last log in the series from the others, and roll it over from the deck upon the carriage. The first claim of the patent was "the toothed-bar, the bottom of which is pivoted to an upright reciprocating shaft, as described." The specification of the patent was illustrated by the annexed drawing.

Fig. 1.



The defendant then introduced evidence tending to show that the machine, the use of which by him was charged by the plaintiff to be an infringement on his reissued letters patent, was constructed according to the patent of John Torrent just described.

The evidence having been closed, the defendant asked the court to charge the jury—

"That in view of the pleadings and proof, and the claims and disclaimers of the plaintiff regarding the portion of his patent claimed to be infringed, the jury are instructed to render a verdict for the defendant."

The court refused to give this charge. After receiving the charge of the court upon the case, as presented by the pleadings and evidence, the jury returned a verdict for the plaintiff for $960, on which the court rendered judgment. This writ of error brought up that judgment for review.

Mr. B. F. Thurston and *Mr. George W. Dyer* for plaintiff in error.

Mr. C. C. Chamberlain for defendant in error.

Mr. Justice Woods delivered the opinion of the court. He recited the facts as above stated, and continued:

The refusal of the court to direct the jury to return a verdict for the defendant is, among other things, assigned for error. We think the charge requested should have been given, because, in our opinion, the first claim of the reissued patent, which is the only one that the plaintiff insisted had been infringed, is void.

The testimony showed that it was the practice in saw-mills to "slab" the logs after they were placed on the carriage, that is, to saw off slabs on two or four sides of the log. To accomplish this it was necessary that the log should be turned on the carriage. An inspection of the drawings and specification of Esau Tarrant's original patent shows that his device was for the turning of logs upon their axes when placed upon the carriage of a saw-mill, so that the opposite parts of the log might be successively presented to the saw and slabs cut therefrom. It was no part of the purpose of the contrivance to roll the log from one place to another, as from one part of the log-deck to another, or from the log-deck to the carriage. On the contrary, the drawing shows that the device was so made as to prevent the rolling of the log from one place to another. This was accomplished by knees considerably higher than the diameter of the log, against which the log was pressed, and which held it in position and formed part of the means by which the log was made to revolve on its axis. When placed in contact with the knees, the log was in the right position to be subjected

to the action of the saw. It is not possible with this device to roll the log from one place to another except by raising it, if that could be done, to the top of the knees and tumbling it over them to the other side; and, if this were done, it would defeat the object of the invention by moving the log off the carriage and away from the saw.

In the reissue the specification is modified so as to make a radical change, not only in the purpose, but in the mechanism of the invention. In the original patent the invention was declared to be an improved device for turning or rolling logs upon the carriage of a saw-mill. In the reissue the invention was declared to be a device for turning or rolling logs *to or* upon the carriage. The device, as described in the reissued patent, is adapted, not only to turn logs on their axes, but to roll them from one place to another, as from one part of the log-deck to another, or from the log-deck to and upon the carriage. This requires a change of mechanism. To turn a log when on the carriage without change of its location requires that the toothed-bar should be placed as closely as possible to the side, or within the side of, the carriage, and there must be knees to prevent a change in the location of the log. To roll a log to the carriage, or to roll a log from the log-deck upon the carriage, the toothed-bar must be at a distance from the carriage at least as great as the diameter of the log, and the slot in which it works must be extended accordingly, and the knees are not only unnecessary, but would be an obstruction to the operation of the device.

The movement of a toothed-bar in turning a log on a carriage against the resistance of the knees is necessarily in the same plane, while the movement of a toothed-bar in rolling a log toward or upon a carriage is necessarily in constantly changing planes, as the bar follows the changing position of the log.

The change of the specification, therefore, includes an omission of the knees, a change in the location of the toothed-bar, a change in its movements, and a change in the effect produced by its movements. The reissue, consequently, covers a different invention from that described in the original patent. It

embraces a different machine, intended for different purposes and performing different functions, from that described in the original patent.

When we turn to the claims of the reissued patent we find a corresponding enlargement of the scope of the patent. The claims of the original patent are substantially reproduced in the reissued patent, except that a combination instead of an arrangement of the different parts was claimed. But a new claim is added, namely, the first, which is as follows: "The toothed-bar herein described operating substantially in the manner and for the purpose described."

Each of the claims of the original patent was for a combination. But the first claim of the reissue covers the toothed-bar operating substantially in the manner described, without reference to the mechanism by which it was moved, segregated from the combination and claimed as a distinct invention of the patentee.

The operation of the toothed-bar is enlarged in the first claim of the reissue. In the original patent it was used in connection with the knees set upon the log carriage to prevent the log changing its place and to aid in giving the log a rotary motion on its axis. In the first claim of the reissue, construed in connection with the changed specification, the toothed-bar may be used with or without the knees. The knees are used when the toothed-bar is employed for revolving the log on its axis, and they are omitted when the toothed-bar is used for rolling the log over and moving it from one place to another. Both the specification and claims of the reissue are enlarged to include an invention not described or included in the original patent.

The application of John Torrent for his patent dated August 12, 1873, was filed January 29, 1873. The invention covered by his patent was the alleged infringing machine used by the defendant. After the patent of John Torrent had been applied for, and his invention fully described in his application, and nearly five years after the grant of the original letters patent to Esau Torrent, the latter applied for the reissue with its expanded specification and claims. The reissue was clearly intended to forestall John Torrent's invention and include it in

the claims of the reissued patent of Esau Tarrant. We find, therefore, that the specification and first claim of the reissue was an enlargement of the claims of the original patent, and covered an invention not covered or described therein; that the reissue was not applied for until nearly five years after the date of the original patent, and not until another inventor had made a substantial advance in the art to which the original patent belonged, which the assignee of the original invention, it may be fairly inferred, desired to include in the monopoly of his patent, and that he sought to accomplish this by its reissue. The first claim of the reissued patent was therefore void. This conclusion is sustained by many decisions of this court, some of which may be found in the following cases: *Gill* v. *Wells*, 22 Wall. 1; *Wood Paper Patent*, 23 Wall. 566; *Powder Co.* v. *Powder Works*, 98 U. S. 126; *Ball* v. *Langles*, 102 U. S. 128; *James* v. *Campbell*, 104 U. S. 356; *Heald* v. *Rice*, 104 U. S. 737; *Miller* v. *Brass Co.*, 104 U. S. 350; *Johnson* v. *Railroad Co.*, 105 U. S. 539; *Bantz* v. *Frantz*, 105 U. S. 160; *Wing* v. *Anthony*, 106 U. S. 142. Especial attention is called to three decisions of this court which are peculiarly apposite: *Clements* v. *Odorless Excavating Co.*, 109 U. S. 641; *McMurray* v. *Mallory*, 111 U. S. 96, and *Mahn* v. *Harwood*, *ante*, 354.

It follows, from the views we have expressed, that the plaintiff below failed to show any cause of action against the defendant. The court should, therefore, have charged the jury, as requested, to return a verdict for the defendant. Its refusal to do so was error, for which

The judgment is reversed, and the cause remanded to the Circuit Court, with instructions to grant a new trial.

MARTINTON *v.* FAIRBANKS.

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

Submitted December 15, 1884.—Decided January 5, 1885.

When there is no demurrer to the declaration, or other exception to the sufficiency of the pleadings, no exception to the rulings of the court in the progress of the trial, in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, or no motion in arrest of judgment, and the only matter presented by the bill of exceptions which this court is asked to review arises upon the exception to the general finding by the court for the plaintiff upon the evidence adduced at the trial, no question of law is presented which this court can review.

This suit was brought by the defendant in error, as plaintiff below, to recover of the plaintiff in error, a municipal corporation, the amount of certain coupons on bonds issued in payment of a subscription to stock in a railroad corporation. The case was tried before the judge without the intervention of a jury. There was a general finding of facts and a judgment for the plaintiff below, and a general bill of exceptions by the defendant, which incorporated all the evidence. The defendant sued out this writ of error. This and the other facts raising the question of jurisdiction appear in the opinion of the court.

Mr. Robert Doyle for plaintiff in error.

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

Mr. Justice Woods delivered the opinion of the court.

Two actions of assumpsit were brought by Fairbanks, the defendant in error, against the town of Martinton, the plaintiff in error. One action was brought upon what the declaration alleges to be "certain instruments in writing called promissory notes or bonds or railroad bonds" made and issued by the town. They were not under seal and were payable to bearer. The other was based on the coupons or interest warrants, also

not under seal, which had belonged to and had been detached from the said bonds. The declaration in both cases was in the form used in the action of assumpsit. The plea in both cases was the general issue. The two suits were, by the agreement of the parties and consent of the court, consolidated and tried together. The parties filed with the clerk a stipulation in writing, by which they waived a trial by jury.

The causes were thereupon tried by the court as one case, and its action was thus stated upon the record: "After hearing the evidence, the court finds the issue for the plaintiff, and assesses his damages at eleven thousand two hundred and nine dollars." Upon this finding the court entered judgment for the plaintiff for the damages so assessed.

During the trial a bill of exceptions was taken which simply set out all the evidence in the case, and closed as follows: "Which was all the evidence offered in said causes; on which evidence the court found for the plaintiff in the sum of $11.209, and entered judgment accordingly, to all of which said defendant then and there excepted. And, as said facts aforesaid do not appear of record, this bill of exceptions is prepared, and we ask that the judge may sign and seal the same, and it is done accordingly."

There was no demurrer to the declaration or other exception to the sufficiency of the pleadings, no exception to the rulings of the court in the progress of the trial, in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, and there was no motion in arrest of judgment. The only matter presented by the bill of exceptions which this court is asked to review arises upon the exception to the general finding by the court for the plaintiff upon the evidence adduced at the trial. The defendant in error insists that, upon this state of the record, no question of law is presented which the court here can review.

We think this contention is well founded. The provisions of the acts of Congress which relate to the trial of issues of fact by the court are found in the act of September 24, 1789, "An Act to establish the judicial courts of the United States," 1

Stat. 73, ch. 20, § 22, and in the act of March 3, 1865, "An Act regulating proceedings in criminal cases, and for other purposes," 13 Stat. 500, ch. 86, § 4. The provision in the act of 1789 is reproduced in § 1011 of the Revised Statutes as follows: "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error . . . for any error of fact." The provisions of the act of 1865 are reproduced in §§ 649, 700 of the Revised Statutes, as follows: SEC. 649. "Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." SEC. 700. "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The provision of § 1011 Revised Statutes continues in force and forbids a reversal of the judgment of the Circuit Court for any error of fact. Upon the issues of fact raised by the pleadings in this case there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by § 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question, by a request for a definite ruling upon that point.

§§ 649 and 700 were first fully construed by this court in *Norris* v. *Jackson*, 9 Wall. 125. The court in that case, speak-

ing by Mr. Justice Miller, laid down the following propositions: "(1) If the verdict be a general verdict, only such rulings of the court, *in the progress of the trial*, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings; (2) in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury; (3) that if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them; (4) that objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions." These propositions have been persistently adhered to by this court. Thus, in *Miller* v. *Life Insurance Co.*, 12 Wall. 285, 297, it was said: "The finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner."

In *Insurance Co.* v. *Folsom*, 18 Wall. 237, the court said: "Where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. . . . Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

So in *Cooper* v. *Omohundro*, 19 Wall. 65, this court, affirming the case last cited, held that "where issues of fact are submitted to the Circuit Court, and the finding is general, nothing is open to review . . . except the rulings of the Circuit Court in the progress of the trial, and the phrase 'rulings of the court in the progress of the trial' does not include the general finding of the Circuit Court, nor the conclusions of the Circuit Court embodied in such general finding." See also *Town of Ohio* v. *Marcy*, 18 Wall. 552; *Insurance Co.* v. *Sea*, 21 Wall. 158; *Jennisons* v. *Leonard*, 21 Wall. 302; *Tyng* v. *Grinnell*, 92 U. S. 467; *The Abbottsford*, 98 U. S. 440; *Otoe County* v. *Baldwin*, 111 U. S. 1.

The proposition that the general finding of the court in this

case is open to review is in direct opposition to the rulings of the court in the cases cited. The plaintiff in error seeks to make the question whether the evidence set out in the bill of exceptions justified the finding by the court for the plaintiff of the issue of fact raised by the pleadings. This is, in defiance of the decision of this court that it cannot be done, an attempt upon a general finding to bring up the whole testimony for review by a bill of exceptions.

The theory of the plaintiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that, by excepting to the general finding, he excepts to such conclusions of law as the general finding implies. But § 649 Revised Statutes provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. *Norris* v. *Jackson*, *ubi supra*. But the plaintiff in error has taken no such exception. By excepting to the general finding of the court, it is in the same position as if it had submitted its case to the jury, and, without any exceptions taken during the course of the trial, had, upon a return of the general verdict for the plaintiff, embodied in a bill of exceptions all the evidence, and then excepted to the verdict because the evidence did not support it.

The provision of the statute, that the finding of the court shall have the same effect as the verdict of a jury, cuts off the right of review in this case. For the Seventh Amendment to the Constitution of the United States declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The only methods known to the common law for the re-examination of the facts found by a jury are, either by a new trial granted by the court in which the issue had been tried, or by the award of a *venire facias de novo* by the appellate court for some error of law. *Insurance Co.* v. *Folsom*, *ubi supra*. The court below having made a general finding, which

by the statute has the same effect as the verdict of a jury, the plaintiff in error can resort to no other means of redress than those open to it had the case been tried by a jury and a general verdict rendered.

But the very question now under discussion was decided by this court adversely to the views of the plaintiff in error in the case of *Coddington* v. *Richardson*, 10 Wall. 516. In that case a jury was waived under the act of March 3, 1865, by stipulation in writing, "and all just and legal objections and exceptions which might be made was reserved by each party." The court found the issue for the plaintiff and assessed his damages at $5,000. The defendant moved for a new trial, but his motion was overruled by the court, and judgment was entered on the finding against the defendant. He took a bill of exceptions which set out all the evidence and showed that he excepted to the rulings of the court in finding the issue for the plaintiff, in assessing the plaintiff's damages, in overruling the motion for a new trial, and in rendering judgment. No exceptions were taken during the course of the trial. Upon this state of the record this court said: "There is no question of law arising upon the pleadings or the trial. Those attempted to be raised refer to the evidence, as embodied in the record, but which, in a trial of the facts before the court, a jury being waived, we do not look into. We look into them only when found by the court."

The statute under consideration could have no other reasonable construction. Prior to the enactment of the act of March 3, 1865, it was held by this court that "when the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment on the law," *Weems* v. *George*, 13 How. 190; and that "no exception can be taken where there is no jury and where the question of law is decided in delivering the final judgment of the court." *United States* v. *King*, 7 How. 832, 853. See also *Craig* v. *The State of Missouri*, 4 Pet. 410, 427.

§ 4 of the act of March 3, 1865, was passed to allow the

parties, where, a jury being waived, the cause was tried by the court, a review of such rulings of the court in the progress of the trial as were excepted to at the time, and duly presented by bill of exceptions, and also a review of the judgment of the court upon the question whether the facts specially found by the court were sufficient to support its judgment. In other respects the old law remained unchanged. In the present case the bill of exceptions presents no ruling of the court made in the progress of the trial, and there is no special finding of facts. The general finding is conclusive of the issues of fact against the plaintiff in error, and there is no question of law presented by the record of which the court can take cognizance.

It follows that

The judgment of the Circuit Court must be affirmed; and it is so ordered.

The cases, *The Town of Sheldon* v. *C. W. Day* and *The Town of Sheldon* v. *J. H. Fairbanks*, both in error to the Circuit Court of the United States for the Northern District of Illinois, are, in all respects, similar to the case just decided.

The judgments in these cases must, therefore, be affirmed; and it is so ordered.

STREEPER & Another *v.* VICTOR SEWING MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Submitted December 15, 1884.—Decided January 5, 1885.

A written agreement between a company making sewing machines, and a consignee to receive and sell them on commission, provided that the commission should be calculated on the retail prices for which the machines should be sold, as reported by the consignee, and that attachments should be sold to the consignee at the lowest wholesale rates. The proceeds of sales of machines, beyond the commission, belonged to the company. In a suit by it against the consignee and a person liable with him, on a bond for his indebtedness, to recover such proceeds, and the sale price of attachments, the complaint set forth schedules showing the retail price of each machine sold, as so reported, and the excess of money, beyond commission, retained

by the consignee, and the price of each attachment sold to the consignee: *Held*, That the complaint was sufficient.

The consignee and another person united in a bond to the company, conditioned that the former should pay to it all moneys which should become due under, or arise from, the written agreement, and waiving notice of non-payment: *Held*, That the liability of the surety arose on the bond, and that of the consignee on the bond or the written agreement, and that the statute of limitations in regard to written instruments governed the case.

The condition of the bond extended to the payment of notes made or indorsed by the consignee, and transferred to the company.

So far as the surety was concerned, his waiver or notice applied to a default by the consignee.

The facts are stated in the opinion of the court.

Mr. J. G. Sutherland and *Mr. John R. McBride* for appellants.

Mr. Charles W. Bennett for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was brought in the District Court of the Third Judicial District of the Territory of Utah, on the 13th of June, 1879, by the Victor Sewing Machine Company, against two persons named Crockwell and Bassett, and two others named Streeper and Murphy. On the 28th of June, 1875, the company, of one part, and Crockwell and Bassett, of the other, entered into a written agreement, whereby the former was (1) to deliver sewing machines to the latter, as consignees, at Chicago, on their order; (2) the latter to sell them in Utah Territory, and, if possible, for cash; all promissory notes taken to be guaranteed by the latter and delivered to the former; indorsement of the notes by the latter before such delivery to be such guaranty; all notes taken to be payable to the order of the former, not more than twelve months from the date of sale; (3) the latter to sell all consigned machines and remit for them within four months from date of shipment; on failure to so sell and remit, the former, after the four months, to be at liberty to charge the latter with all machines consigned four months, and not settled for, at their retail price, less forty per cent., and such amounts to be immediately due on demand; (4) the latter to

report every week machines on hand, and those sold, with terms of sale, and remit the proceeds of sale; (5) on report, and remittance, and approval, the former to credit the latter as follows: On a cash remittance of one-half of the retail price of machines sold, fifty per cent. of their retail price; on sales for notes running not more than six months from sale, forty-five per cent. of such retail price; on sales for notes running more than six, and not more than nine, months from sale, forty per cent. of such retail price; on sales for notes running more than nine, and not more than twelve, months from sale, thirty-five per cent. of such retail price; the latter to be charged with the difference between the amounts remitted and the retail prices reported, and to remit such an amount as will equal the retail price of the machines reported sold (less said commissions), with five per cent. of the retail price of machines sold for notes, such five per cent. to remain with the former till the termination of the contract, and the payment of all notes taken under it, and, after deducting therefrom the cost of collecting the notes, and expenses of settling the contract, the former to pay to the latter such part of the five per cent. as should be due to them; (6) the former to sell parts of their machines at forty per cent. discount from list prices, and attachments at the lowest wholesale rates, both to be settled for with cash every thirty days, unless time should be agreed for, when twenty per cent. should be added to regular cash prices; (7) the former to be at liberty to terminate the contract, and retake their property at any time, charging the latter for loss of or damage to machines; the latter to have the right to take the machines at the retail price as if new, less forty per cent.; the latter to be sole agents for certain counties in Utah while satisfactorily performing the contract; (8) the latter to pay a monthly rent for each wagon furnished by the former; the former to have the right to make, on notice, certain variations in the time of the notes; the latter to be at liberty, for such machines as they shall dispose of during each month otherwise than for cash or note, to give their personal notes, on an average of six months' time, at the retail price of the machines, less forty per cent., or their personal notes on an average of nine months' time, at the retail

price of the machines, less thirty-five per cent.; the former to have the right to terminate and renew this last provision at their election.

On the 3d of July, 1875, the four defendants executed, on the back of said agreement, a joint and several bond, under seal, to the plaintiff, in the penalty of $3,000, with the following condition: "The condition of this obligation is such, that if the above bounden George Wallace Crockwell and Charles Henry Bassett, Jr., shall pay unto said Victor Sewing Machine Company all moneys due, or which shall become due, to said Victor Sewing Machine Company, under or pursuant to the within contract, or which shall arise therefrom, whether by book accounts, notes, renewals or extensions of notes or accounts, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of non-payment, protest or notice of protest, and diligence, upon all notes now or hereafter executed, indorsed, transferred, guaranteed, assigned, and shall well and truly keep and perform, in all respects, according to its true intent and meaning, the contract or agreement to which this obligation is attached, executed between the said Victor Sewing Machine Company and G. W. Crockwell and C. H. Bassett, Jr., dated at Salt Lake City, the 28th day of June, 1875, then this obligation to be void; otherwise, to remain in full force and virtue. But said contract may be varied or modified by the mutual agreement of said Sewing Machine Company and said G. W. Crockwell and C. H. Bassett, Jr., as to the manner of carrying on said business, or as to the time on which notes taken shall be drawn, or as to the compensation to be paid to said G. W. Crockwell and C. H. Bassett, Jr., or as to the period at which said G. W. Crockwell and C. H. Bassett, Jr., shall report to said company for the machines they may sell, or as to the territory on which said machines shall be shipped or sold, or as to the place from which said machines shall be shipped, and such changes and modifications or variations shall in nowise affect or impair our liability on this bond."

This suit is brought to recover the amount of the penalty of the bond. The complaint sets forth *in hæc verba* the agree-

ment and the bond, and alleges that the defendants failed to perform the condition of the bond that Crockwell and Bassett should perform the agreement, in that, (after reciting the provisions of clauses four and five of the agreement), between July 3, 1875, and February 10, 1876, the plaintiff, at the request of Crockwell and Bassett, consigned to them, under the agreement, divers sewing machines, which they sold before 1878, but they did not remit the proceeds, or the part to which the plaintiff was entitled, to the amount of $146.82, "a detailed and itemized account of which said sales, showing the machines received from plaintiff and sold by said Crockwell and Bassett, and the amounts remitted, with the proper credits thereon, and the amounts due and not remitted, as well as the balance thereon now due plaintiff, is hereto attached, marked Exhibit A, and made a part of this complaint." Exhibit A is a commission account, Crockwell and Bassett with the company, containing sales reported, with prices, and notes received, with dates, times, and amounts, and in which Crockwell and Bassett are debited with moneys retained by them, and rent of wagon and collection charges, and a machine consigned over four months, and commission before allowed and now charged back on a machine returned, and are credited with their commissions, and the amounts of the notes taken for the returned machine, showing a balance of $146.82 due to the plaintiff.

The complaint further alleges, that the defendants failed to perform the condition of the bond that Crockwell and Bassett should pay to the plaintiff all moneys due or to become due to it under the agreement, and should perform the agreement, in that, the plaintiff, between July 3, 1875, and February, 1876, under clause six of the agreement, at the request of Crockwell and Bassett, consigned to them parts of machines at forty per cent. discount from list prices, and attachments at the lowest wholesale rates, to be settled for in cash by them every thirty days, unless time was agreed for, when twenty per cent. was to be added to regular cash prices; but Crockwell and Bassett did not settle therefor, with cash, in thirty days, and had not paid therefor; that the money which, by clause six, they were required to pay to the plaintiff, amounted to $87.97;

and that "a detailed and itemized account, showing the parts of machines and attachments so furnished Crockwell and Bassett, and the amounts paid plaintiff therefor, and showing the amounts which should have been, but were not, paid plaintiff by defendants Crockwell and Bassett, with the balance now due plaintiff by Crockwell and Bassett, is hereto attached, marked Exhibit B, and made a part of this complaint." Exhibit B is an attachment account, by items, debiting Crockwell and Bassett with articles furnished, and giving them credits, resulting in a balance of $87.97 due to plaintiff.

The complaint further alleges, that the defendants failed to perform the condition of the bond that Crockwell and Bassett should pay the plaintiff all moneys due, or which should become due, to it, under the agreement, or which should arise therefrom, and should perform the agreement, in that, the plaintiff, between July 3, 1875, and February, 1876, under the agreement and bond, at the request of Crockwell and Bassett, consigned to them sewing machines, which they sold after July 3, 1875, and before April, 1876; that, under the bond and clause eight of the agreement, Crockwell and Bassett, between the dates named, gave to the plaintiff their personal promissory notes, for the price of the machines, and at the rates for the machines, mentioned in the agreement; and that "a list and description of said notes is herewith filed, marked Exhibit C, and made a part of this complaint." Exhibit C shows the date of each note, the time of its maturity, that all the notes were made by Crockwell and Bassett and payable to the plaintiff, and the amount of each note, or the balance due thereon, exclusive of interest. The complaint alleges that the whole amount of them is $1,766.10, to which is to be added $609.93, for interest on them, and $237.60, for attorney's fees for collection, making, in all, $2,613.63, and that Crockwell and Bassett have failed to pay that sum and owe it to the plaintiff.

The complaint further alleges, that the defendants failed to perform the condition of the bond that Crockwell and Bassett should pay to the plaintiff all moneys due, or which should become due, to it, under the agreement, or which should arise

therefrom, and should perform the agreement, in this, that, between July 3, 1875, and February 10, 1876, the plaintiff, under the bond and agreement, and at the request of Crockwell and Bassett, consigned to them sewing machines, which, prior to the last date, they sold, and took therefor the promissory notes of the vendees, payable to the order of the plaintiff, which notes Crockwell and Bassett indorsed and guaranteed and delivered to the plaintiff, this being done under clause two of the agreement; and that "a list and description of said promissory notes is herewith filed, marked Exhibit D, and made a part of this complaint." Exhibit D shows the date of each note, the time of its maturity, and its amount. The complaint alleges that the principal of the notes amounts to $358.83; and that neither their makers nor Crockwell and Bassett have paid them, but owe them to the plaintiff.

It thus appears that the suit covers four claims: (1) proceeds of sales of machines; (2) purchase price of attachments; (3) personal notes for machines consigned; (4) guaranteed notes for machines consigned.

Murphy and Streeper answered, denying specifically the breaches alleged; setting up that all the items in Exhibits A and B accrued more than two years before the suit was commenced, and it was not commenced within the time prescribed by the laws of Utah Territory; claiming a further credit of $203 on Exhibit A; denying that the non-payment of the notes covered by Exhibit C or by Exhibit D was a breach of the condition of the bond; and alleging that Crockwell and Bassett had no notice of the non-payment of the notes covered by Exhibit D. The answer further sets up, that, in March, 1876, the plaintiff, by its agent, applied to Murphy to become surety on a second bond, on a new contract with Crockwell and Bassett; and that a settlement, amounting to an accord and satisfaction, was had between the plaintiff and Crockwell and Bassett, as to the matters covered by the complaint, and its agent informed Streeper and Murphy thereof, and that the existing bond was discharged, and Murphy signed the second bond on that assurance, Crockwell and Bassett being then able to indemnify Streeper and Mur-

phy against liability on the first bond, and having since become insolvent. Crockwell and Bassett also answered.

The cause was referred to a referee to "hear, determine and report a judgment." He reported findings of fact and conclusions of law. He reported the facts to be as alleged in the complaint, as to the items of Exhibits A, B, C and D, with a credit on Exhibit A of $31.22, and that there was due from Crockwell and Bassett, on Exhibit C, at least $2,750, exclusive of allowance for attorney's fees, and on Exhibit D over $450, and due and unpaid from Crockwell and Bassett to the plaintiff, on account of the several matters set forth in the complaint, more than $3,000; that the Exhibits fully credited all sums remitted by Crockwell and Bassett; and that there was no settlement or accounting between Crockwell and Bassett and the plaintiff, and no adjustment of their indebtedness to it, and no agreement or accord or satisfaction made in regard to such indebtedness. The report then proceeded: "8th. In March, 1876, a new contract for the sale of machines was made between the plaintiff and said Crockwell and Bassett, and a new bond given by the latter, upon which the defendant Edmund H. Murphy became a surety. Pending the negotiations for such new contract, and before said Murphy became surety on the new bond, he inquired of George Wilkinson, who was the agent of the plaintiff to negotiate the new agreement, in regard to the past business and the object of the new bond, and said Wilkinson informed him, in substance, that said Crockwell and Bassett had done well, that the business was satisfactory to the plaintiff, and the plaintiff was about to give them a new contract, under which they would get a larger per cent. and have a better opportunity to make money. No other or further representations were made to said defendant Murphy prior to the execution by him of the new bond, and said representations were not false. At that time no settlement had been made of the accounts, but, from casually looking over the accounts, it appeared that Crockwell and Bassett had, in the shape of notes and leases, far in excess of what they owed, and, had the notes turned over to the plaintiff, and the notes and leases held by them, been good and collectible, the same would have far exceeded their liabilities. At that

time but a small portion of the indebtedness of Crockwell and Bassett to plaintiff was due, and it was not known but that the notes and leases taken by Crockwell and Bassett were generally good and collectible. 9th. About November, 1876, when the business of plaintiff was taken from Crockwell and Bassett, and turned over to another party, the said defendant Edmund H. Murphy, in the presence of defendant Crockwell and others, inquired of said Wilkinson, who was plaintiff's agent to turn over said business, in regard to the condition of the business of Crockwell and Bassett, when the following conversation occurred between said Murphy and Wilkinson: 'Q. *Mr. Murphy:* So far as the bondsmen are concerned, how did they stand? A. *Mr. Wilkinson:* So far as the boys (Crockwell and Bassett) have acted, they could not do better; everything is satisfactory and the business has been turned over to another party and everything is agreeable. Q. If that is the case the bondsmen have nothing further to bother about? A. No; everything is satisfactory and the business has been turned over.' This is the substance of representations made at that time, and I find that said defendant Murphy got the impression that he was released on the bonds. 10th. About the 28th of March, 1876, and during the negotiation for the new contract and bond, Crockwell and Bassett, desiring to obtain the defendant Streeper as surety on the new bond, called him into their office, and, in the presence of said Wilkinson, and during a conversation there, Charles H. Bassett informed said Streeper he had nothing to fear; and then Streeper asked Wilkinson if he was released or relieved on the first bond, and Wilkinson informed him he had nothing to fear on that, and made an affirmation which induced Streeper to believe he was no longer liable. Streeper did not execute the new bond. 11th. There is no evidence to show that any change has occurred in the financial condition of Crockwell and Bassett since the spring of 1876, and I find that no such change has occurred. 12th. At the time of the commencement of this action none of the notes guaranteed by Crockwell and Bassett, as aforesaid, had been due four years, and there is no evidence of any change in the financial condition of the

makers. 13th. George Wilkinson had no authority from plaintiff to bind the plaintiff by any declaration as to the release of the said bonds or either of them. And I find he did not intend to make any statement concerning the release which was untrue, or to deceive or mislead the defendants or any of them, and his statements were rather in the nature of assent to, or non-denial of, statements made by Crockwell and Bassett in his presence. I do not find he had or exercised any such apparent authority as should induce the defendants to rely on his statements concerning the business of Crockwell and Bassett or the satisfaction of said bonds, without further inquiry."

The referee found the following conclusions of law:

"1. The non-payment of the several sums found due and unpaid from Crockwell and Bassett to the plaintiff, as in the findings of fact specified, constitute breaches of said bond, and for which breaches the sureties as well as the principals are liable.

2. The action on the bond at the time of the commencement thereof was not barred by the statute of limitations, in respect to any of said breaches.

3. The plaintiff is not estopped, nor its action barred or affected, against any of the debts, by reason of any representations made to the defendant Murphy or Streeper prior to or since the execution of the second bond referred to in the answer, nor was the execution of the second bond by the sureties procured by fraud.

4. The plaintiff is entitled to judgment that it have and recover of and from the defendants the sum of three thousand dollars, and the costs of this action, to be taxed."

Streeper and Murphy filed exceptions to the findings of fact after the seventh, and to all the conclusions of law. Judgment was entered for $3,000 and costs, against all the defendants. Streeper and Murphy appealed to the Supreme Court of the Territory, which affirmed the judgment. Murphy having afterwards died, his administratrix and Streeper appealed to this court. (See *Victor Sewing Machine Co.* v. *Crockwell*, 2 Utah, 557, and 1 West Coast Reporter, 428.)

It is assigned for error, that the complaint is insufficient to support the judgment, because the first two causes of action, those relating to Exhibits A and B, do not allege the value of the goods consigned, either by the article or in the aggregate. The objection made is, that, although the agreement states the shares to which the plaintiff and the consignees are to be respectively entitled, it fixes no price on the machines. The answer to this is, that the agreement states that the retail prices for which the machines consigned are sold, as reported by the consignees, are the prices on which the commissions of the consignees are to be calculated; and that the agreement fixes the prices of parts of the machines at forty per cent. discount from list prices, and the prices of attachments at the lowest wholesale rates. By the agreement, when the fixed commissions are deducted from the retail prices of sales, the rest belongs to the plaintiff; and Exhibit A shows the retail price of each machine sold, as reported by the consignees, and how much they retained beyond what they were entitled to retain as commissions, and Exhibit B shows the price of each attachment sold to the consignees. The Exhibits, in connection with the complaint, make the matter definite.

It is also contended, as to the first two causes of action, that the liability of the defendants arose on the sale of goods to the consignees, and that the two years' limitation applies to those causes of action. Murphy and Streeper were not parties to the agreement. Their liability arose on the bond exclusively. All the defendants were parties to the bond. This is a suit on the bond, and what are called by the defendants, causes of action, are only breaches of the condition of the bond. As the agreement was executory, it was necessary to set out consignments and sales, and resulting amounts due, to establish breaches. Even as regards the consignees, an action against them, if not on the bond, would be on the written agreement. The condition of the bond is, that the consignees shall pay all moneys which shall become due "under or pursuant to the within contract, or which shall arise therefrom, whether by book accounts, notes, renewals or extensions of notes, or accounts." We are of opinion that, this suit being on a written instru-

ment, the limitation was four years, and the action was not barred.

It is also urged, that Streeper and Murphy are not bound for the payment of the notes made or guaranteed by the consignees, and that their obligation was discharged when those notes were made or guaranteed. But it appears clear to us that the condition of the bond is, that the consignees shall pay all money which shall become due, by their notes, or their indorsements, or otherwise (the agreement making the indorsement a guaranty of payment). Language could hardly be stronger or more full. *Dixon* v. *Holdroyd*, 7 Ell. & Bl. 903.

It is also urged, that the facts found constitute an estoppel, as to Murphy and Streeper. The findings of fact negative the allegations of the answer setting up this defence. What occurred in November, 1876, is outside of any issue raised by the answer.

A point is made that the complaint does not aver that Murphy and Streeper had notice of the default of the consignees; that no notice is shown; and that the bond contains no waiver of such notice. Assuming that the point may now be taken, the findings are silent as to notice, but they show there was no prejudice for want of notice. Moreover, the condition of the bond is absolute, that the consignees shall pay all moneys which shall become due to the plaintiff under the agreement, the obligors waiving notice of non-payment on all notes executed, indorsed or guaranteed. As Murphy and Streeper did not make or indorse the notes, their waiver could only apply to a default by the consignees.

We see no error in the record, and

The judgment is affirmed.

MURPHY, Administratrix, *v.* VICTOR SEWING MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Submitted December 15, 1884.—Decided January 5, 1885.

A bond by a principal and a surety was conditioned that the principal should pay to V all indebtedness existing or to exist from the principal to V under existing or future contracts between him and V, and waived notice of non-payment on all notes executed, indorsed or guaranteed by the principal to V. In a suit on the bond, against the obligors, to recover the amount of notes executed by the principal to V, and other notes indorsed and guaranteed by him to V: *Held,* That it was not necessary to allege or show any notice to the surety of a default by the principal in paying V.

The facts are stated in the opinion of the court.

Mr. J. G. Sutherland and *Mr. John R. McBride* for appellant.

Mr. Charles W. Bennett for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was brought in the District Court of the Third Judicial Court of the Territory of Utah, on the 1st of October, 1879, by the Victor Sewing Machine Company, against two persons named Crockwell and Bassett and one named Murphy. On the 11th of March, 1876, the company, of one part, and Crockwell and Bassett, copartners by that name, of the other, entered into a written agreement, whereby (1) the former appointed the latter exclusive agents for the sale of the Victor sewing machine for certain counties in Utah Territory; (2) the former to deliver the machines, free of charge, at Chicago; (3) the former to sell the machines to the latter at fifty per cent. discount from retail list of prices, and parts and attachments at regular agents' prices; (4) settlement to be made by note at twelve months from first of month following date of invoice, payable to the former, or its order, at bank in Salt Lake City, with six per cent. interest, or, in lieu, the latter may indorse and assign to the former promissory notes, draw-

ing interest, given to the latter, not payable longer than twelve months from the time they are received by the former.

On the same day, the three defendants executed a joint and several bond, under seal, to the plaintiff, in the penalty of $2,000, with a condition, of which all that is material to this case was as follows: "The condition of this obligation is such, that if the above-bounden Crockwell & Bassett shall well and truly pay, or cause to be paid, unto the said Victor Sewing Machine Company, any and every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred, on the part of the said Crockwell & Bassett to the said Victor Sewing Machine Company, whether such indebtedness or liability shall exist in the shape of book accounts, notes, guaranteed leases, renewals or extensions of notes, accounts, or guaranteed leases, acceptances, indorsements, or otherwise, or whether such liability shall arise from the consignment of machines or other property to the said Crockwell & Bassett by the said Victor Sewing Machine Company, under any existing contract, or any contract which shall be hereafter entered into in writing by and between the said Crockwell & Bassett and the said Victor Sewing Machine Company, hereby waiving presentment for payment, notice of non-payment, protest, or notice of protest, and diligence, upon all notes or leases now or hereafter executed, indorsed, transferred, guaranteed, or assigned by the said Crockwell & Bassett to the Victor Sewing Machine Company, then this obligation to be void; but otherwise to be in full force and effect."

This suit is brought to recover the amount of the penalty of the bond. The complaint sets forth *in hæc verba* the agreement and the bond, and avers, that, between the 11th of March, 1876, and the 1st of January, 1877, the plaintiff, in pursuance of the agreement and at the request of Crockwell & Bassett, sold and delivered to them, Victor sewing machines, of the value of more than $5,000; that the defendants have broken the conditions of the bond, in that, Crockwell & Bassett, in part payment for such machines, made and delivered to the plaintiff their four promissory notes, one for $423.50, dated April 1, 1876, at 12 months, with interest, one for $1,216.75,

dated May 2, 1876, at 12 months, with interest, one for $49.50, dated September 9, 1876, at 9 months, with interest, and one for $369.47, dated September 1, 1876, at 12 months, with interest, all providing for 10 per cent. interest per annum after due until paid, and 10 per cent. attorney's fees, if collected by an attorney; that Crockwell & Bassett, between the dates first named, resold to purchasers some of the machines, and took the notes of the purchasers therefor, and, in part payment to the plaintiff, indorsed and guaranteed the payment of said notes, and delivered them to the plaintiff, their principal amounting to $1,012; that Exhibit B to the complaint contains a statement of the date of each note, the date when due, the name of the maker, and the amount; and that there is due to the plaintiff on all of said notes over $4,200, for principal, interest and attorney's fees, less a credit of $1,226.31.

Murphy answered, denying specifically the breaches alleged, setting up payment of the notes by Crockwell & Bassett, and averring, that the contract and bond were procured by fraud, and misrepresentations on the part of the plaintiff, made to Crockwell & Bassett, and on which they relied, which the plaintiff knew to be untrue, and which are set forth; and that the defendants were induced to execute the bond by false and fradulent representations of the plaintiff in this: that the plaintiff represented to the defendants that it was well acquainted with the business of Crockwell & Bassett, that they were in good credit, and were good business men, and had promptly met their obligations, and would make money out of the proposed contract with the plaintiff, whereas the plaintiff knew that they were then in failing circumstances, and were not able to pay their debts, and were not good business men, and were at that time indebted to the plaintiff, and had not met their obligations, and that they would lose money on the proposed contract with the plaintiff; and that the defendants signed the bond solely on the faith and credit which they gave to those representations. Crockwell & Bassett also answered.

The cause was referred to a referee to "hear, determine and report a judgment." He reported findings of fact and conclusions of law. He found the facts to be as alleged in the

complaint, and that there was due, at the commencement of the suit, from Crockwell & Bassett, to the plaintiff, in respect of the matters set forth in the complaint, over $2,000, exclusive of offsets and attorney's fees; and that the execution neither of the agreement nor of the bond was procured by any false or fraudulent representations made to Crockwell & Bassett, or either of them, by the plaintiff. The report then proceeded: "I find the defendant Edmund H. Murphy did not execute said bond on or relying upon the representations set forth in the last defence of the answer of the sureties, and that the material part of said alleged representations was not made; that he inquired of George Wilkinson, plaintiff's agent in negotiating said agreement and bond, the object thereof and the condition of the business, and said Wilkinson informed said Murphy that the plaintiff proposed to give Crockwell & Bassett a new contract, and larger commissions and an opportunity to make more money; that, so far as they had acted, it was to the satisfaction of the plaintiff. I find that the business of Crockwell & Bassett did then appear to be in good condition, and they had thus far acted to the satisfaction of the plaintiff; that said Wilkinson made no settlement of the business with Crockwell & Bassett, but they had then given and turned over guaranteed notes to the plaintiff to the full amount of their indebtedness; that said notes were not due, and their indebtedness to the plaintiff on cash account very small; that they held in their hands notes and leases taken on sales of machines, far in excess of their liabilities, and, had said notes and leases, and the notes guaranteed and delivered to the plaintiff, been good and collectible, the contrary of which was not then known to the plaintiff or its agent, the business of Crockwell & Bassett would have been in good condition; that the said George Wilkinson, in November, 1876, had no authority from the plaintiff except to take the business out of the hands of Crockwell & Bassett and turn it over to another party. He did not have in his possession said agreement or bond, or the notes mentioned in the complaint, or exercise or claim to exercise any authority, real or apparent, in regard thereto."

The referee found the following conclusions of law:

"1. That there was due from the defendants Crockwell & Bassett, to the plaintiff, at the time of the commencement of the action, on account of the matters stated in the complaint, more than the sum of two thousand dollars, the non-payment of which constituted breaches of the said bond.

2. That the execution of said bond was not procured by fraud, and the plaintiff is not barred or estopped from enforcing the same, nor are the sureties thereon, or any of them, discharged by reason of any matters occurring subsequent to the execution of the bond.

3. The plaintiff is entitled to judgment against all the defendants, for the sum of two thousand dollars, and interest at ten per cent. per annum from the commencement of the action, to wit, the first day of October, 1879, and costs of suit, to be taxed."

Murphy filed exceptions to the findings of fact and the conclusions of law. Judgment was entered for $2,550 and costs. Murphy appealed to the Supreme Court of the Territory, which affirmed the judgment, and, he having afterwards died, his administratrix appealed to this court.

It is alleged, as error, that the complaint is insufficient in not alleging notice to Murphy of the default of Crockwell & Bassett; and that no notice is shown. There is no force in this objection. The condition of the bond is absolute, that Crockwell & Bassett shall pay all inebtedness, the obligors waiving notice of non-payment on all notes executed, indorsed or guaranteed. As Murphy did not make or indorse the notes, his waiver could only apply to a default by Crockwell & Bassett.

As to the defences of fraud and misrepresentation set up in the answer, they are negatived by the findings.

The judgment is affirmed.

WHITNEY & Another *v.* MORROW.

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

Argued December 2, 1884.—Decided January 5, 1885.

When an act of Congress, confirming a claim to land, contains a proviso that the confirmation shall not include lands occupied by the United States for military purposes, it is incumbent upon one claiming the land by patent from the United States, later than the act, to show that the land claimed was occupied for military purposes.

A direct legislative grant of public lands is the highest muniment of title, and is not strengthened by a subsequent patent of the same land.

The facts which make the case are stated in the opinion of the court.

Mr. Enoch Totten, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This case was before this court at the October term of 1877. 95 U. S. 551. It is an action of ejectment for the possession of a tract of land consisting of ninety-four acres and a fraction of an acre, situated in the borough of Fort Howard, in Brown County, Wisconsin. The plaintiffs derived their title to the premises from one Pierre Grignon, to whom, on June 2, 1870, a patent was issued by the United States. The defendant, in his answer, sets up an adverse possession of the land in himself and those through whom he derived his interest, for more than forty years, under a claim of title, exclusive of any other right, founded upon a written instrument as a conveyance of the premises. It was admitted that he was in the possession of the land at the commencement of the action, and on the trial he relied, not only upon his adverse possession, but also upon a legislative confirmation of a claim to it, under the act of February 21, 1823, by Alexis Gardapier, from whom he traced his title. It appeared on that trial that commissioners under the act, which revived and continued in force certain previous acts for the adjustment of land claims in the Territory of Michigan—

which then included Wisconsin—had confirmed a claim to land presented by said Gardapier and one presented by Pierre Grignon. The confirmations were subject to the condition that the tracts confirmed did not interfere with certain previous confirmations. On April 17, 1828, Congress confirmed the acts of the commissioners respecting these claims, that is, "confirmed the confirmations," with a proviso, however, that they should not be so construed as to extend to any lands occupied by the United States for military purposes. The act also made it the duty of the register of the land office at Detroit to issue to the claimants certificates, upon which patents were to be granted by the Commissioner of the General Land Office. But it did not appear on the trial that any patent had ever been issued to Gardapier. The court held that if, at the time of the confirmation, the land claimed by him was not occupied by the United States for military purposes, it operated to vest in him a perfect title to the land, a legislative confirmation always operating, unless accompanied with reservations, as a conveyance of the estate or right of the government, to the party who is in possession of the premises or has an interest in them.

The tract confirmed appeared to have clearly defined boundaries, or, at least, such as were capable of identification. The question, therefore, whether the land was thus occupied was of the utmost consequence, and the defendant offered, in various forms, to prove, by witnesses produced for that purpose, that it was not thus occupied on the confirmation by Congress and had not been previously; and also that for a period of nearly forty years the land had been in the actual, open, notorious, and exclusive possession of Gardapier and parties claiming under him, and that during that time it had been cultivated, improved, and built upon without objection from any one. But the court refused to admit the proof, and also refused an instruction to the jury, which was requested, that, in order to find for the plaintiff, they must be satisfied that the land was occupied for military purposes on April 17, 1828, or was reserved for military purposes at that time, or was treated by the government as thus reserved.

The plaintiff recovered, but for the error in this ruling and

refusal, this court reversed the judgment and ordered a new trial.

On the second trial, the judgment in which is now before us for review, no proof was offered of the military occupation, the plaintiffs relying upon the patent to Grignon, and the defendant upon the legislative confirmation of the claim to Gardapier, which operated to perfect his title to the tract named, including the premises in controversy, if it were not excepted by its occupation by the United States for military purposes. Such an exception, if it existed, should have been established by the plaintiffs, whose right to the premises depended upon its existence. If the land was thus occupied, the confirmation did not apply, and it remained public property. That which was essential to the plaintiff's recovery was not, therefore, established, nor was any evidence offered for that purpose. The confirmation to Gardapier and the title which followed to the tract designated stood unquestioned, and justified the direction given to the jury that they should find for the defendant.

It would seem that the plaintiffs offered a patent to Gardapier, also issued in 1870, and that its admission was refused. We cannot see what bearing it may have had, as a copy of it is not contained nor are its contents stated in the record. It could not deprive the confirmee of the land confirmed to him by the act of Congress if that was by specific boundaries, distinguishing and separating it from other parcels, or was capable of identification. If, by a legislative declaration, a specific tract is confirmed to any one his title is not strengthened by a subsequent patent from the government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress. *Langdeau* v. *Hanes*, 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S. 78; *Tripp* v. *Spring*, 5 Sawyer, 209, 216.

If there were any difference in the grade of the two convey-

ances of the government—that by a direct legislative act, and that by officers acting under provisions of the statute—it would seem that there should be greater weight and dignity attached to the legislative grant as proceeding more immediately from the source of title than the patent. No impeachment can be had of the motives of the legislature, whereas the motives of officers employed to supervise the alienation of public lands may sometimes be questioned, as in proceedings to set aside their action. Still, if the law be complied with, the title passes as completely in the one case as in the other. *Montgomery* v. *Bevans*, 1 Sawyer, 653, 677.

Judgment affirmed.

KNICKERBOCKER LIFE INSURANCE COMPANY *v.* PENDLETON & Others.

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

Argued November 11, 1884.—Decided January 5, 1885.

Policy of life insurance being conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity; and the annual premium being paid by a foreign bill drawn by the party insured, with a condition that if not paid at maturity the policy should be void: *Held*, That the forfeiture was incurred by non-payment of the bill, on presentment, at maturity, without protest for non-payment, although protest might be necessary to fix the liability of the drawer. *Semble*, if it had been the bill of a stranger, protest would have been necessary for the forfeiture also.

Presentment and non-acceptance of the bill before maturity, without protest, did not dispense with presentment for payment, in order to produce the forfeiture.

Want of funds in the hands of the drawee was no excuse for not presenting the bill, if the drawer had reasonable expectation to believe that it would be accepted and paid.

Preliminary proof of death not required, if the insurer, on being notified thereof, denies his liability altogether, and declares that the insurance will not be paid.

Statement of Facts.

This action was brought in the First Circuit Court of Shelby County, Tennessee, by the defendants in error, Pleasant H. Pendleton and others, against the plaintiff in error, the Knickerbocker Life Insurance Company, to recover the amount of a policy of life insurance on the life of Samuel H. Pendleton.

After declaration filed the case was removed into the Circuit Court of the United States, and the defendant then pleaded no indebtedness, failure to pay the stipulated annual premium, failure to pay a draft given for premium, and failure to give notice and proof of death. A replication put the cause at issue, and it was tried at Memphis, in November Term, 1880, and a verdict rendered for the plaintiff. Judgment being entered upon this verdict, the case was brought here by writ of error. The matters for the consideration of this court were exhibited in a bill of exceptions taken at the trial, from which it appeared that the plaintiff introduced in evidence the policy sued on, dated July 14, 1870, issued for the benefit of the plaintiffs, as the children of Samuel H. Pendleton, for the sum of $10,000 on his life, in consideration of $364.60 then paid, and of the annual premium of a like sum to be paid on or before the 14th day of July in every year during the continuance of the policy. The company agreed to pay the sum insured within three months after due notice and satisfactory proof of the death of the person whose life was insured; but the policy contained the following condition, to wit: "The omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein."

The plaintiffs next introduced in evidence the renewal receipt, in the words and figures following, viz.:

Renewal Receipt.

"Mississippi Valley Branch Office of the Knickerbocker Life Insurance Company at Memphis, Tenn., principal office 161 Broadway, N. Y., renewal No. 94,597.

Statement of Facts.

New York, *July* 14, 1871.

Received of Pleasant H. Pendleton, &c., three hundred & sixty-four 65-100 dollars, being the premium on policy No. 2346, which is hereby continued in force until the fourteenth day of July 1872, at noon.

☞ Not valid until countersigned by the managers of the Mississippi Valley Branch office at Memphis, Tenn.

Erastus Lyman, *President.*

Geo. F. Griffin, *Secretary.*

Countersigned at Memphis this day of 18 .
45,432.] Greene & Lucas, *Managers.*"

The plaintiffs then introduced evidence tending to show that Samuel H. Pendleton died at his home, near Auburn, Arkansas, on the 26th day of March, 1872; that his children, the plaintiffs, were then under age; and that their uncles, A. O. Douglass and W. F. Douglass, on their behalf, wrote from Auburn to Greene & Lucas, the agents of the defendants at Memphis, the former on the 29th of March, and the latter on the 2d of April, 1872, giving them notice of Pendleton's death. A. O. Douglass, in his letter, requested Greene & Lucas to advise him what steps were necessary to be taken in the matter of the policy, and Greene & Lucas at once answered, by letter dated April 2d, that the policy became forfeited on the 14th of October, 1871, by failure to pay the premium, explaining that when the premium became due, they took the draft of Doctor S. H. Pendleton on Moses Greenwood & Son of New Orleans, at three months, in lieu of the cash, conditioned that failure to pay the draft would forfeit the policy; and that Greenwood & Son refused to accept the draft and refused to pay it at maturity. The correspondence was continued by an additional letter from W. F. Douglass to the agents, dated April 9th, and a reply to the same, by the latter, dated April 15, 1872, repeating their position that the policy was forfeited and void, and that there was no legal claim to the insurance.

The defendants below, after an unsuccessful motion for a nonsuit, put in evidence the following draft, given by Samuel

Statement of Facts.

H. Pendleton in part payment of the premium which became due July 14, 1871:

"$325.00. AUBURN, ARK., *July 14th*, 1871.

Three months after date, without grace, pay to the order of the Knickerbocker Life Insurance Co. three hundred and twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity.

[Signed] S. H. PENDLETON.

To Moses Greenwood & Son, New Orleans, La."

Evidence was then introduced by the defendants tending to show that the draft was transmitted by the agents of the company, through the Union and Planters' Bank of Memphis, to the Louisiana National Bank of New Orleans, to be presented for acceptance, and was received by the latter bank and presented on the 29th of September, 1871; that acceptance was refused by Moses Greenwood & Son, the drawees, assigning as the reason of their refusal that they had no advice; that no protest of the draft for non-acceptance was made, because it was marked "no protest;" but that it was returned, on the 30th of September, to the Union and Planters' Bank of Memphis; that it was again transmitted to the Louisiana National Bank, on the 5th of October, 1871, for collection, but was not paid when it became due, and, for the same reason as before, no protest for non-payment was made, and it was returned to the Union and Planters' Bank on the 17th of November, 1871. No direct evidence of presentment to the drawees for payment was given; but the cashier of the Louisiana National Bank testified that, according to their rules and custom of doing business, it must have been presented for payment when due. Evidence was further introduced tending to show that, on or about the 3d of October, 1871, when the draft was first returned from New Orleans, the agents, Greene & Lucas, informed S. H. Pendleton, by letter, of its non-acceptance; and again, on or about the 20th of November, 1871, they informed him in the same way of its non-payment; that in the latter

part of November, or early in December, 1871, he (Pendleton) called on said agents, and expressed surprise that Greenwood & Co. did not pay his draft, but said that they were then prepared to pay it; that the said agents informed him that, as the policy was lapsed by reason of the non-payment of the draft, it would be necessary, in order to reopen the same, that he should be re-examined; and that he promised to call again, but never did; also, that the dealings of the insurance company in reference to the issue of the policy and the payments of premiums thereon, were solely with the said S. H. Pendleton.

Moses Greenwood, of the firm of Moses Greenwood & Son, a witness on the part of the plaintiffs, testified to the effect that his firm were cotton factors and commission merchants, and acted as such for S. H. Pendleton, in 1869, 1870, and 1871, furnishing him supplies for his plantation and selling his cotton crops; and kept a running account with him; and were accustomed to accept and pay his drafts even when he had no money or property in their hands, so that he had good reason to believe that the draft in question would be honored. The witness presented a copy of the account of his firm with S. H. Pendleton, which showed a balance in his favor on the 14th of July, 1871, of about $200, but a balance against him on the 14th of October, 1871, of $502.52. The witness stated that he found no entry of the acceptance or payment of the draft in question, and had no recollection of it other than what was shown by the books and by certain letters from the firm to Pendleton. One of these letters, dated September 29, 1871, informed him (Pendleton) that his draft for life policy (some $330) was presented that day for acceptance; that, having no advice of it, they had requested that it be held till they got an answer from him, and asked him to write at once if he wanted it paid. The other letter, dated November 4, 1871, acknowledged one from him (Pendleton) of the 27th October, and added, "Will pay that insurance note when presented, as you request. This is the first advice we have had about it."

After the evidence was closed the defendant below (the insurance company), through its counsel, requested the court to direct the jury to find a verdict in favor of the defendant on

the ground that the policy sued on was not in force at the time of the death of the person whose life was insured thereby. The court refused to give such direction, and the defendant excepted.

The defendant then requested the court to give the following several instructions to the jury:

1. That upon the undisputed facts appearing from the evidence the defendant is entitled to a verdict.

2. That the reception of this draft for $325 by the defendant on account of premium, imposed upon the drawer or the plaintiffs the duty of making absolute provision for its payment at maturity at the place of payment, and if he or they failed to do so, the defendant was under no obligation to present the same for payment.

3. That the refusal of the drawees to accept the draft when presented for acceptance relieved the defendant from its obligation, if any existed, to present the same for payment in the absence of further notice that the same would be paid when due.

4. That if they believed from the evidence either that the drawer had not placed any funds in the hands of the drawees to meet the draft at its maturity, or that it was in fact presented for payment at or after its maturity, the policy became void and of no effect upon the death of the party whose life was insured thereby, and the plaintiffs are not entitled to recover.

The court refused so to charge, and the defendant excepted.

Thereupon the court proceeded to charge the jury upon the whole case; but it will only be necessary to present the following extracts, in which the court finds that the charge was erroneous, and upon which the whole case depends.

"The defence of the company is that the condition for payment has been violated, and the policy ceased before the death of Pendleton. This is undoubtedly a good defence unless the law imposed some obligation on the company to perform some duty in respect to the draft which it has not performed, and the neglect of which precludes it from invoking the breach of the condition for payment as a defence. In other words, if by its own laches, and neglect of the duty assumed by it as holder of the draft, the failure to pay has occurred, or the parties have

been injured, the company cannot rely on the breach of this condition as a defence. What, then, were the duties imposed on the company as the holder of this draft by the contract of the parties? . . . I have concluded that the true measure of the duty of the company is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed, in reference to this paper, all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any holder would be, under the commercial law. On the other hand, any neglect to proceed properly in the discharge of that duty would be excused under the same circumstances as such neglect would be excused with any other holder, and not otherwise. The condition in the policy was a security to the company, of which it can avail itself only by showing a strict compliance with that duty, or some lawful excuse for non-compliance."

"There is no doubt the draft was sent forward for acceptance, presentment, and acceptance refused. . . . It was not protested for non-acceptance, the agents of the company having directed that no protest should be made, and no legal or proper notice of non-acceptance was given to the drawer. This was a clear breach of duty on the part of the company, and precludes it from claiming a forfeiture of the policy unless excused, as to which I shall instruct you further on. If protest and legal notice had been given for non-acceptance, the company need not have presented for non-payment; but, not having protested the note for non-acceptance, it was its duty to present at maturity and demand payment. There is some dispute as to whether the note was presented for payment on the day of its maturity, namely, October 14, 1871, or later, but there is no claim that it was protested for non-payment and legal notice given. The only notice was a letter from the agents, dated November 20, 1871. This was not legal notice, and the drawer was clearly discharged unless the neglect was excused. By this neglect, as well as the neglect to protest and give legal notice for non-acceptance, the company precluded itself from relying on a breach of the condition in the policy."

Argument for Plaintiff in Error.

Mr. Leslie W. Russell for plaintiff in error.—Proof of death should have been furnished as required by the policy. Notice alone was not sufficient. *Taylor* v. *Ætna Life Ins. Co.*, 13 Gray, 434; *Davis* v. *Davis*, 49 Maine, 282; *Hincken* v. *Mutual Benefit Ins. Co.*, 50 N. Y. 657. The question of waiver was for the court. The contract was broken by the assured, and was not in force at the time of his death. The premium was not paid when it became due. The draft given was not paid. On its face it showed that the policy was to become void if the draft was not paid. Being a time draft no presentment for acceptance before maturity was necessary. *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Townsley* v. *Sumrall*, 2 Pet. 170. Nor was a protest for non-acceptance necessary. The laws of Arkansas, where the contract was made, govern. *Slacum* v. *Pomery*, 6 Cranch, 221; *Bank of the United States* v. *United States*, 2 How. 711. The Arkansas statutes enforce no special duties. They confirm the law merchant. The decisions of this court will be governed by the general law merchant. *Swift* v. *Tyson*, 16 Pet. 1. It is well settled that no particular form of notice is necessary, and that it need not even be in writing. *Cuyler* v. *Stevens*, 4 Wend. 566; *Boyd's Admrs.* v. *Savings Bank*, 15 Gratt. 501; *Cayuga Bank* v. *Warden*, 1 N. Y. 413; *Mills* v. *Bank of United States*, 11 Wheat. 431. And where the notice is received, its mode of transmission is immaterial. *Hyslop* v. *Jones*, 3 McLean, 96; *Bank United States* v. *Corcoran*, 2 Pet. 121. This court has laid down the rule that protest for non-acceptance need not be shown in proceedings for non-payment. *Brown* v. *Barry*, 3 Dallas, 365; *Clarke* v. *Russell*, 3 Dallas, 415. As to presentation for payment at maturity there is no finding on the subject, and it was not necessary. The draft was for the accommodation of the drawer. Notice of non-acceptance having been given him, a demand for payment at maturity as against him was not necessary. *Walker* v. *Stetson*, 19 Ohio St. 400; *Exeter Bank* v. *Gordon*, 8 N. H. 66; *Plato* v. *Reynolds*, 27 N. Y. 586; *Watson* v. *Tarpley*, 18 How. 517. As he had no funds in the drawee's hands no demand was necessary, unless he was justified in expecting it would be paid. *Dickins* v. *Beal*, 10 Pet. 572. In this case he

knew it would not be paid. See *Rhett* v. *Poe*, 2 How. 457; *Valk* v. *Simmons*, 4 Mason, 113. The drawer suffered no injury from non-presentment for payment; or if he was injured the injury was waived. The request to present the draft again for payment, made after knowledge that he had received no protest, was a waiver of all informalities. *Matthews* v. *Allen*, 16 Gray, 594; *Thornton* v. *Wynn*, 12 Wheat. 183; *Sigerson* v. *Matthews*, 20 How. 496. The draft was not a payment, and the premium was never paid. The giving a receipt makes no difference. It may always be shown that no money was actually received. *Bradford* v. *Fox*, 38 N. Y. 289. Retaining the draft did not affect the question. *Nichols* v. *Michael*, 23 N. Y. 264. The draft shows that it was not to be received as payment unless itself paid. *Roehner* v. *Knickerbocker Life Ins. Co.*, 63 N. Y. 160.

Mr. D. H. Poston and *Mr. W. K. Poston*, for defendants in error.—The letters from plaintiff's uncles were both notices and proofs of death within the meaning of the policy. They were treated by the company as a sufficient compliance, and even if not such, further compliance was waived. Upon no proper rule of construction, can the words "satisfactory proof" be held to mean sworn proofs. This court, in a case where the policy stipulated to pay "ninety days after due notice and satisfactory evidence of death," ruled that the proof need only be as to the sole fact of death. *Insurance Co.* v. *Rodel*, 95 U. S. 232. To the same effect is the case of *Insurance Co.* v. *Schwenk*, 94 U. S. 593. So in Massachusetts it was decided that only such proof as was required by the policy was necessary, and that neither the usage of the particular company, nor the general usage and understanding of insurance companies generally, could determine what should be necessary, unless plaintiff knew or had notice of it when he took the policy. *Taylor* v. *Ætna Life Insurance Co.*, 13 Gray, 434. It is true that it has been decided that such a stipulation of the policy requires sworn proofs, as in *O'Reilly* v. *Guardian Ins. Co.*, 60 N. Y. 169. But that is an unsatisfactory solution. The question being unsettled in this court, we insist upon the construction hereinbefore

contended for as the proper logical and reasonable construction. The proposition that such a state of facts as appears in this record establishes a waiver of preliminary proofs is supported by an overwhelming weight of authority. We cite from this court *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390; *Insurance Co.* v. *Warehouse Co.*, 93 U. S. 527, 546; *Columbia Life Ins. Co.* v. *Lawrence*, 10 Pet. 507. The letter relied upon as notice of the dishonor of the draft for non-acceptance was not a valid notice. A notice given before dishonor is premature. 2 Daniel Negotiable Instruments, § 1035, 3d Ed. 87. If valid otherwise, it was not posted in time. *Bank of Alexandria* v. *Swan*, 9 Pet. 33; 2 Daniel Negotiable Instruments, § 1039, 3d Ed. p. 90. Coming from the drawee it was invalid. *Stanton* v. *Blossom*, 14 Mass. 116. The proposition that the law of Arkansas governs is not sustained by authority. The law of the place of payment governs. *Pierce* v. *Indseth*, 106 U. S. 546. See *Bird* v. *Bank*, 93 U. S. 96; *Munn* v. *Lake*, 4 How. 263. Pendleton had the right to draw, and reasonable ground to expect that his draft would be honored. Where a bill is not received in absolute payment of a debt the failure to present, and, in case of dishonor, to properly notify the drawer, releases him both on the draft and on the original debt. Daniel Negotiable Instruments, § 1276; *Smith* v. *Miller*, 43 N. Y. 171. Where forfeiture of a policy of insurance is claimed for non-payment of the premium, and the failure to pay was caused by the omission of the company to do some precedent act, which it had either agreed to do, or even by its usual course of dealing induced the assured to believe it would do, then it is estopped to claim the forfeiture. *Insurance Co.* v. *Eggleston*, 96 U. S. 572; *Insurance Co.* v. *Doster*, 106 U. S. 30. The conduct of one party to a contract, which prevents the other from performing his part, is an excuse for non-performance. *United States* v. *Peck*, 102 U. S. 64; *Young* v. *Hunter*, 6 N. Y. 203.

Mr. Justice Bradley delivered the opinion of the court. He recited the facts as above stated, and continued:

The court instructed the jury, in substance and effect, that the insurance company, having accepted the draft or bill of

Dr. Pendleton on his factors for the premium due on the policy, was in duty bound to pursue all the steps necessary to enable it to recover against him as drawer of said draft or bill, regarded as a bill of exchange under the law merchant—amongst which steps one was that of protesting the bill for non-acceptance, and another, that of protesting it for non payment. The court held that, whilst it was not necessary that the draft should have been presented for acceptance before maturity, yet that, having been so presented, and acceptance refused, the defendants ought to have had it regularly protested, and notice of dishonor given to the drawer. The court further held, that if the draft was presented for payment, and not paid, the defendants were bound to have had it regularly protested for non-payment. True, it was conceded, that the defendants might be excused from the performance of these duties if it were shown that the drawer had no funds in the hands of his factors, and had no reasonable expectation that his draft could be accepted. But, unless this excuse could be established, the doctrine of the charge was, that the defendants must have complied with all the before-mentioned formalities incident to commercial paper, in order to entitle them to the benefit of the condition for avoiding the policy.

As the drawer of the bill in this case was really interested in the policy on behalf of his children, we do not concur in the view taken by the court below, that a forfeiture of the policy required, on the part of the insurance company, as holders of the bill, the same diligence, and performance of the same acts, as were required of them to make the drawer liable upon it. For the latter purpose a regular protest for non-acceptance, or non-payment, or a proper excuse for omitting them, such as want of funds in the hands of the drawees, was undoubtedly necessary; for, according to the general law prevailing in this country, the draft was a foreign bill of exchange, being drawn by a person resident in one State upon persons resident in another. *Buckner* v. *Finley*, 2 Pet. 586, 589; *Dickins* v. *Beal*, 10 Pet. 572, 579; Story on Bills, §§ 23, 465; 1 Daniel Negotiable Instruments, §§ 6–9. But whether the policy would not be forfeited without any such protest, or excuse

for non-protest, is a different question, depending upon the contract of the parties. This contract was expressed on the face of the draft itself, which contained a statement that it was given for premium on policy No. 2,346, followed by this condition: "which policy shall become void if this draft is not paid at maturity." This was the condition and the only condition on which the policy was to become void. The primary condition expressed in the policy itself, of forfeiture for non-payment of the premium on the day it became due, was waived by the receipt of the draft, and the consequent extension of the time thereby. The renewal receipt given when the draft was received was absolute, it is true, acknowledging the receipt of the premium, and declaring the policy continued in force for another year. But this receipt is explained by the actual transaction, the mode of payment being shown to be the making and delivery of the draft in question, having in it the condition above expressed, which condition was in exact accordance with the secondary condition contained in the policy, namely, "failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein." We think it clear, therefore, that, notwithstanding the renewal receipt, the condition expressed in the draft was binding on the insured. As we have shown, that condition was that the policy should become void if the draft was not paid at maturity. The draft, being without grace, matured on the 14th of October, 1871. If not paid on that day the policy was forfeited, unless it was the usage of the New Orleans banks to grant days of grace even when they were waived, of which there was some evidence on the trial. In such case the forfeiture would take place, if the draft were not paid on the 17th of October. Of course, it must be presented for payment on the one day or the other—for the drawees could not pay it unless it was presented, for they would not know where to find it. But supposing it to have been presented for payment, and payment refused by the drawees, then the condition of forfeiture was complete. Protest and notice of non-payment

might be further necessary to hold the drawer, if the insurance company desired to hold him; but they were not necessary to the forfeiture. That occurred when non-payment at maturity or presentation occurred. The drawer, Pendleton, who took entire charge of the policy for his children, put its existence on the condition of payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid; that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not. Such, we think, was the clear purport of the condition, and as the court below took a different view, holding that the insurance company was bound not only to present the draft for payment, but to have it protested for non-payment, before a forfeiture of the policy would ensue, the judgment must be reversed.

What might have been the result had the bill of a stranger been taken in payment of the premium, is a different question which we are not now called upon to decide. It may be that in such a case the company would have been required to take all the steps necessary to fix the liability of all the parties to the bill.

With regard to the other points raised by the plaintiffs in error a few words will suffice.

1. They contended at the trial, and contend here, that no presentment of the draft was necessary, because Pendleton had no funds in the hands of the drawees. The substance and effect of the charge given by the court on this point was, that if Pendleton had a reasonable expectation that the draft would be accepted and paid; as if there was an agreement between him and the drawees, that they would accept his drafts, or a course of dealing between them in which the drawees were accustomed to accept his drafts without reference to the state of their mutual accounts, he was entitled to demand and notice; or, according to our view of the principal point in the case, the insurance company was bound to present the draft for payment at its maturity. In this we think there was no error. The law is laid down substantially to the same effect in *Dickins* v. *Beal*, 10 Pet. 572, 577; and see 2 Daniel Negotiable Instruments, § 1074.

2. The plaintiffs in error contend that as the draft was not accepted by the drawees when presented for acceptance, they were under no obligation to present it for payment at maturity. This would be so in an ordinary case of non-acceptance of a bill, provided it was followed up by protest and notice. But this particular draft, or bill, had a condition in it, that the policy should be void if it were not paid at maturity, and the plaintiffs in error claimed the benefit of this condition. As forfeitures upon condition broken are to be strictly construed, the condition in this case could not be regarded as broken by the non-acceptance of the bill before maturity; but could only be broken by non-payment at maturity. The drawees might not have felt authorized to accept the bill when it was presented; and yet, when it came to maturity, in consequence of further advice from the drawer, or other reasons, they might be ready and willing to pay it. The holders of the policy were entitled to this opportunity of obviating a forfeiture. We are of opinion, therefore, that the court below was right in holding that a presentment for payment was necessary notwithstanding the non-acceptance.

3. The plaintiffs in error further contend that the charge was erroneous in holding that no formal proof of the death of S. H. Pendleton was necessary in this case. On this point the charge was as follows: "As to the proof of loss not being filed, it is conceded notice of the death was given. If, when that was done, the agents of the company repudiated all liability, and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file it cannot alter the case." We think that there was no error in this instruction. The weight of authority is in favor of the rule, that a distinct denial of liability and refusal to pay, on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished. *Tayloe* v. *Merchants' Fire Insurance Co.*, 9 How. 390, 403; *Allegre* v. *Maryland Insurance Co.*, 6 H. & J. 408; *Norwich & N. Y. Transportation Co.* v. *Western Mass. Insurance Co.*, 34 Conn. 561; *Thwing* v. *Great Western*

Insurance Co., 111 Mass. 92, 110; *Brink* v. *Hanover Fire Insurance Co.*, 80 N. Y. 108; May on Insurance, §§ 468, 469.

The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground without reference to the want of defect of the preliminary proof, the occasion for it ceases, and it will be deemed to be waived. And this can work no prejudice to the insurers, for in an action on the policy the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proofs were exhibited or not.

The judgment of the Circuit Court is reversed, and the cause remanded with directions to award a new trial.

POWER & Another *v.* BAKER & Another.

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

Submitted November 24, 1884.—Decided December 15, 1884.

Motions to vacate a supersedeas, and other motions of that kind, made before the record is printed, must be accompanied by a statement of the facts on which they rest, agreed to by the parties, or supported by printed copies of so much of the record as will enable the court to act understandingly, without reference to the transcript on file.

This was a motion to vacate a supersedeas.

Mr. J. H. Davidson for the motion.

Mr. Edward G. Rogers opposing.

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

Neither the record in this case, nor the part thereof on which this motion depends, has been printed, and the appellees have neglected to state in their motion papers the facts as presented by the transcript on which they rely. An affidavit has been filed to the effect that the appellees were not served with a

Counsel for Parties.

citation, nor with a notice of an application for the allowance of an appeal, until after the expiration of sixty days, Sundays exclusive, from the time of the rendition of the decree appealed from. In the same affidavit it is stated, however, that the proctor of the appellees was informed that an appeal bond had been presented to the Circuit Court for approval within the sixty days. It is also stated that on the 10th of January, 1884, an order allowing an appeal was entered *nunc pro tunc* as of the date of the presentation of the bond. An affidavit filed by the appellants shows, that, on the day the bond was presented to the Circuit Court, it was approved, allowed and filed in the cause. As upon this motion it rests upon the appellees to show that the bond was not accepted in time, and that has not been done, the motion to vacate the supersedeas is denied.

In this connection we take occasion to say, that motions of this kind, made before the record is printed, must be accompanied by a statement of the facts on which they rest, agreed to by the parties, or supported by printed copies of so much of the record as will enable us to act understandingly, without reference to the transcript on file.

Motion denied.

SCHARFF & Another *v.* LEVY & Another.

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

Submitted November 24, 1884.—Decided December 15, 1884.

A case cannot be removed from a State court under the act of March 3, 1875, 18 Stat. 470, after hearing on a demurrer to a complaint because it did not state facts sufficient to constitute a cause of action. *Alley* v. *Nott*, 111 U. S. 472, affirmed.

The facts are stated in the opinion of the court.

Mr. John W. Noble and *John C. Orrick* for plaintiff in error.

Mr. John P. Ellis and *Mr. Jeff. Chandler* for defendant in error.

Opinion of the Court.

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

The order remanding this cause to the State court from which it was removed is affirmed on the authority of *Alley* v. *Nott*, 111 U. S. 472, where it was decided that a case could not be removed from a State court under the act of March 3, 1875, ch. 137, 18 Stat. 470, after a hearing on a demurrer to a complaint because it did not state facts sufficient to constitute a cause of action. To that decision we adhere. The Code of Civil Procedure of New York, from which State that cause came, provided that the court might, in its discretion, allow the party in fault to plead over or amend after the decision against him on a demurrer. In Missouri, from which State this case comes, § 3518 of the Revised Statutes, 1879, provides that a plaintiff may amend, of course, with or without costs, as the court may order. But in Missouri, as in New York, a general demurrer to a petition or complaint raises an issue of law, which when tried, will finally dispose of the case unless the plaintiff amends or the defendant answers, as may be required. "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 of another suit for the same cause of action." An issue of law involving the merits of the action is as much tried on the hearing of a demurrer in Missouri as it is in New York. The fact that in Missouri an amendment may be made or a plea filed as a matter of course does not affect the principle on which the right of removal depends.

The demurrer in the present case is not set out in full in the record, but it is conceded, in the brief of counsel for the plaintiffs in error, that it was "on the ground that the facts stated did not constitute a cause of action," and that would have been a fair inference from the entry, "demurrer filed," if the admission had not been made. *Affirmed.*

Syllabus.

MATTOON *v.* McGREW.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 26, 1884.—Decided December 15, 1884.

Hitz v. *National Metropolitan Bank*, 111 U. S. 722, was decided after elaborate argument and careful consideration, and is adhered to by the court.

Mr. S. S. Henkle for appellant.

Mr. Leigh Robinson and *Mr. James Lowndes* for appellee.

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

A motion has been made to dismiss this appeal because the value of the matter in dispute does not exceed $2,500. From the facts appearing in the record, supplemented as they have been by affidavits as to value, we are satisfied this motion should be overruled, and it is so ordered.

It is conceded in the brief filed for the appellee "that the essential facts in this case are substantially like those in *Hitz* v. *The National Metropolitan Bank*, 111 U. S. 722." That case was decided on full consideration after an elaborate argument on both sides, and we are satisfied with the conclusion then reached. We therefore reverse this decree, on that authority, and remand the cause, with instructions to enter a decree in accordance with the prayer of the bill, enjoining the appellee McGrew from selling, or attempting to sell, the marital right or interest of the husband of the appellant in the property described in the bill for the payment of his judgment against the husband. *Reversed.*

HALFERTY *v.* WILMERING.

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

Argued December 2, 1884.—Decided January 5, 1885.

In Iowa, a general denial by a defendant, in an action on a contract, of each and every allegation in a petition which sets forth the contract and avers

that the plaintiff had duly performed all the conditions on his part to be performed, admits the performance of a condition precedent in the contract that the plaintiff should deposit a sum of money for his faithful performance thereof.

The facts that make the case are stated in the opinion of the court.

Mr. Galusha Parsons for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, sued to recover damages for an alleged breach of a written contract, entered into at Chicago, for the sale and delivery of 1,000 hogs, to average 250 pounds or over, to be delivered at Plattsburg, Missouri, in the month of December, 1876, at the seller's option, at $4.50 per hundred gross weight. The contract contained the following clause:

"Each party hereby agrees to deposit one thousand dollars ($1,000) each in the Union Stock Yard National Bank for the faithful performance of the above contract, the thousand dollars to be forfeited to the party who fails to perform his part of the contract."

The petition, setting out the cause of action, alleged that "the plaintiff duly performed all the conditions upon his part to be kept and performed."

The answer stated that the defendant "denies each and every allegation in said petition, and the three several counts thereof contained as fully and to the same purpose and effect as though each special allegation were herein specifically put in issue."

On the trial it was claimed by counsel for the plaintiff that the deposit of money, specified in the contract, was not a condition precedent to the right of recovery; but that if it was, its performance by the plaintiff was admitted upon the face of the pleadings. The court was requested so to instruct the jury, and its refusal to do so is now alleged as error.

The obligation to make the stipulated deposit rested upon each party, as one of the terms of the agreement, so that to charge

the other with a default, it became necessary to allege and prove performance, or some legal excuse for non-performance. And if the National Bank, specified in the contract, refused to become the depository for the purposes of the agreement, none other could be substituted without the consent of both parties. This is the plain meaning of the stipulation. It is one the parties had a right to make; and their agreement on the subject is the law of the case.

The denial in the answer of each and every allegation in the petition would certainly seem, as far as words are concerned, to put in issue the performance in this respect, as in every other, on the part of the plaintiff, alleged in the petition.

But counsel for the plaintiff in error contends that such is not its legal effect under the Code of Iowa, which also regulates the pleading and practice in such cases in the courts of the United States sitting in that State.

By § 2715 of the Iowa Code, it is provided that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part;" and § 2712 enacts that every material allegation in a pleading not controverted by a subsequent pleading shall, for the purposes of the action, be deemed true.

§ 2717 is as follows:

"If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated."

The two other sections referred to are §§ 2714 and 2716, the latter of which provides that, "a plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way."

Opinion of the Court.

The application of the rule prescribed in § 2717 to the cases described in § 2716, has several times been considered and adjudged by the Supreme Court of Iowa. In the most recent of them, to which our attention has been called, *Mayes, Adm'r*, v. *Turley*, 60 Iowa, 407, the plaintiff averred in his petition that he was the duly appointed, qualified and acting administrator of the estate, &c. The defendants' answer said, they denied each and every allegation in said petition contained. It was held by the court that the jury should have been instructed that, the denial being insufficient, they could not take notice of it, and they should therefore consider it admitted that the plaintiff was duly appointed and qualified administrator.

So in *Stier* v. *The City of Oskaloosa*, 41 Iowa, 353, it was held that a bare denial, in the answer, of the averment in the petition, that the defendant was a corporation, does not put that fact in issue.

To the same effect are the following cases: *Coates* v. *The Galena and Chicago Union Railroad Co.*, 18 Iowa, 277; *Blackshire* v. *The Iowa Homestead Co.*, 39 Iowa, 624; *Gates* v. *Carpenter*, 43 Iowa, 152.

No distinction can be drawn between the application of the rule to the cases mentioned in § 2716 and that specified in § 2715; and upon such a question we feel bound to adopt the construction of the State Code which has been established by the decisions of the Supreme Court of Iowa.

It follows, therefore, that the Circuit Court erred in its instruction to the jury that the alleged performance, on the part of the plaintiff below, of the condition of the contract which required a deposit of money in the Union Stock Yard National Bank, was a matter in issue and requiring proof; and in not instructing them, as requested by the defendant, that it was to be taken as a fact without proof, upon the admission in the pleadings.

For this error,

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to award a new trial.

THAYER & Another *v.* LIFE ASSOCIATION OF AMERICA & Others.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Submitted December 16, 1884.—Decided January 5, 1885.

Two citizens of West Virginia conveyed to a trustee certain real property in that State, to secure the payment of notes executed by them to a Missouri corporation, which was subsequently dissolved, and its assets placed in the hands of a citizen of the latter State. Upon default in the payment of the notes, the trustee, under authority given by the deed, advertised the property for sale. The grantors thereupon instituted a suit in equity in one of the courts of West Virginia to enjoin the sale, making the trustee, the Missouri corporation, and the person who held its assets, defendants. Upon the joint petition of that corporation and the defendant holding its assets, the cause was removed to the Circuit Court of the United States, and was there finally determined: *Held*, That since the trustee was an indispensable party, his citizenship was material in determining the jurisdiction of the Circuit Court; and as that was not averred, and did not otherwise affirmatively appear to be such as gave the right of removal, the decree must be reversed and the cause remanded to the State court.

By a duly recorded deed of August 22, 1872, Otis A. Thayer and William T. Thayer conveyed to Edward B. Knight certain real estate in Kanawha County, State of West Virginia, in trust, to secure the payment of several notes executed by the grantors to the Life Association of America, a corporation created and organized under the laws of the State of Missouri. The deed was upon the condition that if the notes were paid at maturity, and the covenants therein contained were kept and performed, the property should be released; but if the notes, or any of them, were not paid as stipulated, or if said covenants were not fully kept, then the deed should remain in full force, with the right in the trustee to take immediate possession of the property; that, after such default, the grantors and their heirs and assigns should hold the premises conveyed as tenants only of the trustee from month to month, and the latter might proceed to sell the property, at public auction, to the highest bidder, on the terms and conditions prescribed by the laws of the State, first giving twenty days' notice of the

time, terms, place of sale, and the property to be sold, by advertisement in some newspaper; upon such sale to execute and deliver a deed in fee simple of the property sold; receive the proceeds of sale, out of which shall be paid, first, the cost and expenses of the trust; next, all amounts expended as aforesaid for taxes and other purposes, with interest, as above mentioned; and then, the amount that might remain unpaid on the notes. The deed also provided that any failure to pay the notes at their respective maturities, or to keep its covenants, should cause all of the notes to become and be considered due and payable, for the purpose of the trust, at the time of such default.

Knight, the trustee, under the authority given by the deed, having advertised the property for sale on the 25th of April thereafter, at public auction, to the highest bidder, for the purpose of satisfying the debt secured by it to the Life Association of America, this suit was commenced in the Circuit Court of Kanawha County, West Virginia, by the grantors in the deed of trust, against The Life Association of America, Wm. S. Relfe, Superintendent of the Department of Insurance of the State of Missouri, and Edward B. Knight, Trustee. The bill showed that by a decree of the Circuit Court of the county of St. Louis, Missouri, the Life Association of America was dissolved, and its assets placed in the hands of the defendant Relfe, as superintendent of the Insurance Department of that State. It set out the consideration of the before-mentioned notes, the execution of the deed of trust, and the proposed sale of the property, by the trustee, at the instance of Relfe. The complainants contended, upon grounds which need not be here stated, that the trust debt was paid, and that there was a balance due them of $91.63. Claiming that the sale of the trust property would be unjust and inequitable, they asked that the trustee be enjoined from selling it; also, that the trust debt be decreed to be extinguished.

A temporary injunction against the sale was issued. In due time the defendants, the Life Association and Relfe, appeared and filed their joint petition and bond for the removal of the cause into the Circuit Court of the United States. The peti-

tion averred that at that time, as well as at the commencement of the action, the complainants were citizens of West Virginia, while the Life Association of America and Relfe were citizens of Missouri. There was no allegation of the citizenship of Knight, the trustee. He was alleged, in the petition for removal, to have no interest in the suit, and to be a nominal party only. The right of removal was recognized by the State court. Subsequently, in the Circuit Court of the United States, a demurrer to the bill was sustained; and no amendment having been made, the suit was dismissed.

Mr. Charles C. Cole, and *Mr. J. Holdsworth Gordon*, for appellants.

Mr. R. G. Barr, for appellee.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated, and continued:

The trustee was not a merely nominal party. The object of the suit was to prevent him from selling the property under the power given by the deed of trust. The relief asked could not have been granted without his being before the court. There was no separable controversy between the complainants and the other defendants, touching the sale of the property, which could have been determined between them without the presence of the trustee. He was, therefore, an indispensable party defendant. Whether he had the right and was under a duty to sell the property was the controversy in which all the parties to the suit were interested. His citizenship, therefore, is material in determining whether the suit was one of which the Circuit Court could take cognizance. The record discloses nothing upon that point. He may be—and we infer from the recitals of the deed of trust that he is—a citizen of the same State with the complainants. If such be the fact, the cause was not one that could be removed. As the trustee and the complainants are on opposite sides of the real controversy in relation to the sale of the property, and since it does not appear, affirmatively, that the Circuit Court had jurisdiction, by reason of the citizenship of the parties, the decree must be

reversed, with directions—unless such jurisdiction, upon the return of the cause, shall be made to appear—to remand the suit to the State court. *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Gardner* v. *Brown*, 21 Wall. 36; *Ribon* v. *Railroad Co.*, 16 Wall. 446; *Knapp* v. *Railroad*, 20 Wall. 117; *Grace* v. *American Ins. Co.*, 109 U. S. 278; *Mansfield Railway Co.* v. *Swan*, 111 U. S. 379, 381–2; *American Bible Society* v. *Price*, 110 U. S. 61; *Barney* v. *Latham*, 103 U. S. 205; *Blake* v. *McKim*, 103 U. S. 336.

It is so ordered.

ST. PAUL & SIOUX CITY RAILROAD COMPANY & Another *v.* WINONA & ST. PETER RAILROAD COMPANY.

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

Argued December 18, 19, 1884.—Decided January 5, 1885.

In grants of lands to aid in building railroads, the title to the lands within the primary limits within which all the odd or even sections are granted, relates, after the road is located according to law, to the date of the grant, and in cases where these limits, as between different roads, conflict or encroach on each other, priority of date of the act of Congress, and not priority of location of the line of road, gives priority of title.

When the acts of Congress in such cases are of the same date, or grants are made for different roads by the same statute, priority of location gives no priority of right; but where the limits of the primary grants, which are settled by the location, conflict, as by crossing or lapping, the parties building the roads under those grants take the sections, within the conflicting limits of primary location, in equal undivided moieties, without regard to priority of location of the line of the road, or priority of construction.

A different rule prevails in case of lands to be selected in lieu of those within the limits of primary location, which have been sold or pre-empted before the location is made, where the limits of selection interfere or overlap

In such cases neither priority of grant, nor priority of location, nor priority of construction, gives priority of right; but this is determined by priority of selection, where the selection is made according to law.

The facts which make the case are stated in the opinion of the court.

Mr. E. C. Palmer for plaintiff in error.

Mr. Thomas Wilson for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Minnesota, and a motion is made to dismiss it for want of jurisdiction.

It will sufficiently appear in the opinion on the merits, that the rights asserted by both parties are founded on acts of Congress, and require the construction of those acts to determine their conflicting claims. The motion to dismiss, therefore, cannot prevail.

The source of this controversy is to be found in the act of Congress of March 3, 1857, 11 Stat. 195, making grants of land to the Territory of Minnesota and the State of Alabama to aid in the construction of railroads. The first section of this statute—the important one in the case—is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the north at such point as the Legislature of said Territory may determine; from St. Paul and from Saint Anthony via Minneapolis to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux River, with a branch via Faribault to the north line of the State of Iowa, west of range sixteen; from Winona via Saint Peter, to a point on the Big Sioux River south of the forty-fifth parallel of north latitude; also from La Crescent, via Target Lake, up the valley of Root River, to a point of junction with the last-mentioned road, east of range seventeen, every alternate section of land, designated by odd numbers, for six sections in width on each side of

each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the Governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid; *Provided*, That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches; *Provided further*, That the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; *And provided further*, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the rights of way only shall be granted, subject to the approval of the President of the United States."

The Territory of Minnesota accepted this grant and conferred the right to the lands which came to it by means of its

provisions on certain railroad corporations, which failed to perform their obligations to the State; by reason of which, and by the foreclosure of statutory mortgages, the State resumed control of the lands. It is unnecessary to pursue the various steps by which it was done, but it may be stated shortly that the right to build one of the roads mentioned in the act of Congress, and to receive the lands granted in aid of the enterprise, namely, from St. Paul and St. Anthony, by way of Minneapolis, to the southern boundary of the State, in the direction of the mouth of the Big Sioux River, became vested in the St. Paul and Sioux City Railroad Company, the plaintiff in error in this case.

A similar right in regard to the road to be built from Winona *via* St. Peter to a point on the Big Sioux River, south of the forty-fifth parallel of latitude, and to the lands granted by the act in aid of it, became vested in the Winona and St. Peter Railroad Company, the defendant in error.

These companies have complied with the terms of the grant by Congress and by the Minnesota Legislature, and completed the construction of the roads which they undertook to build. They have also each of them, received large quantities of the land appropriated by the act of March, 1857, and by subsequent acts on the same subject, and, at one point where the lines of the two roads crossed, so that the grant of lands to each of the roads ran into the other's limit, the conflict has been settled by adopting the principle of an equal undivided interest in the lands so situated.

The present controversy has relation to another part of the general course of these roads, where the lines of their location, *not* approaching each other so close that the limits of six miles within which the alternate six sections are to be first sought for interfere with each other, but so close that the fifteen-mile limits, under the act of 1857, of selection for lands sold or pre-empted *do* overlap each other, as do also the limits of the extension of the grants under the acts of 1864 and 1865, to be hereafter considered.

It is in regard to the lands to be *selected* under all these grants, and chiefly in regard to the claim of the St. Paul Com-

pany, that, in search of its deficient lands *in place* (using that phrase for lands within six miles of its road), which had been disposed of before its location, it can, within its limit of fifteen miles under the original act, or its twenty miles under the subsequent acts, make those selections of odd-numbered sections within the six-miles limit of the Winona Company, that the present controversy arises.

The Secretary of the Interior, after a contest before the department between the parties to the present litigation, certified to the State of Minnesota, on May 14, 1874, a large quantity of lands, of odd-numbered sections, within the six-miles limit of the Winona road, as land properly selected by the St. Paul Company, to make up its deficiencies of lands within its own six-miles limits, and also to make up its deficiencies within the twenty-miles limits before referred to. A small part of these lands was within the fifteen-miles limits of the Winona road, and not within its six-miles limit.

Thereupon the Winona Company brought the present suit, in the proper court of the State, to have a declaration of its rights in the lands described in a schedule attached to the bill, as against the St. Paul Company and others, and to restrain them from receiving a patent, or other evidences of title to the lands, from the governor of the State.

The local court granted relief, but whether to the full extent of the prayer of plaintiff we do not know, for, while the judgment of that court is before us, with a specific description of the pieces of land which it declares to be rightfully owned by the Winona Company, the schedules referred to in the original petition are not in the record. From that judgment the St. Paul Company appealed to the Supreme Court of the State, where it was affirmed, and then prosecuted this writ of error to that judgment of affirmance. See 26 Minn. 179; 27 Minn. 128.

The judge of the District Court for Blue Earth County, in which the case was first tried, made an elaborate finding of the facts on which his judgment was rendered, and also an amended finding, and by these, so far as any controversy on the facts arises, the Supreme Court of Minnesota was governed,

and so is this court. These findings of fact are very full, and are intended to meet several aspects of the case, some of which are, in our view, immaterial to its decision.

The Supreme Court of Minnesota divides the lands in controversy in the suit into four classes, only the first two of which are in controversy here, namely:

First. Those lying without the six, but within the fifteen, miles limit of the defendant (the St. Paul Company), and within the six-miles limit of plaintiff (the Winona Company).

Second. Those lying without the six-miles limit of each company, within the fifteen-miles limit of plaintiff (the Winona Company), and without the fifteen, but within the twenty miles limit of the defendant (the St. Paul Company).

The decision of that court gave the lands embraced in both these classes to the Winona Company, and the St. Paul Company assigns for error here that it is entitled to both classes.

The act of March 3, 1857, is of the class of acts which this court has repeatedly held to be a grant *in præsenti*. Its language is "that there be, and hereby is, granted to the Territory of Minnesota . . . every alternate section of land designated by odd numbers, for six sections in width on each side of said roads;" and though the roads may not be located through these lands for several years, whenever the location is made the alternate odd-numbered sections are thereby ascertained, and the title then perfected relates back to the statute; and as to all such sections, or parts of sections, not sold, or to which a pre-emption right has not attached at the time of this location, the title is valid from the date of the act. There are perhaps other lands reserved by the United States and otherwise excepted out of the grant which do not pass, but these are not material to the decision of the present case.

In this act of March 3, 1857, and in the earlier act of May 15, 1856, granting lands to the State of Iowa for railroad purposes, and perhaps in other similar acts, Congress has, in a single statute, made provisions for several different roads, with different places of beginning and ending, and running in different directions. These roads have, in every instance, been built by different corporations, organized under State laws, having

no other connection with each other than this common source from which the lands are received, and the rights and duties arising under these acts of Congress and the acts of the State on the same subject.

In each and all of these cases the date of the title and the source of the title are the same, because they arise under the same act of Congress. It results from this that no priority of title can be obtained by the earlier location of the line of the road, provided this be done within the time limited for the forfeiture of the grant. Though one of the corporations to which the right to build a road and receive the grant has been given may locate its road two or three years earlier than another company authorized to build another road under the same grant, there is no priority of title nor any priority of right to the lands found in place within the six-miles limit by reason of this earlier location.

As we said before, the title to the alternate sections to be taken within the limit, when *all* the odd sections are granted, becomes fixed, ascertained and perfected in each case by this location of the line of the road, and in case of each road the title relates back to the act of Congress. *Missouri, Kansas & Texas Railroad Co.* v. *Kansas Pacific Railroad Co.*, 97 U. S. 491, 501; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Cedar Rapids Co.* v. *Herring*, 110 U. S. 27; *Grinnell* v. *Railroad Co.*, 103 U. S. 739. In cases where these lines of road do not cross each other, nor the limits within which the lands in place are found do not cross or overlap, nor the limits within which lands in lieu of those sold or pre-empted are to be selected, this is a matter of no consequence.

But in the administration of these land grants of the same date, it has more than once occurred that, by reason of the lines crossing each other or the exterior limits of the lands in place coming so near as to overlap, the question of priority of right has arisen.

In such cases it has been insisted very earnestly that priority of location gave priority of right to all the lands coming within the six-miles limit of the road first located. Such is the argument of plaintiff in error in this case; and while there is here

no lap or collision of the six-miles limit of these two roads as located and constructed as to lands now in question, it is much insisted that, the appellant's road having been first located, this carries with it the identity of the limits within which indemnity lands may be selected for those sold or pre-empted within its own six-miles limit; and as this indemnity limit extends over a part of appellee's six-miles limit, it is urged that this selection, though made years after both roads are located and built, is a right paramount to any right the appellee has within that limit, unless it be the road-bed and right of way.

It is on this ground that the appellant here insists upon its right to enter the six-miles limit of the appellee's road wherever its indemnity limit of fifteen miles and its extension limit of twenty miles overlap the six-miles limit of the latter, and, to the exclusion of the appellee, select there all the odd-numbered sections to which that company would otherwise be entitled.

We do not think this proposition is sound. It has been the practice and usage of the land department, when these conflicting lines relate to the limits within which the designated alternate odd-numbered sections are to be found, to hold that the respective companies take the lands so situated in undivided moieties, without regard to the date of location of the lines of road. The parties to this litigation adjusted the conflict where their roads crossed on that basis, and the principle is a necessary result of the rule that no priority of right is secured by priority of location. We entertain no doubt of its soundness.

It follows from these principles that the decision of the Supreme Court was right that the lands embraced in its first class, namely, those found within the six-miles limit of the road of the plaintiff below, the Winona Company, and without the six-miles limit of the defendant, were definitely fixed and ascertained to belong to the former when its line was located, and could not be taken to supply deficiencies in the grant of the other company, whether its road was located first or last.

A careful examination of the list of lands decreed by the court to be the property of plaintiff below, demonstrates that much the larger proportion of the lands in controversy, probably nine-tenths of them, belong to this class, and are found

within the limits of the Winona Company's six-miles primary grant.

It is also to be remarked that this includes all the lands in controversy lying east of the west line of range thirty-nine (39).

With regard to the lands of the second class, as classified by the Supreme Court, the decision depends upon the right of selection by the respective parties, or of the State for them, for lands not found within the six-miles limit and the twenty-miles limit when their respective roads were located.

By the act of 1857 these selections could only be made within fifteen miles of the line of the road, and the court says that the lands, which it now classifies together in this second group, are within the fifteen-miles or indemnity limit of the Winona road, and are *not* within the fifteen-miles or indemnity limit of the St. Paul road, but they *are* within the twenty-miles limit of the latter road.

In regard to these lands, the court held that the right of the Winona Company was superior, under the act of 1857, to the St. Paul Company's claim, under the act of 1864, and that the latter had no other claim.

This act of 1864, 13 Stat. 72, was one which, by its title, was passed to give to the State of Iowa lands in aid of a road from McGregor, on the Mississippi River, to the western boundary of the State, and another road from Sioux City to the Minnesota line in the county of O'Brien. To this State was given the alternate sections, designated by odd numbers, for *ten* sections on each side of these roads. As the Sioux City road was probably intended to meet the road from St. Paul and St. Anthony towards the mouth of the Big Sioux River, at the line between the two States, Congress by the seventh section enlarged the grant to this latter road to make it equal to that of the Iowa roads. This section reads as follows:

"SEC. 7. That there be, and is hereby, granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from St. Paul and St. Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the State, in the direction of the mouth of the Big Sioux river, four additional alternate sections of

land per mile, to be selected upon the same conditions, restrictions and limitations as are contained in the act of congress entitled 'An act making a grant of land to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands, in alternate sections, to the state of Alabama to aid in the construction of a certain railroad in said state,' approved March third, eighteen hundred and fifty-seven: *Provided*, That the land to be so located by virtue of this section may be selected within twenty miles of the line of said road, but in no case at a greater distance therefrom." 13 Stat. 74.

By the act of March 3, 1865, 13 Stat. 526, it was enacted that the grant of lands to the State of Minnesota to aid in the construction of railroads, of March 3, 1857, "shall be increased to ten sections per mile for each of said roads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided," thus placing all the other Minnesota roads on an equality in that respect with the one from St. Paul and St. Anthony to the Iowa State line. This statute also requires that the first proviso to the first section of the act of 1857 be so amended as to read, that the land so located shall in no case be farther than twenty miles from the lines of said roads, and said lands shall in all cases be indicated by the Secretary of the Interior. It also provides that nothing herein contained shall interfere with any existing rights acquired under any law of Congress heretofore enacted granting lands to the State of Minnesota to aid in the construction of railroads.

There is nothing in either of these statutes which indicates or requires that the six-miles limit of the original grant is to be enlarged, so that within a limit of ten miles all the odd sections fall immediately within the grant on the location of the road. Such language was used in the fourth section of the act concerning the Union Pacific Railroad in 1864, only a few weeks later than the act of that year, now under consideration. There it was enacted that the words of the act of 1862 should be so changed as to change the original limits, and include within that grant the sections added to it by the amendment

of 1864. *United States* v. *Burlington & Missouri River Railroad Co.*, 98 U. S. 334.

In addition to this significant fact, both the acts of 1864 and of 1865 speak of the additional sections to be *selected*, a word wholly inapplicable to lands in place, which are not ascertained by selection, but are fixed and determined by the location of the line of the road. The act of 1865, which is to be considered *in pari materia* on this point, provides that these lands shall be *indicated* by the Secretary of the Interior.

What this word indicated means may admit of some doubt, but taken in connection with the other two statutes, and other acts granting lands to aid in the construction of railroads, it probably means no more than what is expressed in the act of 1857, namely, that the selections of lieu lands shall be made by the governor or his agent, and *approved* by the Secretary.

We think, therefore, that these additional lands granted to appellant, under which it claims the right to go into the limits of appellee's primary grant, are lands to be *selected*, and that some selection on the part of appellee, or for its benefit, must be shown. As to the lands in the second class of the Minnesota Supreme Court, it is found as a fact, by the amended finding, in which the attention of the court was specially turned to that matter, that no selection of any of them was ever made by defendant below, or by any one for that company. The language of the court in its supplementary finding of facts is:

"Neither the State nor the defendant, nor any agent of the State or of the defendant, ever selected for the defendant, or on account of the location or construction of its line of road, any of the lands in controversy in this action lying west of the west line of range (37) thirty-seven."

As all the lands in controversy lying east of this line are included in the first class as being within the plaintiff's six-miles limit of land in place, and as no *selection* on behalf of defendant has ever been made of any of the lands west of that line, these two facts would seem to dispose of the whole controversy. For while the inferior court so far modified its first finding, namely, that both parties did on the 23d day of May, 1872, present lists of all the lands in controversy to the local district

land officers as selections under their respective grants, as to say that no selections were ever presented by *defendant* for any lands west of range thirty-seven, it left the fact that lists of selection for these latter were presented by *plaintiff* to stand, and also of the payment of the office fees, and that the lists were certified to the department. There was then a selection of the lands included in this class made by plaintiff or for its benefit on the 23d of May, 1872, and no selection of them ever made by or on behalf of defendant.

The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road. In *Ryan* v. *Railroad Co.*, 99 U. S. 382, this court, speaking of a contest for lands of this class, said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose;" and the reason given for this is that "when the road was located and maps were made the right of the company to the odd sections first named became fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specified tracts until the selection was actually made in the manner prescribed."

The same idea is suggested, though not positively affirmed, in the case of *Grinnell* v. *Railroad Co.*, 103 U. S. 739.

In the case of the *Cedar Rapids Railroad Co.* v. *Herring*, 110 U. S. 27, this principle became the foundation, after much consideration, of the judgment of the court rendered at the last term. And the same principle is announced at this term in the case of the *Kansas Pacific Railroad Co.* v. *Atchison, Topeka & Santa Fé Co.*, *ante*, 414.

The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained

and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss.

The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or any one for it. Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?

It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land.

In this case, and for these reasons, priority of selection secures priority of right.

Syllabus.

The judgment of the Supreme Court as to the land in this, its second class, is correct, whatever may have been its reasons for it.

It is no answer to this to say that the Secretary of the Interior certified these lands to the State for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. *Johnson* v. *Towsley*, 13 Wall. 72, 80; *Gibson* v. *Chouteau*, 13 Wall. 92, 102; *Shepley* v. *Cowen*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 536.

We see no error in the judgment of the Supreme Court of Minnesota, and it is accordingly

Affirmed.

ST. PAUL & DULUTH RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 8, 1884.—Decided January 5, 1885.

A voluntary transfer of a claim against the United States by way of mortgage, completed and made absolute by judicial sale, is within the provision, in Rev. Stat. § 3477, that assignments of claims against the United States shall be void, "unless they are freely made and executed, in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

A transfer of a contract with the United States by way of mortgage, completed and made absolute by judicial sale, is within the prohibition of Rev. Stat. § 3737, that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other

party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

The rulings of the court in *Chicago & Northwestern Railway Co.* v. *United States*, 104 U. S. 650, and *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States*, 104 U. S. 687, maintained.

This case came up on appeal from the Court of Claims.

The facts which make the case are stated in the opinion of the court.

Mr. J. F. Farnsworth, for appellant.

Mr. Solicitor-General, for appellee.

Mr. Justice Matthews delivered the opinion of the court.

On the 8th day of October, 1875, the Lake Superior and Mississippi Railroad Company entered into a contract in writing with the United States, acting by the Postmaster-General, for carrying the mails between St. Paul and Duluth for a term of four years, for an agreed compensation of $13,859.97 per annum.

On the 20th day of October, 1876, the Postmaster-General gave notice to the company of a reduction in its compensation at the rate of $2,772 per annum, in accordance with the Post Office Appropriation Act of July 12, 1876; and on the 28th day of August, 1878, a further decrease was notified by the department under the Post Office Appropriation Act of June 30th, 1878, amounting to $498.96 per annum.

The total reduction amounted to $12,141.36, of which $3,686.76 was made prior to June 12, 1877, and $8,454.60 after that date. The service rendered during the first period was by the contractor, the Lake Superior and Mississippi Railroad Company; during the latter period, by the appellant, the St. Paul and Duluth Railroad Company, claiming to be the successor to all rights of the former under the contract.

Its title thereto arises under a judicial sale by virtue of a decree of the Circuit Court of the United States for the District of Minnesota, foreclosing a mortgage given by the Lake Superior and Mississippi Railroad Company to trustees to secure its bonds, dated January 1, 1869.

Opinion of the Court.

This mortgage professes to convey the lands of the mortgagor, to which it was or might be entitled under grants from the United States and the State of Minnesota, and its railroad constructed or to be constructed, right of way, and all tracks, bridges, viaducts, culverts, fences, depots, station-houses and other similar houses, superstructures, erections, and fixtures held or to be acquired for the use of the railway, or in connection therewith, or the business thereof; also, all locomotives, tenders, cars, rolling stock or equipments, and all machinery, tools, implements, &c., and also all franchises connected with or relating to said railway and said line of telegraph, and all corporate franchises of any nature, including the franchise to be a corporation, and all endowments, income and advantages, &c., to the above-mentioned lands, railroad, or property belonging or appertaining, and the income, rents, issues and profits thereof.

The decree for sale directs the sale of the mortgaged premises, and a sale thereof was confirmed by the court and a conveyance made to the appellant, a corporation organized by the purchasers for that purpose, under the laws of Minnesota, on June 27, 1878.

In respect to the claim of the appellant for so much of the reduction made by the Post Office Department as relates to the service performed prior to the sale by the Lake Superior and Mississippi Railroad Company, it would be governed by the decision of this court in the cases of the *Chicago & North Western Railway Co.* v. *United States*, 104 U. S. 680, and the *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States*, 104 U. S. 687, if the corporation with whom the contract was made were the claimant; but we do not find in the mortgage, or decree for sale, any terms of description, as to the property and interests conveyed, sufficient to pass the interest therein of the original company to the purchasers at the sale.

The same remark applies to the contract itself. The appellant, by virtue of the sale of the railroad and property rights mortgaged, did not become assignee of the contract between the United States and the Lake Superior and Mississippi Railroad Company, and can claim nothing as such in this suit.

There are no words of description in the mortgage which include it. The fact that service was performed in carrying the mail, subsequent to the sale, by the appellant, does not commit the government to a recognition of the contract as if made with it. No such recognition is found as a fact by the Court of Claims, and it is apparent, from the facts found, that the Post Office Department treated the service performed by the appellant as subject to regulation according to the terms of the act of June 17, 1878, which justified the reduction complained of.

If it were otherwise, however, the appellant's case must still fail.

That part of its claim for services rendered prior to the sale by the Lake Superior and Mississippi River Railroad Company falls within the prohibition of Rev. Stat. § 3477, which provides that, "All transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

In *Erwin* v. *The United States*, 97 U. S. 392, it was held that an assignment by operation of law to an assignee in bankruptcy was not within the prohibition of the statute; and in *Goodman* v. *Niblack*, 102 U. S. 556, a voluntary assignment by an insolvent debtor, for the benefit of creditors, was held valid to pass the title to a claim against the United States. But, in our opinion, the present case is not within the principle of these exceptions, but falls within the purview of the prohibition. It is a voluntary transfer, by way of mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale.

If the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition.

So, the transfer, by the same proceeding, of the contract itself, so as to entitle the assignee to perform the service and claim the compensation stipulated for, is forbidden by Rev. Stat. § 3737, which provides that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

The explicit provisions of this statute do not require any comment. No explanation could make it plainer.

The judgment of the Court of Claims is affirmed.

Flint & Père Marquette Railroad Company v. *United States* was also an appeal from the Court of Claims. See 18 C. Cl. 420. The facts raised the question decided in the second branch of the foregoing case. Judgment below affirmed, see post, 762.

PEUGH *v.* PORTER & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 17, 1884.—Decided January 5, 1885.

An instrument, by which A, as attorney in fact by substitution, for good consideration, assigns to B an interest in claims to be established against a foreign government in a mixed commission, is valid in equity, although made before the establishment of the claim, and creation of the fund; and may work a distinct appropriation of the fund in B's favor, to the extent of the assignment, within the rule laid down in *Wright* v. *Ellison*, 1 Wall. 16.

This was an appeal from a decree in a suit in equity in the Supreme Court of the District of Columbia. The facts which make the case are stated in the opinion of the court.

Mr. Jeremiah M. Wilson (*Mr. Shellabarger* was with him) for appellant.

Mr. S. V. White, one of the appellees, in person.

Mr. Justice Matthews delivered the opinion of the court.

Several awards were made by the Mexican Claims Commission, under the treaty between the United States and Mexico of July 4, 1868, in favor of claimants, representatives respectively of three American citizens, Parsons, Conrow and Standish, which amounted in the aggregate to $143,812.32. Of this, one-half was paid to the claimants and the other half remained with their consent under the control of the Secretary of State, to be paid to the agents and counsel of the claimants according to their respective rights and interests. Several bills in equity to determine these interests were filed in the Supreme Court of the District of Columbia, to one of which Peugh, the appellant, was made a defendant, and, appearing therein, also filed a cross-bill on his own behalf. On final hearing all the bills and cross-bills were dismissed, Peugh alone appealing. The adverse interest in the litigation is represented by White, who claims as a purchaser of the whole fund. The object of the bill of Peugh was to obtain a declaration of the fact and extent of his interest in the fund, and to enjoin the defendant White from demanding and receiving more than what should remain after satisfaction of the appellant's claim. The Secretary of State was made a party defendant, but did not appear, and no relief is asked against him. The jurisdiction of the court is invoked for the single purpose of determining the relative equities of the parties in the fund, and giving effect to them by an appropriate decree.

The history of the case, so far as material to the determination of the controversy, we gather from a volume of testimony, not without conflict, and find to be as follows:

The three claimants severally employed Richard H. Musser, of St. Louis, to prosecute their claims, and, agreeing that he should pay all expenses and receive half of the net proceeds of the claims after deducting the expenses of their prosecution, executed and delivered to him full powers of attorney, with power of substitution.

Knowledge of the existence of these claims had been first

communicated to Musser by Richard H. Porter, and the agreement between them was, that each should have an equal interest in the prosecution and proceeds of the claims in case of recovery.

Accordingly, Porter entered into an agreement with the appellant Peugh and C. E. Rittenhouse, a copy of which is as follows:

"Memorandum of agreement, made by and between Richard H. Porter, of St. Louis, Mo., and Charles E. Rittenhouse and Samuel A. Peugh, of this city of Washington, District of Columbia.

"Whereas said Richard H. Porter, acting as attorney for Richard H. Musser by authority of substitution from said Musser, who, acting in behalf as attorney in fact for Mildred Standish, widow of Austin M. Standish; Mrs. —— Conrow, widow of Aaron H. Conrow, and —— Parsons, father of Monroe M. Parsons, and guardian of the son Monroe M. Parsons, above named, all of the State of Missouri; and whereas said Porter is desirous of the aid of said Rittenhouse and Peugh in a certain advance of money to the said Porter, to enable him to procure the testimony to sustain the claims of these other certain named parties have against the government of Mexico for robbery and destruction of the lives of those whom they represent under the treaty made between the United States and the Republic of Mexico on the 4th day of July, 1868, and also the prosecution of said claim before a commission appointed by and between the two said Republics, and now in session in the city of Washington, D. C.; and whereas said Porter being, in his agreement with the said parties claiming against Mexico as aforesaid, entitled to one-half of any amount to which he may establish claim before said commission, he hereby agrees to, and does hereby transfer and assign, in consideration of the premises, unto the said Rittenhouse and Peugh one-half of the amount he is entitled to receive under and by virtue of his authority in the premises, the said last-named parties to be at the expense of prosecuting the said claims before the commission herein named, but the testimony to be produced to them by the said parties.

"In testimony whereof, we, and each of us, have hereunto set our hands and seals, this 16th day of February, 1870.

"(Signed) R. H. Porter. [seal.]
S. A. Peugh. [seal.]
C. A. Rittenhouse. [seal.]"

At the date of the execution of this paper Porter had not in fact been substituted by Musser, under his powers, in writing, but subsequently, on July 4, 1870, Musser did so by writing, indorsed on the letters of attorney given by the claimants; and Porter himself subsequently, in 1874, obtained direct powers from at least two of them.

Peugh and Rittenhouse entered upon the performance of their engagements with Porter in pursuance of the agreement of February 16, 1870, but Rittenhouse subsequently released his interest therein to Porter, by the following instrument:

"Washington, *September* 2, 1872.

"In consideration of said Porter's having paid certain expenses on the claim of Mrs. Hamilton for $35,000, now pending before the Southern Claims Commission, one-half of which he demands of me on account of my interest therein, I hereby relinquish to him, said Porter, all my right, title, and interest in and to the several claims referred to in the foregoing agreement, and release him from his obligation to repay me the sum advanced by me for my aforesaid interest in these Mexican claims.

"(Signed) C. E. Rittenhouse."

In the mean time Peugh and Rittenhouse had employed Charles H. Winder, as counsel, for a fixed compensation, payable out of their proportion of the awards, to present the case to the commission in argument; and, after the relinquishment by Rittenhouse of his interest in the matter, Peugh and Winder continued to co-operate in the prosecution of the claims.

Their services in that behalf were well known to Porter and to Musser, as well as the particular arrangements under which they were rendered. Indeed, the latter, by a letter to Ritten-

house, dated February 18, 1871, expressly ratified the contract made by Porter with Peugh and Rittenhouse. Mr. Winder, the record abundantly shows, under his employment by Peugh, and a distinct agreement directly with Porter, made afterwards, rendered constant and evidently very valuable and efficient services in the prosecution of the claims until the awards were finally made. And, in respect to the services rendered by Peugh, which were also continuous during the entire proceeding, Mr. Winder, whose statements seem to be entitled to full credit, testifies as follows:

"With regard to the statement contained in the 8th paragraph of Mr. Peugh's amended cross-bill in cause of *McManus* v. *White et al.*, No. 6,382, I would say that I have no knowledge of the amount of money Mr. Peugh may have spent in the matter; but, as attorney in fact and agent, he was industrious and persistent in his efforts to procure testimony and to forward the proceedings before the commission. I think he was especially diligent in getting the parties in Missouri to furnish the necessary pleadings in the case—I mean memorials—and also the testimony upon which the cases were adjudicated. My belief at the time was that it was in a great measure due to his efforts that the testimony was received in time to meet the requirements of the commission in relation to the closing of the cases on the 1st of April, 1872. I don't know of any duties strictly as counsel that were performed by him."

On the whole, we think it is satisfactorily shown that Peugh's services were as valuable and meritorious in the successful prosecution of these claims, as those of any other person engaged in it; and that they were rendered in pursuance of his agreement with Porter, confirmed by Musser, and assented to by all parties in interest.

The claim of White is founded upon a purchase made by him from Musser and Porter, and from others claiming under the former, whose rights arose subsequent in time to the contract between Porter and Peugh and Rittenhouse, and White's purchase being made after Peugh's services had been fully rendered.

Apart from the merits, objection is made to a decree in favor

of Peugh, on the ground that he has no equitable lien on the fund in controversy, within the decisions in *Wright* v. *Ellison*, 1 Wall. 16, and *Trist* v. *Child*, 21 Wall. 441, 447. The rule, as declared in the first of these cases, is, that "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." 1 Wall. 22.

Here, as between Musser and Porter on the one hand, and Peugh on the other, there were words in the agreement, of express transfer and assignment of the very fund now in dispute, though not then in existence, which, in contemplation of equity, is not material. And if that was not the case in the powers of attorney given by the claimants to Musser and Porter, it is not pertinent to this controversy; for the principals have voluntarily permitted the one-half of the fund to remain unclaimed by them, in order that their agents and attorneys may have it apportioned among themselves according to their respective rights.

It is further objected that Peugh's rights under the contract of February 16, 1870, were lost by the release of Rittenhouse, their interest being joint. If this were so at law, it would not be so in equity, contrary to the intention of the parties; but here there was an express and distinct recognition of the several interest of Peugh in the contract, and of his right to proceed in its performance, after the release of his co-contractor. His services were rendered and were accepted, and he is entitled to his compensation in accordance with his agreement. There should have been a decree in his favor on his cross-bill for the one-fourth of the fund, subject to the claim of the estate of Winder, who is deceased, for the amount of his compensation under his agreement with Peugh and Rittenhouse.

The decree of the Supreme Court of the District of Columbia is accordingly reversed, and the cause remanded, with directions to render a decree in conformity with this opinion.

APPENDIX.

1.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

Rule in Admiralty.

RULE 59.

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

Promulgated March 26, 1883.*

* This announcement should have appeared in Volume 107.

II.

PROCEEDINGS AT THE UNVEILING OF THE STATUE OF CHIEF JUSTICE MARSHALL.

In the Senate of the United States, Mr. Sherman, from the Committee on the Library, submitted the following Report*:

The Joint Committee on the Library respectfully report that, in pursuance of the act of Congress approved March 10, 1882, as follows—

AN ACT to authorize the erection of a statue of Chief Justice Marshall.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the Senate and the Speaker of the House of Representatives do appoint a joint committee of three Senators and three Representatives with authority to contract for and erect a statue to the memory of Chief Justice John Marshall, formerly of the Supreme Court of the United States; that said statue shall be placed in a suitable public reservation, to be designated by said joint committee, in the city of Washington; and for said purpose the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated—

your committee, in connection with the trustees of the Marshall Memorial Fund, contracted with and have received from the artist, W. W. Story, a bronze statue of John Marshall, late Chief Justice of the United States, which has been placed on the site selected, near the west front of the Capitol, and, in accordance with separate resolutions of the two houses, was, on the 10th of May, 1884, unveiled in the presence of both houses of Congress, the chief officers of the various Departments of the Government, the descendants of Chief Justice Marshall, and many citizens, with appropriate ceremonies, in the order as follows:

Order of exercises at the unveiling of the statue of John Marshall, late Chief Justice United States, on Saturday, May 10th, 1884.

Music—Marine band; Prayer—Rev. Dr. Armstrong; Music; Address—The Chief Justice; Music; Oration—William Henry Rawle, Esq.; Music; Benediction.

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* From Senate Report, No. 544: 1st Session, 48th Congress

Hon. John Sherman, by direction of the Joint Committee on the Library, introduced the Chief Justice of the Supreme Court of the United States as presiding officer.

The Rev. Dr. J. G. Armstrong, pastor of the Monumental Church, Richmond, Va., then delivered the following prayer:

O God—Father, Son, and Holy Spirit! We adore Thee as the Father of all mankind, and of our Lord Jesus Christ, the centre and bond of the great brotherhood of man, in whom there is neither Jew nor Greek. We adore Thee as the answerer of prayer, who holdest in Thy grasp all the physical, intellectual, political, and moral forces of the world, and canst adjust and direct them to intelligent and beneficent ends. In this faith we pray to-day for thy blessing upon our nation in all her governmental departments. Direct her legislators, in Congress and State legislatures, to the enactment of such laws as shall secure to all the people of the land their full constitutional rights, and as shall be in conformity to that higher law whose seat is the bosom of God, and whose voice the harmony of the world. May her judges, supreme and subordinate, interpret the laws under the lights of strict integrity and justice. And in the hands of her executives may the laws be administered irrespective of party or sectional interest, without partiality and without hypocrisy.

And we bless Thy name for all that Thou hast done for our nation. We bless Thee for her great men, for her warriors, her statesmen, her orators, her poets, and her men of science, come they from whatever quarter—North, South, East, or West—who have been such powerful factors in the production of the national character and reputation. And especially do we to-day bless Thee for the life of him whose statue is now to be unveiled, whom a nation honors, and whose memory a nation would cherish and perpetuate. May the example of his pure personal and juridic life stimulate the private citizen and the ermined judge to the faithful performance of duty and the emulation of his great virtues. And may Thy Kingdom come and Thy will be done as in Heaven so in our land, and so in all the earth, through Jesus Christ our Lord, who liveth and reigneth with the Father and the Holy Spirit, ever One God, world without end. Amen.

Hon. Morrison R. Waite, Chief Justice of the United States, spoke as follows:

Chief Justice Marshall died in Philadelphia on the 6th of July, 1835. The next day the bar of that city met and resolved "that it be recommended to the bar of the United States to co-operate in erecting a monument to his memory at some suitable place in the city of Washington." The committee charged with the duty of carrying this recommendation into effect were Mr. Duponceau, Mr. Binney, Mr. Sergeant, Mr. Chauncey, and Mr. J. R. Ingersoll. A few days later the bar of the city of New York appointed Mr. S. P. Staples, Mr. R. M. Blatchford, Mr. Beverley Robinson, Mr. Hugh Maxwell, and Mr. George Griffin to represent them in the work which had thus been inaugurated. Undoubtedly there were similar organizations in other localities, but the publications of the day, to which access has been had, contain no notice of them. The Philadelphia committee, "desiring to make the subscrip-

tions as extensive as possible, and to avoid inconvenience to those who may be willing to unite with them," expressed the wish "that individual subscriptions should be moderate, and that the required amount may be made up by the number of contributions, rather than the magnitude of particular donations, so that the monument may truly be the work of the bar of the United States, and an enduring evidence of their veneration for the memory of the illustrious deceased." Accordingly, in Philadelphia no more than $10 was received from any one member, and the committees of other localities were advised of the adoption of this regulation. In this way the sum of $3,000 was collected, and then the subscriptions stopped. Not so, however, the work of the Philadelphia committee—or, as I prefer to call them, the Philadelphia trustees—for a few years ago the last survivor of them brought out their package of securities, and it was shown that under their careful and judicious management the $3,000 of 1835 had grown in 1880 to be almost $20,000.

At this time it was thought something might be done by the bar alone to carry out, in an appropriate way, the original design; but Congress, in order that the nation might join the bar in honoring the memory of the great man to whom so much was due, added another $20,000 to the lawyers' fund, and to-day Congress as well as the bar has asked you here to witness the unveiling of a monument which has been erected under these circumstances.

For twenty-four years there sat with the Chief Justice on the bench of the Supreme Court one whose name is largely associated with his own in the judicial history of the times. I need hardly say I refer to Mr. Justice Story. Fortunately, a son of his, once a lawyer himself, had won distinction in the world of art, and so it was specially fit that he should be employed, as he was, to develop in bronze the form of one he had from his earliest childhood been taught to love and to revere. How faithfully and how appropriately he has performed his task you will soon be permitted to see.

But, before this is done, let me say a few words of him we now commemorate. Mr. Justice Story, in an address delivered on the occasion of his death, speaks "of those exquisite judgments, the fruits of his own unassisted meditations, from which the court has received so much honor," and I have sometimes thought even the bar of the country hardly realizes to what extent he was, in some respects, unassisted. He was appointed Chief Justice in January, 1801, and took his seat on the bench at the following February term. The court had then been in existence but eleven years, and in that time less than one hundred cases had passed under its judgment. The engrossed minutes of its doings cover only a little more than two hundred pages of one of the volumes of its records, and its reported decisions fill but five hundred pages of three volumes of the reports published by Mr. Dallas. The courts of the several colonies before the Revolution, and of the States afterwards, had done all that was required of them, and yet the volumes of their decisions published before 1801 can be counted on little more than the fingers of a single hand, and if these and all the cases decided before that time, which have been reported since, were put into volumes of the size now issued by the reporter of the Supreme Court, it would not require the fingers of both the hands for their full enumeration. The reported decisions of all the circuit and district courts of the United States were put into a little more than two hundred pages of Dallas.

In this condition of the jurisprudence of the country, Marshall took his place at the head of the national judiciary. The Government, under the Constitution, was only organized twelve years before, and in the interval eleven amendments of the Constitution had been regularly proposed and adopted. Comparatively nothing had been done judicially to define the powers or develop the resources of the Constitution. The common law of the mother country had been either silently, or by express enactment, adopted as the foundation of the system by which the rights of persons and property were to be determined, but scarcely anything had been done by the courts to adapt it to the new form of government, or to the new relations of social life which a successful revolution had produced. In short, the nation, the Constitution, and the laws were in their infancy. Under these circumstances, it was most fortunate for the country that the great Chief Justice retained his high position for thirty-four years, and that during all that time, with scarcely any interruption, he kept on with the work he showed himself so competent to perform. As year after year went by and new occasion required, with his irresistible logic, enforced by his cogent English, he developed the hidden treasures of the Constitution, demonstrated its capacities, and showed beyond all possibility of doubt, that a government rightfully administered under its authority could protect itself against itself and against the world. He kept himself at the front on all questions of constitutional law, and, consequently, his master hand is seen in every case which involved that subject. At the same time he and his co-workers, whose names are, some of them, almost as familiar as his own, were engaged in laying, deep and strong, the foundations on which the jurisprudence of the country has since been built. Hardly a day now passes in the court he so dignified and adorned, without reference to some decision of his time, as establishing a principle which, from that day to this, has been accepted as undoubted law.

It is not strange that this is so. Great as he was, he was made greater by those about him, and the events in the midst of which he lived. He sat with Paterson, with Bushrod Washington, with William Johnson, with Livingston, with Story, and with Thompson, and there came before him Webster and Pinckney and Wirt and Dexter and Sergeant and Binney and Martin, and many others equally illustrious, who then made up the bar of the Supreme Court. He was a giant among giants. Abundance of time was taken for consideration. Judgments, when announced, were the result of deliberate thought and patient investigation, and opinions were never filed until they had been prepared with the greatest care. The first volume of Cranch's Reports embraces the work of two full years, and all the opinions save one are from the pen of the Chief Justice. Twenty-five cases only are reported, but among them is *Marbury* v. *Madison*, in which, for the first time, it was announced by the Supreme Court, that it was the duty of the judiciary to declare an act of the legislative department of the Government invalid, if clearly repugnant to the Constitution.

After this came, in quick succession, all the various questions of constitutional, international, and general law, which would naturally present themselves for judicial determination in a new and rapidly developing country. The complications growing out of the wars in Europe, and of our own war with Great Britain, brought up their disputes for settlement, and the boundary line between the powers of the States and of the United States had more

than once to be run and marked. The authority of the United States was extended by treaty over territory not originally within its jurisdiction. All these involved the consideration of subjects comparatively new in the domain of the law, and rights were to be settled, not on authorities alone, but by the application of the principles of right reason. Here the Chief Justice was at home, and, when at the end of his long and eminent career he laid down his life, he, and those who had so ably assisted him in his great work, had the right to say that the judicial power of the United States had been carefully preserved and wisely administered. The nation can never honor him, or them, too much for the work they accomplished.

Without detaining you longer, I ask you to look upon what is hereafter to represent, at the seat of government, the reverence of the Congress and the bar of the United States for John Marshall, "The Expounder of the Constitution."

Mr. William Henry Rawle, of Philadelphia, then delivered the following oration :

John Marshall, Chief Justice of the United States, has been dead for nearly half a century, and if it be asked why at this late day we have come together to do tardy justice to his memory and unveil this statue in his honor, the answer may be given in a few words. The history dates from his death. He had held his last court, and had come northward to seek medical aid in the city of Philadelphia, and there, on the 6th of July, 1835, he died. While tributes of respect for the man and of grief for the national loss were paid throughout the country, it was felt by the bar of the city where he died that a lasting monument should be erected to his memory in the capital of the nation. To this end subscriptions, limited in amount, were asked. About half came from the bar of Philadelphia, and of the rest, the largest contribution was from the city of Richmond, but all told, the sum was utterly insufficient. What money there was, was invested by trustees as "The Marshall Memorial Fund," and then the matter seemed to pass out of men's minds. Nearly fifty years went on. Another generation and still another came into the world, till lately, on the death of the survivor of the trustees, himself an old man, the late Peter McCall, the almost forgotten fund was found to have been increased, by honest stewardship, seven-fold. Of the original subscribers but six were known to be alive, and upon their application trustees were appointed to apply the fund to its original purpose. It happened that at this time the Forty-seventh Congress appropriated of the people's money a sum about equal in amount for the erection of a statue to the memory of Chief Justice Marshall, to be "placed in a suitable public reservation in the city of Washington." To serve their common purpose, the Congressional committee and the trustees agreed to unite in the erection of a statue and pedestal ; and after much thought and care the commission was intrusted to William W. Story, an artist who brought to the task not only his acknowledged genius, but a keen desire to perpetuate, through the work of his hands, the face and form of one who had been not only his father's professional brother, but the object of his chiefest respect and admiration. That work now stands before you. Its pedestal bears the simple inscription :

JOHN MARSHALL—CHIEF JUSTICE OF THE UNITED STATES—ERECTED BY THE BAR AND THE CONGRESS OF THE UNITED STATES—A. D. MDCCCLXXXIV.

No more "suitable public reservation" could be found than the ground on which we stand, almost within the shadow of the Capitol in which for more than thirty years he held the highest judicial position in the country.

It may well be that the even tenor of his judicial life has driven from some minds the story of his brilliant and eventful youth. The same simplicity, the same modesty which marked the child distinguished the great Chief Justice; but as a judge, his life was necessarily one of thought and study, of enforced retirement from much of the busy world, dealing more with results than processes, and the surges of faction and of passion, the heat of ambition, the thirst of power reached him not in his high judicial station. Yet he had himself been a busy actor on the scenes of life, and if his later days seemed colorless, the story of his earlier years is full of charm.

The eldest of a large family, reared in Fauquier County, in Virginia, he was one of the tenderest, the most lovable children. He had never, said his father, seriously displeased him in his life. To his mother—to his sisters especially—did he bear that chivalrous devotion which to the last hour of his life he showed to women. Such education as came to him was little got from schools, for the thinly-settled country and his father's limited means forbade this. A year's Latin at fourteen at a school a hundred miles from his home, and another year's Latin at home with the rector of the parish was the sum of his classical teaching. What else of it he learned was with the unsympathetic aid of grammar and dictionary. But his father—who, Marshall was wont to say, was a far abler man than any of his sons, and who in early life was Washington's companion as a land surveyor, and, later, fought gallantly under him—his father was well read in English literature, and loved to open its treasures to the quick, receptive mind of his eldest child, who in it all, especially in history and still more in poetry, found an enduring delight. Much of his time was passed in the open air, among the hills and valleys of that beautiful country, and thus it was that in active exercise, in day dreams of heroism and poetry, in rapid and eager mastery of such learning as came within his reach, and surrounded by the tender love, the idolatry of a happy family, his early days were passed.

The first note of war that rang through the land called him to arms, and from 1775, when was his first battle on the soil of his own State, until the end of 1779, he was in the army. Through the battles of Iron Hill, of Brandywine, of Germantown, and of Monmouth, he bore himself bravely, and through the dreary privations, the hunger, and the nakedness of that ghastly winter at Valley Forge, his patient endurance and his cheeriness bespoke the very sweetest temper that ever man was blessed with. So long as any lived to speak, men would tell how he was loved by the soldiers and by his brother officers; how he was the arbiter of their differences and the composer of their disputes, and when called to act, as he often was, as judge advocate, he exercised that peculiar and delicate judgment required of him who is not only the prosecutor but the protector of the accused. It was in the duties of this office that he first met and came to know well the two men whom of all others on earth he

most admired and loved and whose impress he bore through his life, Washington and Hamilton.

While of Marshall's life war was but the brief opening episode, yet before we leave these days, one part of them has a peculiar charm. There were more officers than were needed, and he had come back to his home. His letters from camp had been read with delight by his sisters and his sisters' friends. His reputation as a soldier had preceded him, and the daughters of Virginia, then, as ever, ready to welcome those who do service to the State, greeted him with their sweetest smiles. One of these was a shy, diffident girl of fourteen; and to the amazement of all, and perhaps to her own, from that time his devotion to her knew no variableness neither shadow of turning. She afterwards became his wife, and for fifty years, in sickness and in health, he loved and cherished her, till, as he himself said, "her sainted spirit fled from the sufferings of life." When her release came at last, he mourned her as he had loved her, and the years were few before he followed her to the grave.

But from this happy home he tore himself away, and at the college of William and Mary attended a course of law lectures, and in due time was admitted to practice. But practice there was none, for Arnold had then invaded Virginia, and it was literally true that *inter arma silent leges*. To resist the invasion, Marshall returned to the army, and at its end, there being still a redundance of officers in the Virginia line, he resigned his commission and again took up his studies. With the return of peace the courts were opened and his career at the bar began. Tradition tells how even at that early day his characteristic traits began to show themselves —his simple, quiet bearing, his frankness and candor, his marvellous grasp of principle, his power of clear statement, and his logical reasoning. It is pleasant to know that his rapid rise excited no envy among his associates, for his other high qualities were exceeded by his modesty. In after life, this modesty was wont to attribute his success to the "too partial regard of his former companions in arms, who, at the end of the war had returned to their families and were scattered over the States." But the cause was in himself, and not in his friends.

In the spring of 1782, he was elected to the State legislature, and in the autumn chosen to the executive council. In the next year took place his happy marriage, his removal to Richmond, thenceforth his home, and soon after, his retirement, as he supposed, from public life. But this was not to be, for his election again and again to the legislature called on him for service which he was too patriotic to withhold, even had he felt less keenly how full of trouble were the times. Marshall threw himself, heart and soul, into the great questions which bid fair to destroy by dissension what had been won by arms, and opposed to the best talent of his own State, he ranged himself with an unpopular minority. In measured words, years later, when he wrote the Life of Washington, he defined the issue which then threatened to tear the country asunder. It was, he said, "divided into two great political parties, the one of which contemplated America as a nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members." Though the proposed Constitution might form, as its preamble declares, "a

more perfect union" than had the Articles of Confederation, though it might prevent anarchy and save the States from becoming secret or open enemies of each other, though it might replace "a Government depending upon thirteen distinct sovereignties for the preservation of the public faith" by one whose power might regulate and control them all—the more numerous and powerful, and certainly the more clamorous party, insisted that such evils, and evils worse than these, were as nothing compared to the surrender of State independence to Federal sovereignty. In public and private, in popular meetings, in legislatures and in conventions, on both sides passion was mingled with argument. Notably in Marshall's own State did many of her ablest sons, then and afterwards most dear to her, throw all that they had of courage, of high character and of patriotism, into the attempt to save the young country from its threatened yoke of despotism. Equally brave and able were those few who led the other party, and chief among them were Washington, Madison, Randolph and, later, Marshall. Young as he was, it was felt that such a man could not be left out of the State convention to which the Constitution was to be submitted, but he was warned by his best friends that unless he should pledge himself to oppose it his defeat was certain. He said plainly that, if elected, he should be "a determined advocate for its adoption," and his integrity and fearlessness overcame even the prejudices of his constituents. And in that memorable debate, which lasted five-and-twenty days, though, with his usual modesty, he contented himself with supporting the lead of Madison, three times he came to the front, and to the questions of the power of taxation, the power over the militia, and the power of the judiciary, he brought the full force of his fast developing strength. The contest was severe and the vote close. The Constitution was ratified by a majority of only ten. But as to Marshall, it has been truly said that "in sustaining the Constitution, he unconsciously prepared for his own glory the imperishable connection which his name now has with its principles." And again his modesty would have it that he builded better than he knew, for in later times he would ascribe the course which he took to casual circumstances as much as to judgment; he had early, he said, caught up the words, "united we stand, divided we fall;" the feelings they inspired became a part of his being; he carried them into the army, where, associating with brave men from different States who were risking life and all else in a common cause, he was confirmed in the habit of considering America as his country, and Congress as his Government.

The convention was held in 1788. Again Marshall was sent to the legislature, where in power of logical debate he confessedly led the House, until in 1792 he left it finally.

During the next five years he was at the height of his professional reputation. The Federal reports and those of his own State show that among a bar distinguished almost beyond all others, he was engaged in most of the important cases of the time. A few of these he has reported himself; they are modestly inserted at the end of the volume, and are referred to by the reporter as contributed "by a gentleman high in practice at the time, and by whose permission they are now published."

And here a word must be said as to the nature and extent of his technical learning, for it is almost without parallel that one should admittedly have held the highest position at the bar, and then for thirty-five years should, as

admittedly, have held the reputation of a great judge, when the entire time between the very commencement of his studies and his relinquishment of practice was less than seventeen years. In that generation of lawyers and the generation which succeeded them, it was not unusual that more than half that time passed before they had either a cause or a client. Marshall had emphatically what is called a legal mind ; his marvellous instinct as to what the law *ought* to be doubtless saved him much labor which was necessary to those less intellectually great. With the principles of the science he was of course familiar ; with their sources he was scarcely less so. A century ago there was less law to be learned and men learned it more completely. Except as to such addition as has of late years come to us from the civil law, the foundation of it was the same as now—the same common law, the same decisions, the same statutes—and in that day, a century's separation from the mother country had wrought little change in the colonies except to adapt this law to their local needs with marvellous skill. Save as to this, the law of the one country was the law of the other, and the decisions at Westminster Hall before the Revolution were of as much authority here as there. There was not a single published volume of American reports. The enormous superstructure which has since been raised upon the same foundation, bewildering from its height, the number of its stories, the vast number of its chambers, the intricacies of its passages, has been a necessity from the growth of a country rapid beyond precedent in a century to which history knows no parallel. But the foundation of it was the same, and the men of the last century had not far to go beyond the foundation, and hence their technical learning was, as to some at least, more complete, if not more profound. There were a few who said that Marshall was never what is called a thoroughly technical lawyer. If by this is meant that he never mistook the grooves and ruts of the law for the law itself—that he looked at the law from above and not from below, and did not cite precedent where citation was not necessary—the remark might have semblance of truth, but the same might be said of his noted abstinence from illustration and analogy, both of which he could, upon occasion, call in aid ; but no one can read those arguments at the bar or judgments on the bench in which he thought it needful to establish his propositions by technical precedents, without feeling that he possessed as well the knowledge of their existence and the reason of their existence, as the power to analyze them. But he never mistook the means for the end.

Even in the height of his prosperous labor he never turned his back upon public duty. Not all the excesses of the French revolution could make the mass of Americans forget that France had been our ally in the war with England, and when, in 1793, these nations took arms against each other, and our proclamation of neutrality was issued to the world, loud and deep were the curses that rang through the land. Hated as the proclamation was, Marshall had no doubt of its wisdom. Great was his grief to oppose himself to the judgment of Madison, but he was content to share the odium heaped upon Hamilton and Washington, and to be denounced as an aristocrat, a loyalist, and an enemy to republicanism. With rare courage, at a public meeting at Richmond, he defended the wisdom and policy of the administration, and his argument as to the constitutionality of the proclamation anticipated the judgment of the world.

Two years later came a severer trial. Without his knowledge and against his will, Marshall had been again elected to the legislature. Our minister to Great Britain had concluded a commercial treaty with that power, and its ratification had been advised by the Senate and acted on by the President. The indignation of the people knew no bounds. In no State was it greater than in Virginia. The treaty was "insulting to the dignity, injurious to the interests, dangerous to the security, and repugnant to the Constitution of the United States"—so said the resolutions of a remarkable meeting at Richmond, and these words echoed through the country. Had not the Constitution given to Congress the right to regulate commerce, and how dared the Executive, without Congress, negotiate a treaty of commerce? Marshall's friends begged him, for his own sake, not to stem the popular torrent. He hoped at first that his own legislature might, as he wrote to Hamilton from Richmond, "ultimately consult the interest or honor of the nation. But now," he went on to say, "when all hope of this had vanished, it was deemed advisable to make the experiment, however hazardous it might be. A meeting was called which was more numerous than I have ever seen at this place; and after a very ardent and zealous discussion, which consumed the day, a decided majority declared in favor of a resolution that the welfare and honor of the nation required us to give full effect to the treaty negotiated with Britain." Thus measuredly he told the story of one of his greatest triumphs, and afterwards, in his place in the House, he again met the constitutional objection in a speech which, men said at the time, was even stronger than the other. As he spoke reason asserted her sway over passion, party feeling gave way to conviction, and for once the vote of the House was turned. Of this speech no recorded trace remains, but even in that time, when news travelled slowly, its fame spread abroad, and the subsequent conduct of every administration has to this day rested upon the construction then given to the Constitution by Marshall.

Henceforth his reputation became national, and when, a few months later, he came to Philadelphia to argue the great case of the confiscation by Virginia of the British debts, a contemporary said of him, "Speaking, as he always does, to the judgment merely, and for the simple purpose of convincing, he was justly pronounced one of the greatest men in the country." He were less than human not to be moved by this, but, in writing to a friend, he modestly said, "A Virginian who supported with any sort of reputation the measures of the Government was such a *rara avis* that I was received with a degree of kindness which I had not anticipated." Soon after Washington offered him the office of Attorney-General, and some months later the mission to France. Both he declined. His determination to remain at the bar was, he thought, unalterable.

And again he altered it. Neither France herself nor the "French patriots" here had forgotten or forgiven the treaty with Great Britain, and if the disgust at our persistent neutrality did not break into open war it was because France knew, or thought she knew, that the entire American opposition to the Government was on her side. Just short of war she stopped. Privateers fitted out by orders of the French minister here preyed upon our commerce; the very ship which brought him to our shores began to capture our vessels before even his credentials had been presented; later, by order of the Directory he suspended his diplomatic functions here and

flung to our people turgid words of bitterness as he left; the minister whom we had sent to France when Marshall had declined to go, was not only not received, but was ordered out of the country and threatened with the police. The crisis required the greatest wisdom and firmness which the country could command. Mr. Adams was then President ; he never lacked firmness, and his words to Congress at its special session were full of fearless dignity. "Three envoys," said he, "persons of talents and integrity, long known and intrusted in the three great divisions of the Union," were to be sent to France, and Marshall was to be one of them. It went hard with him, but the struggle was short, and as he left his home at Richmond crowds of citizens attended him for miles, and all party feeling was merged in respect and affection. The issue of his errand belongs to history. He has himself told us, in his Life of Washington, how the envoys—his own name being characteristically withheld—were met by contumely and insult ; how the wiliest minister of the age suggested that a large sum of money must be paid to the Directory as a mere preliminary to negotiation; how, if they refused, it would be known at home that they were corrupted by British influence, and how insults and menaces were borne with equal dignity. But he has not told us that his were the two letters to Talleyrand which have justly been regarded as among the ablest State papers in diplomacy. They were unanswerable, and nothing remained but to get Marshall and one of his colleagues out of the country with as little delay as was consistent with additional marks of contempt. His return showed that republics are not always ungrateful, for there came out to him on his arrival a crowd even greater than that which had witnessed his departure, the Secretary of State and other officials among them, and at a celebration in his honor the phrase was coined which afterwards became national, "Millions for defence, but not one cent for tribute."

Now, surely, he had earned the right to return to his loved professional labor. Nor only this—he had earned the right to such honor as the dignified labor of high judicial station could alone afford. The position of Justice of the Supreme Court of the United States had fallen vacant, and the President's choice rested on Marshall. "He has raised the American people in their own esteem," wrote Mr. Adams to the Secretary of State, "and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter." But again there had come to him the call of duty. For Washington, who, in view of the expected war with France, had been appointed to command the army, had begged Marshall to come to him at Mount Vernon, and there in earnest talk for days dwelt upon the importance to the country that he should be returned to Congress. His reluctance was great not only to re-enter public life, but to throw himself into a contest sure to be marked with an intensity of public excitement, degenerating into private calumny. If Washington himself had not escaped this, how should he ?

The canvass began. In the midst of it came the offer of the repose and dignity of the Supreme Bench. But his word had been given and he at once declined. The contest was severe, his majority was small, and his election, though intensely grateful to Washington and those who thought with him, was met with many misgivings from some who thought him "too much disposed to govern the world according to rules of logic."

His first act in Congress was to announce the death of Washington, and the words of the resolutions which he then presented, though written by another, meet our eyes on every hand, "First in war, first in peace, and first in the hearts of his countrymen." It was like Marshall that when later he came to write the life of Washington, he should have said that the resolutions were presented by "a member of the House."

In that House—the last Congress that sat in Philadelphia—he met the ablest men of the country. New member as he was, when the debate involved questions of law or the Constitution he was confessedly the first man in it. His speech on the question of Nash's surrender is said to be the only one ever revised by him, and, as it stands, is a model of parliamentary argument. The President had advised the surrender of the prisoner to the English Government to answer a charge of murder on the high seas on board a British man-of-war. Popular outcry insisted that the prisoner was an American, unlawfully impressed, and that the death was caused in his attempt to regain his freedom, and though this was untrue, it was urged that as the case involved principles of law, the question of surrender was one for judicial and not Executive decision. In most of its aspects the subject was confessedly new, but it was exhausted by Marshall. Not every case, he showed, which involves principles of law necessarily came before the courts; the parties here were two nations, who could not litigate their claims; the demand was not a case for judicial cognizance; the treaty under which the surrender was made was a law enjoining the performance of a particular object; the department to perform it was the Executive, who, under the Constitution, was to "take care that the laws be faithfully executed;" and even if Congress had not yet prescribed the particular mode by which this was to be done, it was not the less the duty of the Executive to execute it by any means it then possessed.

There was no answer to this, worthy the name; the member selected to answer it sat silent; the resolutions against the Executive were lost, and thus the power was lodged where it should belong, and an unwelcome and inappropriate jurisdiction diverted from the judiciary.

The session was just over when, in May, the President, without consulting Marshall, appointed him Secretary of War. He wrote to decline. As part of the well-known disruption of the Cabinet the office of Secretary of State became vacant, and Marshall was appointed to and accepted it. During his short tenure of office an occasion arose for the display of his best powers, in his dispatch to our minister to England concerning questions of great moment under our treaty, of contraband, blockade, impressment, and compensation to British subjects, a State paper not surpassed by any in the archives of that Department.

The autumn of 1800 witnessed the defeat of Mr. Adams for the Presidency and the resignation of Chief Justice Ellsworth, and, at Marshall's suggestion, Chief Justice Jay was invited to return to his former position, but declined. On being again consulted, Marshall urged the appointment of Mr. Justice Patterson, then on the Supreme Bench. Some said that the vacant office might possibly be filled by the President himself after the 3d of March, but Mr. Adams disclaimed the idea. "I have already," wrote he, "by the nomination to this office of a gentleman in full vigor of middle life, in the full habits of business, and whose reading in the science of law is fresh in his head,

put it wholly out of my power, and indeed it never was in my hopes and wishes," and on 31st of January, 1801, he requested the Secretary of War "to execute the office of Secretary of State so far as to affix the seal of the United States to the inclosed commission to the present Secretary of State, John Marshall of Virginia, to be Chief Justice of the United States." He was then forty-six years old.

It is difficult for the present generation to appreciate the contrast between the Supreme Court to which Marshall came and the Supreme Court as he left it; the contrast is scarcely less between the court as he left it and the court of to-day. For the first time in the history of the world had a written constitution become an organic law of government; for the first time was such an instrument to be submitted to judgment. With admirable force Mr. Gladstone has said, "As the British Constitution is the most subtile organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." On that subtle and unwritten Constitution of England, the professional training of every older lawyer in the country had been based, and they had learned from it that the power of Parliament was above and beyond the judgments of any court in the realm. Though this American Constitution declared in so many words that the judicial power should extend to "all cases arising under the Constitution and the laws of the United States," yet it was difficult for men so trained to conceive how any law, which the Legislative department might pass and the Executive approve, could be set aside by the mere judgment of a court. There was no precedent for it in ancient or modern history. Hence when first this question was suggested in a Federal court, it was received with grave misgiving; the general principles of the Constitution were not, it was said, to be regarded as rules to fetter and control, but as matter merely declaratory and directory; and even if legislative acts directly contrary to it *should* be void, whose was the power to declare them so?

Equally without precedent was every other question. Those who, in their places as legislators, had fought the battle of State sovereignty, were ready to urge in the courts of justice that the Federal Government could claim no powers that had not been delegated to it *in ipsissimis verbis*. If delegated at all, they were to be contracted by construction within the narrowest limits. Whether the right of Congress to pass all laws "necessary and proper" for the Federal Government was not restricted to such as were indispensable to that end; whether the right of taxation could be exercised by a State against creations of the Federal Government; whether a Federal court could revise the judgment of a State court in a case arising under the Constitution and laws of the United States; whether the officers of the Federal Government could be protected against State interference; how far extended the power of Congress to regulate commerce within the States; how far to regulate foreign commerce as against State enactment; how far extended the prohibition to the States against emitting bills of credit—these and like questions were absolutely without precedent.

It is not too much to say that but for Marshall such questions could hardly have been solved as they were. There have been great judges before and since, but none had ever such opportunity, and none ever seized and improved

it as he did. For, as was said by our late President, "He found the Constitution paper, and he made it power; he found it a skeleton, and clothed it with flesh and blood." Not in a few feeble words at such a time as this can be told how, with easy power he grasped the momentous questions as they arose; how his great statesmanship lifted them to a high plane; how his own clear vision pierced clouds which caused others to see as through a glass darkly, and how all that his wisdom could conceive and his reason could prove was backed by a judicial courage unequalled in history.

It may be doubted whether, great as is his reputation, full justice has yet been done him. In his interpretation of the law, the premises seem so undeniable, the reasoning so logical, the conclusions so irresistible, that men are wont to wonder that there had ever been any question at all.

A single instance—the first which arose—may tell its own story. Congress had given to his own court a jurisdiction not within the range of its powers under the Constitution. If it could lawfully do this, the case before the court was plain. Whether it could, said the court, in Marshall's words, "Whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest;" and in these few words was the demonstration made: "It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it, or that the legislature can alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable."

Here was established one of the great foundation principles of the Government, and then in a few sentences, and for the first time, was clearly and tersely stated the theory of the Constitution as to the separate powers of the legislature and the judiciary. If, he said, its theory was that an act of the legislature repugnant to it was void, such an act could not bind the courts and oblige them to give it effect. This would be to overthrow in fact what was established in theory. It was of the very essence of judicial duty to expound and interpret the law; to determine which of two conflicting laws should prevail. When a law came in conflict with the Constitution, the judicial department must decide between them. Otherwise, the courts must close their eyes on the Constitution, which they were sworn to support, and see only the law.

The exposition thus begun was continued for more than thirty years and in a series of judgments, contained in many volumes, is to be found the basis of what is to-day the constitutional law of this country. Were it possible, it would be inappropriate to follow here, with whatever profit, the processes by which this great work was done. The least approach to technical analysis would demand a statement of the successive questions as they arose, each fraught with the history of the time and each suggesting illustrations and analogies which subsequent time has developed. It may have been that could

Marshall have foreseen the extent to which, in some instances, his conclusions could be carried, in the uncertain future and under such wholly changed circumstances as no man could then conjecture, he would possibly have qualified or limited their application ; but the marvel is, that of all he wrought in the field of constitutional labor there is so little that admits of even question.

But besides this, there was much more. It has been truly said of him that he would have been a great judge at any time and in any country. Great in the sense in which Nottingham and Hardwicke as to equity were great ; in which Mansfield as to commercial law and Stowell as to admiralty were great—great in that, with little precedent to guide them, they produced a system with which the wisdom of succeeding generations has found little fault and has little changed. In Marshall's court there was little precedent by which to determine the rights of the Indian tribes over the land which had once been theirs, or their rights as nations against the States in which they dwelt ; there was little precedent when, beyond the seas, the heat of war had produced the British Orders in Council and the retaliatory Berlin and Milan Decrees ; when the conflicting rights of neutrals and belligerents, of captors and claimants, of those trading under the flag of peace, and those privateering under letters of marque and reprisal ; when the effect of the judgments of foreign tribunals ; when the jurisdiction of the sovereign upon the high seas—when these and similar questions arose, there was little precedent for their solution, and they had to be considered upon broad and general principles of jurisprudence, and the result has been a code for future time.

Passing from this, a word must be said as to his judicial conduct when sitting apart from his brethren in his circuit courts. Especially when presiding over trials by jury his best personal characteristics were shown ; the dignity, maintained without effort, which forbade the possibility of unseemly difference, the quick comprehension, the unfailing patience, the prompt ruling, the serene impartiality, and, when required, the most absolute courage and independence, made up as nearly perfect a judge at Nisi Prius as the world has ever known.

One instance only can be noticed here. The story of Aaron Burr, with all its reality and all its romance, must always, spite of much that is repugnant, fascinate both young and old. When in a phase of his varied life, he who had been noted, if not famous, as a soldier, as a lawyer, as an orator, who had won the reason of men and charmed the hearts of women, who had held the high office of Vice-President of the United States, and whose hands were red with the blood of Hamilton—when he found himself on trial for his life upon the charge of high treason, before a judge who was Hamilton's, dear friend, and a jury chosen with difficulty from an excited people, what wonder that, like Cain, he felt himself singled out from his fellows, and coming between his counsel and the court, exclaimed : " Would to God that I did stand on the same ground with any other man ! " And yet the impartiality which marked the conduct of those trials was never excelled in history. By the law of our mother country to have only compassed and imagined the Government's subversion was treason ; but, according to our Constitution, " treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and can it be, said Marshall, that the landing of a few men, however desperate and however intent to

overthrow the government of a State, was a levying of war? It might be a conspiracy, but it was not treason within the Constitution—and Burr's accomplices were discharged of their high crime. And upon his own memorable trial—that strange scene in which these men, the prisoner and the judge, each so striking in appearance, were confronted, and as people said, "two such pairs of eyes had never looked into one another before"—upon that trial the scales of justice were held with absolutely even hand. No greater display of judicial skill and judicial rectitude was ever witnessed. No more effective dignity ever added weight to judicial language. Outside the court and through the country it was cried that "the people of America demanded a conviction," and within it all the pressure which counsel dared to borrow was exerted to this end. It could hardly be passed by. "That this court dares not usurp power, is most true," began the last lines of Marshall's charge to the jury. "That this court dares not shrink from its duty, is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace." That counsel should, he said, be impatient at any deliberation of the court, and suspect or fear the operation of motives to which alone they could ascribe that deliberation, was perhaps a frailty incident to human nature, "but if any conduct could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regrets."

The result was acquittal, and as was said by the angry counsel for the Government, "Marshall has stepped in between Burr and death!" Though the disappointment was extreme; though, starting from the level of excited popular feeling, it made its way upward till it reached the dignity of grave dissatisfaction expressed in a President's message to Congress; though the trial led to legislative alteration of the law, the judge was unmoved by criticism, no matter from what quarter, and was content to await the judgment of posterity that never, in all the dark history of State trials, was the law, as then it stood and bound both parties, ever interpreted with more impartiality to the accuser and the accused.

Once only did Marshall enter the field of authorship. Washington had bequeathed all his papers, public and private, to his favorite nephew, who was one of Marshall's associates on the bench. It was agreed between them that Judge Washington should contribute the material and that Marshall should prepare the biography. The bulk of papers was enormous, and Marshall had just taken his seat on the bench and was deep in judicial work. The task was done under severe pressure, and ill health more than once interrupted it; but it was a labor of love, and his whole heart went out toward the subject. His political opponents feared that his strong convictions, which he never concealed, would now be turned to the account of his party, but the writer was as impartial as the judge. He recalled and perpetuated the intrigues and cabals, the disappointments and the griefs which, equally with the successes, were

part of Washington's life ; but full justice was done to those men whom both Washington and his biographer distrusted and opposed. It is agreed that for minuteness, impartiality and accuracy, the history is exceeded by none. There were those who said the work was colorless, and others were severe by reason of the absolute truth which became their most absolute punishment, but no one's judgment was as severe as Marshall's own, save only as to its accuracy. Once only was this seriously questioned, and by one of the most distinguished of his opponents, and the result was complete vindication.

It is matter of history that upon Washington's death the House had resolved that a marble monument should be erected in the city of Washington, "so designed as to commemorate the great events of his military and political life." But, as Marshall tells us, "that those great events should be commemorated could not be pleasing to those who had condemned, and continued to condemn, the whole course of his administration." The resolution was postponed in the Senate and never passed, and almost the only tinge of bitterness in his pages is that those who possessed the ascendency over the public sentiment employed their influence "to impress the idea that the only proper monument to a meritorious citizen was that which the people would erect in their affections." This he wrote in 1807 and repeated in 1832, and in the next year the people resolved that this should no longer be. The National Monument Association was then formed, and Marshall was its first president. Under its auspices, and with the aid, long after, of large appropriations by Congress, the gigantic column within our sight is slowly and gradually being reared.

Near the close of his life, when he was seventy-four years old, Marshall was chosen a member of the convention which met, in 1829, to revise the Constitution of his native State. It was a remarkable body. The best men of the State were there. Some of them were among the best men in the country, for then, as always, Virginia had been proud to rear and send forth men whose names were foremost in their country's history. Prominent among them were Madison, Monroe, and Marshall. Even then party spirit ran high. Two questions in particular, the basis of representation and the tenure of judicial office, distracted the convention as they had distracted the people. On both these questions Marshall spoke with his accustomed dignity and not less than his accustomed force, and his words were listened to with reverent respect. Upon the subject of judicial tenure he spoke from his very heart, "with the fervor and almost the authority of an apostle." He knew better than any how a judge, standing between the powerful and the powerless, was bound to deal justice to both, and that to this end his own position should be beyond the reach of anything mortal. "The judicial department," said he, "comes home in its effects to every man's fireside ; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience?" And his next words were fraught with the wisdom of past ages, let us hope not with prophetic foreboding : "I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

Something has here been said of Marshall's inner life in its earlier years, and no man's life was ever more dear to those around him than was his from its be-

ginning to its close. His singleness and simplicity of character, his simplicity of living, his love for the young and respect for the old, his deference to women, his courteous bearing, his tender charity, his reluctance to conceive offence and his readiness to forgive it, have become traditions from which in our memories of him we interweave all that we most look up to with all that we take most nearly to our hearts.

As the evening of life cast its long shadows before him, the labor and sorrow that come with four score years were not allowed to pass him by. Great physical suffering came to him; the hours not absorbed in work brought to him memories of her whose life had been one with his for fifty years. The "great simple heart, too brave to be ashamed of tears," was too brave not to confess that rarely did he go through a night without shedding them for her. No outward trace of this betrayed itself, but lest some part of it should, all unconsciously to himself, impair his mental force, he begged those nearest to him to tell him in plain words when any signs of failing should appear. But the steady light within burned brightly to the last, however waning might be his mortal strength. He met his end, not at his home, but surrounded by those most dear to him. As it drew near he wrote the simple inscription to be placed upon his grave. His parentage, his marriage, with his birth and death, were all he wished it to contain. And as the long summer day faded, the life of this great and good man went out, and in the words of his church's liturgy, he was "gathered to his fathers, having the testimony of a good conscience, in the communion of the catholic church, in the confidence of a certain faith, in the comfort of a reasonable, religious, and holy hope, in favor with God, and in perfect charity with the world."

And for what in his life he did for us, let there be lasting memory. He and the men of his time have passed away: other generations have succeeded them; other phases of our country's growth have come and gone; other trials, greater a hundred fold than he or they could possibly have imagined, have jeoparded the nation's life; but still that which they wrought remains to us, secured by the same means, enforced by the same authority, dearer far for all that is past, and holding together a great, a united and a happy people. And all largely because he whose figure is now before us has, above and beyond all others, taught the people of the United States, in words of absolute authority, what was the Constitution which they ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

Wherefore with all gratitude, with fitting ceremony and circumstance; in the presence of the highest in the land; in the presence of those who make, of those who execute, and of those who interpret the law; in the presence of those descendants in whose veins flows Marshall's blood, have the Bar and the Congress of the United States here set up this semblance of his living form, in perpetual memory of the honor, the reverence, and the love which the people of his country bear to the great Chief Justice.

The ceremonies were concluded with a benediction by the Rev. Dr. J. G. Armstrong.

III.

FLINT AND PÈRE MARQUETTE RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 8, 1884.—Decided January 5, 1885.

This was an appeal from the Court of Claims. The facts are stated in the opinion of the court.

Mr. J. F. Farnsworth for appellant.

Mr. Solicitor-General for appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

In this case the appellant sued in the Court of Claims to recover $14,394.71, alleged to have been earned by the Flint and Père Marquette Railroad Company under a contract for postal service, and which the Postmaster-General had withheld, as a reduction of compensation under the Post Office Appropriation Act of July 12, 1876, and that of June 17, 1878.

The appellant is a corporation, organized under the laws of Michigan by the purchasers at a judicial sale of the railroad property and franchises of the Flint and Père Marquette Railroad Company, under proceedings to foreclose mortgages which expressly conveyed to the mortgagees all choses in action and all claims and demands whatsoever, including claims against the United States. The sale undoubtedly passed the interest and title of the mortgagor to the claim sued on, if that was capable in law of being assigned.

As it has just been decided in the case of the St. Paul and Duluth Railroad Company that the assignment and transfer of such a claim was rendered void as against the United States by Rev. Stat. § 3477, the appellant had no title to the claim sued on, which it could enforce in the Court of Claims.

The judgment of that court is accordingly

Affirmed.

INDEX.

ASSIGNMENT.

See CLAIMS AGAINST FOREIGN GOVERNMENTS;
CLAIMS AGAINST THE UNITED STATES.

BAILMENT.

See COMMON CARRIER.

BARRATRY.

See FRIVOLOUS DEFENCE.

BILLS OF EXCHANGE.

See LIFE INSURANCE, 1, 2, 3;
PRINCIPAL AND AGENT;
PROMISSORY NOTE.

BOND.

See APPEAL BOND;
CONTRACT, 2;
SURETY.

CASES AFFIRMED.

Hitz v. *National Metropolitan Bank*, 111 U. S. 722, was decided after elaborate argument and careful consideration, and is adhered to by the court. *Matoon* v. *McGrew*, 713.

The rulings of the court in *Chicago & Northwestern Railway Co.* v. *United States*, 104 U. S. 680, and *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States*, 104 U. S. 687, maintained. *St. Paul & Duluth Railroad* v. *United States*, 733.

See JURISDICTION, A, 4, 5, 6; B, 2, 4;
PATENT, 9;
QUO WARRANTO.

CASES DISTINGUISHED.

See PUBLIC LAND, 4.

CERTIFICATE OF DIVISION.

See CONSTITUTIONAL LAW, 5.

CHINESE LABORERS.

The fourth section of the act of Congress, approved May 6, 1882, ch. 126,

CONSTITUTIONAL LAW.

CONSTRUCTION OF STATUTES.

CONTRACT.

CONTEMPT.

When a judgment of a State court removes a State officer and thereby vacates the office, and a writ of error from this court is allowed for the reversal of that judgment, one appointed to the vacancy with knowledge of the granting of the writ of error on the part of the judge of the Supreme Court of the State making the appointment, but before the filing of the writ in the clerk's office where the record remains, is guilty of no contempt of this court in assuming to perform the duties of the office. *Foster* v. *Kansas*, 201.

CORPORATION.

1. A vote by a County Court in Missouri subscribing to the capital stock of a railroad company on certain conditions named in the vote, and directing a designated agent to make the subscription on the stock books of the company, and to copy the conditions in full thereon; and a presentation of the subscription and of the conditions in writing by the agent in person to the directors at a directors' meeting; and the acceptance of them by the board with a direction that the same be spread upon the record books of the company, constituted a subscription to the stock, although no actual subscription was made by the agent personally on the stock books. *Bates County* v. *Winters*, 325.
2. In Missouri the consolidation of two or more railroad companies organized under the general law does not avoid subscriptions made to the stock of either, or invalidate the delivery of municipal bonds to the consolidated company in payment of such subscriptions. *Ib.*
3. A statute exempting a corporation from taxation confers the privilege only on the corporation specially referred to, and the right will not pass to its successor unless the intent of the statute to that effect is clear and express. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; and *Louisville & Nashville Railroad Company* v. *Palmes*, 109 U. S. 244, affirmed. *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 609.
4. The franchise to be a corporation is not a subject of sale and transfer, unless made so by a statute, which provides a mode for exercising it. *Ib.*
5. A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway: the latter may be mortgaged without the former, and may pass to a purchaser at a foreclosure sale. *Ib.*
6. A mortgage of the charter of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation: if it confers any right of corporate existence upon them, it is only a right to reorganize as a

ERROR.

See HABEAS CORPUS, 1;
PRACTICE, 5, 6.

ESTOPPEL.

1. The facts in this case do not estop the defendant in error from objecting to the list of swamp lands in Buena Vista County, which was filed by the agent of the county in the office of the Surveyor-General in Iowa in accordance with provisions of a law of that State. *Buena Vista County* v. *Iowa Falls Railroad*, 165.
2. The judgment of a State court in Missouri adverse to the validity of bonds issued by a county in that State in payment of the subscription to stock in a railroad company, which judgment was made in a suit brought by citizens and tax-payers against county officers in order to enjoin the issue of the bonds, and to have them declared invalid, is a binding adjudication in a suit against the county by a holder of the bonds who took with notice of the pendency of the suit. The fact that this court, in another case, and on a different state of facts, held the same issue to be valid does not affect this result. *Scotland County* v. *Hill*, 183.

EVIDENCE.

1. The provision in the New York Civil Code that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that State, in trials at common law. *Connecticut Insurance Co.* v. *Union Trust Co.*, 250.
2. Section 721 of the Revised Statutes, declaring that "the laws of the several States, except where the Constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," relates to the nature and principles of evidence, and also to the competency of witnesses, except as the latter subject may be regulated by specific provisions of the statutes of the United States. *Ib.*
3. To the question, in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was No : *Held*, That the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease, that is, of a character so well defined and marked as to materially disturb or derange for a time its vital functions ; that the question did not require him to state every instance of slight or accidental disorders or ailments, affecting the

JURY.

See COURT AND JURY;
WAIVER OF JURY.

KANSAS.

See LIMITATION.

LAND GRANT.

See PUBLIC LAND, 6, 8, 11, 12, 13, 14.

LEASE.

The legal title to real estate acquired subsequent to the lease by a lessor owning the equitable title at the date of the lease, inures to the benefit of the lessee as against a judgment creditor of the lessor whose judgment is subsequent to the lease. *Skidmore* v. *Pittsburgh & Cincinnati Railway*, 33.

LEGISLATIVE CONFIRMATION.

See MUNICIPAL CORPORATION.

LIEN.

1. F conveyed to W, as trustee, real estate in Illinois on trust to permit F's wife to use and occupy and receive the rents and profits during her lifetime and to her own use, and at any time to convey on the written request of F and the wife, to the person designated, and in case of the wife's death in the husband's lifetime to convey to the husband for life with remainder to their children : *Held*, That, under the laws of Illinois in force when the rights of the parties became fixed, a judgment creditor of F had no lien at law upon his interest in the property, and could acquire one only by filing a bill in equity. *Brandies* v. *Cochrane*, 344.
2. At the common law (in force in Illinois when the rights of the parties became fixed), the lien of a judgment against one having a power of appointment, with the estate vested in him until, and in default of, appointment, was liable to be defeated by execution of the power, even though the purchaser had actual notice of the judgment. *Ib.*
3. The general doctrine in equity that where a person has a general power of appointment, and executes this power, the property appointed is deemed, in equity, part of his assets, cannot be invoked to support a claim of a judgment lien at law upon the antecedent estate, which the exercise of the power had displaced. *Ib.*

LIFE INSURANCE.

See EVIDENCE, 3.

LIMITATION, STATUTES OF.

MANDAMUS.

1. A writ of mandamus is not ordinarily granted when the party alleging the grievance has another adequate remedy, and that remedy has not been exhausted. *Virginia Commissioners, ex parte*, 177.
2. Mandamus will lie against commissioners of a county to enforce a judgment against a township within the county when the law casts upon them the duty of providing for its satisfaction, and when mandamus is, in other respects, the proper remedy. *Labette County Commissioners* v. *Moulton*, 217.
3. One writ of mandamus against all officers concerned in the separate but co-operative steps for levying and collecting a tax is the proper and effective remedy to enforce its collection. *Ib.*

See JURISDICTION, A, 1, 2.

MANDATE.

See JURISDICTION, A, 8.

MARRIAGE.

See COURT AND JURY, 2.

MASTER AND SERVANT.

See RAILROAD 1, 2.

MECHANICS' LIEN.

See CONFLICT OF LAW, 2.

MEXICAN WAR.

See OFFICERS OF THE ARMY AND NAVY.

MILITARY ACADEMY.

See LONGEVITY PAY.

MORTGAGE.

1. In a suit in equity to foreclose a mortgage from a railroad corporation of its whole railroad, franchise, lands and property, which have since been put in the possession of a receiver, an intervening prior mortgagee of part of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to his mortgage. *Woodworth* v. *Blair*, 8.
2. A mortgage executed by husband and wife of her land, for the accom-

MOTION TO DISMISS.

MUNICIPAL BOND.

MUNICIPAL CORPORATION.

A municipal subscription to the stock of a railroad company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given. *Grenada County* v. *Brogden*, 261.

MUNICIPAL ORDINANCE.

PATENT.

PLEADING.

POWER.

PRACTICE.

PRE-EMPTION.

PRESUMPTION.

PRINCIPAL AND AGENT.

A bank in Pittsburgh sent to a bank in New York, for collection, eleven unaccepted drafts, dated at various times through a period of over three months, and payable four months after date. They were drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J." and were sent to the New York bank as drafts on the Tea Tray Com-

SUBROGATION.

H & M being owners in common of a tract of land covered by a mortgage to D, from whom they purchased, agreed to partition, H taking tract 1, M taking tract 2, and tract 3 being subdivided between them. M agreed to assume the mortgage to D, and that H should take his portion free from the encumbrance. M sold his interest to Y, who borrowed from R through his agents to make the purchase, mortgaged his interest in tract 2 to secure the money borrowed, and agreed to apply the money borrowed to obtain a release of tract 2 from the mortgage. Instead of doing it he obtained with it a release of tract 3. Subsequently with money obtained from sale of lots in tract 3, and with other money advanced by them, R's agents acquired the notes secured by his mortgage : *Held*, That under all circumstances of this case, this was to be regarded as a payment of the mortgage notes, and that R as against H was not entitled to be subrogated in the place of D, with the right to enforce the mortgage against tract 2. *Richardson* v. *Traver*, 423.

SUPERSEDEAS.

1. A writ of error operates as a supersedeas only from the time of the lodging of the writ in the office of the clerk where the record to be examined remains. *Foster* v. *Kansas*, 201.
2. The Circuit Courts of the United States, taking jurisdiction of a proceeding to enforce a remedy given by a State statute, can act only in accordance with the statute creating the remedy, and are possessed only of the powers conferred by it on the State courts : and this court will modify a supersedeas granted by a Circuit Court of the United States in such a proceeding, in order to make it conform to the powers conferred upon State courts in that respect. *East Tennessee Railroad Co.* v. *Southern Telegraph Co.*, 306.

See CONTEMPT; PRACTICE, 10.

SURETY.

A bond by a principal and a surety was conditioned that the principal should pay to V all indebtedness existing or to exist from the principal to V under existing or future contracts between him and V, and waived notice of non-payment on all notes executed, indorsed or guaranteed by the principal to V. In a suit on the bond, against the obligors, to recover the amount of notes executed by the principal to V, and other notes indorsed and guaranteed by him to V : *Held*, That it was not necessary to allege or show any notice to the surety of a default by the principal in paying V. *Murphy* v. *Victor Sewing Machine Co.*, 688.

See CONTRACT, 2.

SWAMP LANDS.

See ESTOPPEL, 1;
PUBLIC LAND, 7.

TAX.

See CONSTITUTIONAL LAW, 9, 10, 11, 12; JURISDICTION, A, 1, 2;
CORPORATION, 3; MANDAMUS, 3.

TREATY.

1. A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interest of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this, judicial courts have nothing to do. *Head Money Cases*, 580.
2. But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnish, in cases otherwise cognizable in such courts, rules of decision. The Constitution the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried. *Ib.*
3 But in this respect, so far as the provisions of a treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification, or repeal. *Ib.*

See JURISDICTION, C, 1.

TRIAL.

See COURT AND JURY;
PRACTICE, 1, 2, 3, 5, 6.

TRUST.

Under a deed of trust to secure M, covering land in the District of Columbia, owned by B and W, as tenants in common, the land was sold to B, in 1873. The amount secured by the deed was $5,000 of principal and $2,429.02 interest, expenses and taxes. The sale was for enough to pay all this and leave a sum due to W for her share of the surplus. The terms of sale were not carried out, but M advanced to B $3,200 more (out of which the $2,429.02 was paid), and took a deed of trust for $8,200, which was recorded as a first lien. A deed of trust to secure the amount going to W was recorded as a second lien, but was never accepted by W. Litigation afterwards ensued, to which M and B and W were parties, and in which a sale of the land was ordered and made in 1880, and M bought it, for a sum not sufficient to pay the $7,429.02, with interest, and the subsequent taxes on the land. W claimed priority out of the purchase money for her share of the surplus on the sale of 1873, and M claimed the right to set off against the purchase money enough of her claim for the $7,429.02, and interest, and the subsequent taxes, to absorb it: *Held*, That the parties had abandoned the sale of 1873, and that the sale of 1880 must be regarded as a sale to enforce the original deed of trust to secure M, and that W had no right to any of the proceeds of the sale of 1880. *Mellen* v. *Wallach*, 41.

TRUSTEE.

See JURISDICTION, B, 5.

USURY.

1. The provision in § 715 Rev. Stat. District of Columbia, that a lender contracting to receive an illegal rate of interest, shall forfeit all such interest, and shall be entitled to recover only the principal sum, applies only to cases in which the illegal interest has been contracted for, but has not been paid. *Carter* v. *Carusi*, 478.
2. The remedy given by § 716 Rev. Stat. District of Columbia to recover back unlawful interest actually paid is exclusive. *Ib.*

VERDICT.

1. A general verdict, upon an information in several counts for a single forfeiture under the internal revenue laws, is valid if one count is good. *Snyder* v. *United States*, 216.
2. A verdict which speaks of "evaluating," instead of "valuing," is not therefore insufficient to support a judgment. *Ib.*
3. A general verdict upon distinct issues raised by several pleas cannot be sustained if there was error as to the admission of evidence, or in the charge of the court, as to any one of the issues. *Maryland* v. *Baldwin*, 490.

VESSEL.

See COLLISION.

WAIVER OF JURY.

The filing of a stipulation in writing, waiving a jury, under section 649 of the Revised Statutes, is not sufficiently shown by a statement in the record, or in the bill of exceptions, that "the isssue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial, by agreement of parties, by the court, without the intervention of a jury." *Bond* v. *Dustin*, 604.

WILL.

See DEVISE, 1, 2.

WRIT OF ERROR.

See HABEAS CORPUS, 2;
PRACTICE, 7.