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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.

ATTORNEYS-GENERAL.

Benjamin Harris Brewster.

Augustus H. Garland.*

SOLICITOR-GENERAL.

Samuel Field Phillips.

REPORTER.

J. C. Bancroft Davis.

CLERK.

James H. McKenney.

MARSHAL.

John G. Nicolay.

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* Mr. Brewster having resigned, Mr. Garland was appointed in his stead, and qualified on the 7th day of March, 1885.

THE CHIEF JUSTICE was absent, by reason of indisposition, between December 12, 1884, and March 2, 1885, and during that period heard argument in no case reported in this volume.

April 6, 1885. The Reporter having represented that, owing to the number of decisions at the Term, it will be impracticable to put the reports in one volume, it is therefore now here ORDERED: That he publish an additional volume in this year, pursuant to Section 681 of the Revised Statutes.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1884.

COLE *v.* LA GRANGE.

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

Submitted December 8, 1884.—Decided January 5, 1885.

The general grant of legislative power in the Constitution of a State does not authorize the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object.

The legislature of Missouri has no constitutional power to authorize a city to issue its bonds by way of donation to a private manufacturing corporation.

This was an action to recover the amount of coupons for interest from January 1, 1873, to January 1, 1880, attached to twenty-five bonds, all exactly alike, except in their serial numbers, and one of which was as follows:

"United States of America:
State of Missouri, City of La Grange.

No. 23. $1,000.

"Know all men by these presents, that the City of La Grange doth for a good, sufficient and valuable consideration promise to pay to the La Grange Iron and Steel Company or

bearer the sum of one thousand dollars in current funds, thirty years after the date hereof, at the third National Bank, City of New York, together with interest thereon at the rate of eight per cent. per annum, payable annually in current funds on the first day of each January and July ensuing the date hereof on presentation and surrender of the annexed interest coupons at said Third National Bank.

"This bond is issued under an ordinance of the City Council of the said City of La Grange, passed and approved September 22d, 1871, under and in pursuance of an act of the legislature of the State of Missouri, entitled 'An act to amend an act entitled an act to incorporate the City of La Grange,' approved March 9th, 1871, which became a law and went into force and effect from and after its said approval.

"This bond to be negotiable and transferable by delivery thereof.

"In testimony whereof the City Council of the City of La Grange hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the city council of said city this 14th day of December, 1871.

[SEAL.] J. A. HAY, Mayor.
R. McCHESNEY, Clerk."

The petition alleged that the city of La Grange on December 14, 1871, executed the twenty-five bonds, and delivered them to the La Grange Iron and Steel Company, under and by virtue of the authority contained in section 1 of article 6 of the city charter, as amended by an act of the legislature of Missouri, approved March 9, 1871 (which section, as thus amended, was set forth in the petition, and is copied in the margin),* and under and by virtue of an ordinance of the city,

* SECT. 1. The city council shall have power to levy and collect taxes upon all real and personal property within the limits of the corporation, not to exceed one half of one per centum per annum upon the assessed valuation thereof, in any manner to be provided by ordinance not repugnant to the Constitution of the State of Missouri. And whenever twenty-five persons, who are taxpayers and residents of the City of La Grange, shall petition the city council, setting forth their desire to donate or subscribe to the capital stock of any railroad,

dated September 22, 1871, by which an election was authorized to be held in the city on October 4, 1871, to test the sense of the people of the city upon the question of issuing the bonds; that, in compliance with the ordinance and with the city charter, an election was held, at which the proposition was adopted by a two-thirds vote of the qualified voters; and that on September 1, 1872, the plaintiff bought the twenty-five bonds, for value, relying upon the recitals on their face, and without knowledge of any irregularity or defect in their issue: of all which the defendant had notice; by means whereof the defendant became liable and promised to pay to the plaintiff the sums specified in the coupons, according to their tenor and effect.

The answer denied all the allegations of the petition; and for further answer averred that the act of the legislature mentioned in the petition, approved March 9, 1871, attempted to give, and in terms did give, to the city authority to make gifts and donations to private manufacturing associations and corporations; that the city council, purporting to act under such authority, by an ordinance adopted September 22, 1871, (which was referred to in the answer and is copied in the margin*), did submit to a vote of the citizens a proposition to

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or manufacturing company, or for the improvement of any road leading into the city, or for increasing the trade, travel or commerce thereof, or for securing the location and maintenance of any manufacturing company, stating the terms and conditions on which they desire such donation or subscription to be made, it shall be the duty of the city council to order an election to be held, at which the qualified voters of said city shall be allowed to vote; and if it shall appear from the returns of said election that two-thirds of the resident taxpayers have voted in favor of such donation or subscription, it shall be declared carried by proclamation of the mayor, and a special tax of not exceeding two per centum per annum may be levied on the assessed value of real and personal property to pay such donation or subscription, and the city council shall, under the hand of the mayor and attested by the seal of said city, issue bonds of the City of La Grange to the amount of the capital stock so subscribed, or to the amount of the donation made to any such enterprise, or for any purpose hereinbefore specified; which said bonds shall be conditioned upon the proposition submitted and voted upon at the election held for that purpose, and said bonds shall not bear a greater rate of interest than ten per centum per annum.

* Be it Ordained by the City Council of the City of La Grange as follows:

give or donate to the La Grange Iron and Steel Company, a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill, the sum of $200,000; that, in accordance with that ordinance, the bonds of the city were issued, with interest coupons attached, a part of which were those sued on; that the bonds and coupons were issued to said manufacturing company, which was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character; and that it was incompetent for the legislature to grant authority to cities or towns to make donations and issue bonds to mere private companies or associations having no public functions to perform, and the act of the legislature and the ordinance of the city were void; wherefore the bonds and coupons were issued without any legal authority, and were wholly void.

To this answer the plaintiff filed a general demurrer, which was overruled by the court, and the plaintiff electing to stand by his demurrer, judgment was entered for the defendant. 19 Fed. Rep. 871. The plaintiff sued out this writ of error.

Mr. George A. Sanders for plaintiff in error.—The important questions in this case have been settled both in the State

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That upon petition of John M. Glover and twenty-five other taxpayers of said city, that an election be and is hereby ordered to be held at the city hall in said city on Wednesday, the fourth day of October next, to test the sense of the legal voters of said city on the propriety of the said city donating ten acres of land, and two hundred thousand dollars in city bonds, to be due in thirty years from date, and to bear interest at the rate of eight per cent. per annum, the interest to be paid semi-annually at New York or Boston to Isaac R. Adams and associates, in consideration that the said Isaac R. Adams and associates will build and construct at the City of La Grange a rolling iron mill of sufficient capacity to roll twenty-five thousand tons of railroad iron per annum, the said mill to be built within one year from the date of the election herein ordered, and the said company shall operate and maintain the same at the City of La Grange for the term of twenty years from its completion, in accordance with the memorandum and agreement here filed of this date; and on the ballot of each voter shall be written or printed "For the donation," or "Against the donation." Adopted September 22d, 1871.

J. A. Hay, Mayor.

and Federal courts. A construction of section 14, article 11, of the Constitution of Missouri was given in *State* v. *Curators of State*, 57 Missouri, 178, in which an injunction was sought, to prohibit the issue of $75,000 of bonds by Phelps County, in aid of the School of Mines and Metallurgy, at Rolla, Missouri, and the injunction was granted because there had been no election and no assent of two-thirds of the voters, which is the all-important and only restriction in that section of the Constitution. Courts have no power to render legislative acts void, unless there is express constitutional prohibition to the enactment. In case of doubt the act must be sustained. *St. Louis* v. *Griswold*, 58 Missouri, 175; *Van Hostrup* v. *Madison*, 1 Wall. 291; *Richards* v. *Raymond*, 92 Ill. 612. The defendant's acts under the powers granted to it not being *ultra vires*, it is estopped from denying that power. *National Bank* v. *Matthews*, 98 U. S. 621, 629; *Hitchcock* v. *Galveston*, 96 U. S. 341; *Coloma* v. *Eaves*, 92 U. S. 484, 493. As the issue of the bonds was regular and in exact accordance with the requirements of the statute, the sole question in the case is whether the legislature had constitutional power to authorize their issue. It is claimed that this is settled adversely to plaintiff by *Loan Association* v. *Topeka*, 20 Wall. 655; but we submit that the dissenting opinion of Mr. Justice Clifford better accords with later decisions. See *County of Livingston* v. *Darlington*, 101 U. S. 407. The rule well settled now seems to be: "That courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restrictions." *Walker* v. *Cincinnati*, 21 Ohio, 41. The Supreme Court of Missouri refused to decide what purposes were public and what private. The city of La Grange decided this by its vote for the issue of the bonds. The Constitution having imposed no limit, the authority of the legislature is practically absolute to give or refuse such powers to municipal organizations. *Providence Bank* v. *Billings*, 4 Pet. 514; *Calder* v. *Bull*, 3 Dall. 385; *Pine Grove* v. *Talcott*, 19 Wall. 666, 677. If, however, it is held that the question of a public pur-

pose is to enter into this case, then we insist that these bonds were issued for such a corporate purpose as constitutes a public purpose. A public purpose is one that promotes the general prosperity and welfare of the community. *Hackett* v. *Ottawa*, 99 U. S. 86, 94. In that case bonds issued to a manufacturing company were held good. In *Livingston* v. *Darlington*, above cited, bonds issued to aid in the erection of buildings to be given by the county to a Reform University were held good, as issued for a public corporate purpose. How do those cases differ from this? See also *Taylor* v. *Thompson*, 42 Illinois, 9; *Chicago & Iowa Railroad* v. *Pinckney*, 74 Illinois, 277, 279.

Mr. David Wagner for defendant in error.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.

In *Loan Association* v. *Topeka*, 20 Wall. 655, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in *Parkersburg* v. *Brown*, 106 U. S. 487. The decisions in the courts of the States are to the same effect. *Allen* v. *Jay*, 60 Maine, 124; *Lowell* v. *Boston*, 111 Mass. 454; *Weismer* v. *Douglas*, 64 N. Y. 91; *In re Eureka Co.*, 96 N. Y. 42; *Bissell* v. *Kankakee*, 64 Illinois, 249; *English* v. *People*, 96 Il-

linois, 566; *Central Branch Union Pacific Railroad* v. *Smith*, 23 Kansas, 745.

We have been referred to no opposing decision. The cases of *Hackett* v. *Ottawa*, 99 U. S. 86, and *Ottawa* v. *National Bank*, 105 U. S. 342, were decided, as the Chief Justice pointed out in *Ottawa* v. *Carey*, 108 U. S. 110, 118, upon the ground that the bonds in suit appeared on their face to have been issued for municipal purposes, and were therefore valid in the hands of *bona fide* holders. In *Livingston* v. *Darlington*, 101 U. S. 407, the town subscription was towards the establishment of a State Reform School, which was undoubtedly a public purpose, and the question in controversy was whether it was a corporate purpose, within the meaning of the Constitution of Illinois. In *Burlington* v. *Beasley*, 94 U. S. 310, the grist mill held to be a work of internal improvement, to aid in construct ing which a town might issue bonds under the statutes of Kansas, was a public mill which ground for toll for all customers. See *Osborne* v. *Adams County*, 106 U. S. 181, and 109 U. S. 1; *Blair* v. *Cuming County*, 111 U. S. 363. Subscriptions and bonds of towns and cities, under legislative authority, to aid in establishing railroads, have been sustained on the same ground on which the delegation to railroad corporations of the sovereign right of eminent domain has been justified, the accommodation of public travel. *Rogers* v. *Burlington*, 3 Wall. 654; *Queensbury* v. *Culver*, 19 Wall. 83; *Loan Association* v. *Topeka*, 20 Wall. 661, 662; *Taylor* v. *Ypsilanti*, 105 U. S. 60. Statutes authorizing towns and cities to pay bounties to soldiers have been upheld, because the raising of soldiers is a public duty. *Middleton* v. *Mullica*, 112 U. S. 433; *Taylor* v. *Thompson*, 42 Illinois, 9; *Hilbish* v. *Catherman*, 64 Penn. St. 154; *State* v. *Richland*, 20 Ohio St. 362; *Agawam* v. *Hampden*, 130 Mass. 528, 534.

The express provisions of the Constitution of Missouri tend to the same conclusion. It begins with a Declaration of Rights, the sixteenth article of which declares that "no private property ought to be taken or applied to public use without just compensation." This clearly presupposes that private property cannot be taken for private use. *St. Louis County Court* v.

Griswold, 58 Missouri, 175, 193; 2 Kent Com. 339 note, 340. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever. It is true that this article regards the right of eminent domain, and not the power to tax; for the taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes. But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the State for the public use, and not to promote private ends.

The only other provisions of the Constitution of Missouri, having any relation to the subject, are the following sections of the eleventh article:

"SECT. 13. The credit of the State shall not be given or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the State.

"SECT. 14. The general assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

Both these sections are restrictive, and not enabling. The thirteenth section peremptorily denies to the State the power of giving or lending its credit to, or becoming a stockholder in, any corporation whatever. The aim of the fourteenth section is to forbid the legislature to authorize counties, cities or towns, without the assent of the taxpayers, to become stockholders in, or to lend their credit to, any corporation, however public its object; *State* v. *Curators State University*, 57 Missouri, 178; not to permit them to be authorized, under any circumstances, to raise or spend money for private purposes.

It is averred in the answer, and admitted by the demurrer,

that the La Grange Iron and Steel Company, to which the bonds were issued, was "a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill," and "was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character." The ordinance referred to shows that the mill was to manufacture railroad iron; but that is no more a public use than the manufacture of iron bridges, as in the *Topeka Case*, or the making of blocks of stone or wood for paving streets. There can be no doubt, therefore, that the act of the legislature of Missouri is unconstitutional, and that the bonds, expressed to be issued in pursuance of that act, are void upon their face.

As for this reason the action cannot be maintained, it is needless to dwell upon the point that the answer demurred to, besides the special defence of the unconstitutionality of the act, contains a general denial of the allegations in the petition. That point was mentioned and passed over in the opinion of the Circuit Court, and was not alluded to in argument here, the parties in effect assuming the general denial in the answer to have been withdrawn or waived, and the case submitted for decision upon the validity of the special defence.

Judgment affirmed.

HEAD *v.* AMOSKEAG MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Argued December 16, 17, 1884.—Decided January 5, 1885.

A statute of a State, authorizing any person to erect and maintain on his own land a water mill and mill-dam upon and across any stream not navigable, paying to the owners of lands flowed damages assessed in a judicial proceeding, does not deprive them of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Statement of Facts.

This was a writ of error to reverse a judgment of the Supreme Court of the State of New Hampshire against the plaintiff in error, upon a petition filed by the defendant in error (a corporation established by the laws of New Hamsphire for the manufacture of cotton, woolen, iron and other materials) for the assessment of damages for the flowing of his land by its mill-dam at Amoskeag Falls on the Merrimack River, under the general mill act of that State of 1868, ch. 20, which is copied in the margin.*

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* An Act for the Encouragement of Manufactures.

Sect. 1. Any person, or any corporation authorized by its charter so to do, may erect and maintain on his or its own land, or upon land of another with his consent, a water mill, and dam to raise the water for working it, or for creating a reservoir of water, and for equalizing the flow of the same, for its use and of mills below, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed.

Sect. 2. If the land of any person shall be overflowed, drained, or otherwise injured by the use of such dam, and said damage or injury shall not, within thirty days after due notice thereof, be satisfactorily adjusted by the party erecting or maintaining said dam, either party may apply by petition to the Supreme Judicial Court, in the county or counties where such damage or grievance arises, to have the damage, that may have been or may be done thereby, assessed ; which petition shall set out the title and description of the premises damaged, the right by reason whereof said grievance arises, the location of the dam and extent of the damages that may be occasioned thereby; and said court, after reasonable notice to all persons interested, shall, unless the parties agree upon the judgment that shall be rendered, refer said petition to a committee of three disinterested persons to be appointed by said court, to determine in relation to the matters set forth therein.

Sect. 3. The committee shall give such notice to the parties as shall be ordered by said court ; shall hear the parties and view the premises ; and, if they shall be of opinion that the flowing or draining of said land, to the depth and extent that the same may or can be flowed by said dam, is or may be of public use or benefit to the people of this State, and that the same is necessary for the use of the mill or mills for which said dam was designed, they shall estimate the damages, and make report to the said court at the next term thereof after said view and estimate. Upon the return of the report of said committee, any person interested therein may object to the acceptance of the same for any irregularity or improper conduct of said committee ; and said court may set aside said report for any just and reasonable cause, and, if required, shall inquire for itself whether the erection of said dam is of public use or benefit, any finding of the committee upon that point notwithstanding ;

Statement of Facts.

In the petition filed in the State court, the Amoskeag Manufacturing Company alleged that it had been authorized by its charter to purchase and hold real estate, and to erect thereon such dams, canals, mills, buildings, machines and works as it might deem necessary or useful in carrying on its manufactures and business; that it had purchased the land on both sides of the Merrimack River at Amoskeag Falls, including the river and falls, and had there built mills, dug canals, and established works, at the cost of several millions of dollars, and, for the purpose of making the whole power of the river at the falls available for the use of those mills, had constructed a dam across the river; that the construction of the mills and dam, to raise the water for working the mills, for creating a reservoir of water, and for equalizing its flow, was of public use and benefit to the people of the State, and necessary for the use of the mills for which it was designed; and that Head, the owner of a tract of land, described in the petition, and bounded by the river, claimed

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and, if the court shall be of opinion that the erection of said dam is not of public use or benefit, the petition shall be dismissed. But if the report shall be accepted and established, the court shall render judgment thereon, after adding fifty per cent. to the estimate of damage; which judgment shall be final, and execution shall issue thereon. Before the reference of such petition to the committee, if either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition, and assess the damages; and judgment rendered on the verdict of such jury, with fifty per cent. added, shall be final, and said court may award costs to either party at its discretion.

SECT. 4. No person or corporation shall derive any title from said proceedings, or be discharged from any liability in relation to said premises, until he or it has paid or tendered to the person aggrieved or damaged the amount of such adverse judgment.

SECT. 5. This act shall in no way affect existing suits, nor any mill of other persons lawfully existing on the same stream, nor any mill-site or mill privilege of other persons on which a mill-dam has been lawfully erected and used, nor the right of any owner of such mill, mill-site or mill privilege, unless the right to maintain on such last mentioned site or privilege shall have been lost or defeated by abandonment or otherwise; neither shall it affect the right of a town in any highway or bridge which said town may by law be liable to keep in repair: Provided, however, that the provisions of this act shall not be applicable to any navigable waters in this State.

SECT. 6. This act shall take effect from and after its passage. [Approved July 3, 1868.]

damages for the overflowing thereof by the dam, which the corporation had been unable satisfactorily to adjust; and prayed that it might be determined whether the construction of the mills and dam, and the flowing, if any, of Head's land to the depth and extent that it might or could be flowed thereby, were or might be of public use or benefit to the people of the State, and whether they were necessary for the mills, and that damages, past or future, to the land by the construction of the dam might be assessed according to the statute.

At successive stages of the proceedings, by demurrer, by request to the court after the introduction of the evidence upon a trial by jury, and by motion in arrest of judgment, Head objected that the statute was unconstitutional, and that the petition could not be maintained, because they contemplated the taking of his property for private use, in violation of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; as well as in violation of the Constitution of the State, the Bill of Rights of which declares that all men have certain natural, essential and inherent rights, among which are the acquiring, possessing and protecting property, and that every member of the community has a right to be protected in the enjoyment of his property.

His objections were overruled by the highest court of New Hampshire, and final judgment was entered, adjudging that the facts alleged in the petition were true, and that, upon payment or tender of the damages assessed by the verdict, with interest, and fifty per cent. added, making in all the sum of $572.43, the company have the right to erect and maintain the dam, and to flow his land forever to the depth and extent to which it might or could be flowed or injured thereby. 56 N. H. 386; 59 N. H. 332, 563.

Mr. C. R. Morrison for plaintiff in error.—The Fourteenth Amendment exempts private property from taking for other than public uses. This term is used in its proper sense. *Par-*

kersburg v. *Brown*, 106 U. S. 487; *Ex parte Virginia*, 100 U. S. 339; *Olcott* v. *Supervisors*, 16 Wall. 678. Whether a use is public or private is a question of general law, not of constitutional construction; and hence the decision of the State court on that point in this case is entitled only to the weight of other equally respectable courts. *Hagar* v. *Reclamation District*, 111 U. S. 701, 704; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244; *Lavin* v. *Emigrant Savings Bank*, 18 Blatchford, 1, 13; *Butz* v. *Muscatine*, 8 Wall. 575. There has been in New Hampshire but one decision of this question on the merits, that in *Great Falls Co.* v. *Fernald*, 47 N. H. 444. This opinion is entitled to less weight than is ordinarily given to New Hampshire decisions, because it was a friendly suit without a vigorous defence; it rests on no historical basis; it is inconsistent with the decisions of the same judge in *Mount Washington Road Company Case*, 35 N. H. 134, and with the well considered case of *Concord Railroad* v. *Greeley*, 17 N. H. 47, 56; and, though since followed, doubts have been expressed as to its correctness. So, too, courts in other States, while sustaining similar statutes, have expressed doubts of their validity if the question were open. *Miller* v. *Troost*, 14 Minn. 365, 367, 369; *Jordan* v. *Woodward*, 40 Maine, 317, 324; *Fisher* v. *Horicon Manufacturing Co.*, 10 Wisc. 351, 353; *Harding* v. *Funk*, 8 Kansas, 315, 323. In Massachusetts it is denied that there is any taking; and it is said to be a regulation of water rights. *Lowell* v. *Boston*, 111 Mass. 454; *Murdoch* v. *Stickney*, 8 Cush. 113; *Fisher* v. *Framingham Manufacturing Co.*, 12 Pick. 68. But this idea is repudiated in New Hampshire and other States, and in this court. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Eaton* v. *Railroad*, 51 N. H. 504; *Winn* v. *Rutland*, 52 Vt. 481, 494; *Inman* v. *Tripp*, 11 R. I. 520; *Nevins* v. *Peoria*, 41 Ill. 502; *Pettigrew* v. *Evansville*, 25 Wisc. 223; *O'Brien* v. *St. Paul*, 18 Minn. 176; *Columbus* v. *Woolen Mills*, 33 Ind. 435; *Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308, 321; *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481; *Broadwell* v. *Kansas*, 75 Missouri, 213, 218. The common-law right of a riparian owner is, that the level of the water at his boundary shall not be changed.

A lower riparian proprietor, by taking his land as a part of his reservoir, appropriates property which may have a value far beyond its value as land. This cannot be done, without buying it. *McCoy* v. *Danley*, 20 Penn. St. 85; Gould on Waters, § 210. The police power of a State to restrict the uses to which one may put his own property, is quite a different thing from the attempted grant of a right to appropriate the property of another. *Munn* v. *Illinois*, 94 U. S. 113; *Davidson* v. *New Orleans*, 96 U. S. 97, 107; *Beer Company* v. *Massachusetts*, 97 U. S. 25, 32, 33; *Water Works Co.* v. *St. Tammany Co.*, 4 Woods, 134; *Escanaba Co.* v. *Chicago*, 107 U. S. 679, 683. The police power proper may be exercised without compensation. Eminent domain must be with compensation, and for public uses only, although the occasion for its exercise may be necessary regulations for health, morals, and good order in the community. The public has a right to pure air as much as to pure water, and hence there doubtless may be a taking to prevent or remove nuisances, as by draining swamps. *Hagar* v. *Reclamation District*, 111 U. S. 701. Private roads, so called, have in general been sustained, or condemned, according as courts have or have not found that the public have a right to use them, even if not compelled to repair them. *Underwood* v. *Bailey*, 59 N. H. 480; *Proctor* v. *Andover*, 42 N. H. 348, 360. Whatever is a public use for the exercise of eminent domain, is a public use for the exercise of the taxing power. *Renwick* v. *Davenport Railroad*, 47 Iowa, 511; *Bennington* v. *Park*, 50 Vermont, 178; *Talbot* v. *Hudson*, 16 Gray, 417; *Commercial Bank* v. *Iola*, 2 Dillon, 353, 363. This rule that the taking must be for the use of the public, and not permissive, but of right, has been recognized in many other cases, and is the only one which will bear examination. Nothing short of it is a taking for public use. *Bridge Co.* v. *Bridge Co.*, 17 Conn. 40, 64; *Bloodgood* v. *Railroad*, 18 Wend. 9, 15; *Burlington* v. *Beasley*, 94 U. S. 310; Mills Eminent Domain, § 287. Any other principle would afford no protection, as all agree that the judiciary cannot question the propriety of taking except as involved in the question whether it is for public use. The New Hampshire statute does not require a finding that the

taking will be of public use, but only that it may be. Similar mill acts have been declared void in Alabama, Georgia, Michigan, New York, Tennessee and Vermont, besides being questioned in other States. *Moore* v. *Wright*, 34 Ala. 311; *Loughbridge* v. *Harris*, 42 Georgia, 500; *Ryerson* v. *Brown*, 35 Mich. 333; *Hay* v. *Cohoes Co.*, 3 Barb. 42; *Harding* v. *Goodlett*, 3 Yerger, 41; *Tyler* v. *Beacher*, 44 Vermont, 648. So even at the time of the decision in *Company* v. *Fernald*, the weight of authority was against its correctness; and the preponderance has greatly increased since. And, finally, it is now settled law in this court of last resort, as well as elsewhere, that a legislature cannot authorize taxes in aid of manufacturing corporations; and a use that is not a public use for the imposition of taxes, is not a public use for the appropriation of property under the right of eminent domain. The very ground upon which the power to tax in aid of manufacturing corporations is denied, is that it is taking a part of the property of the citizen for the private use and benefit of another. How then can the legislature take a much larger part, for the same use, against the will of the owner? *Allen* v. *Jay*, 60 Maine, 124; *Cole* v. *La Grange*, 19 Fed. Rep. 871; *English* v. *People*, 96 Ill. 566; *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, cited above; *Weismer* v. *Douglass*, 64 N. Y. 91.

Mr. George F. Hoar and *Mr. B. Wadleigh* for defendant in error.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The position that the plaintiff in error has been denied the equal protection of the laws was not insisted upon at the argument. The single question presented for decision is whether he has been deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. It is only as bearing upon that question, that this court, upon a writ of error to a State court,

has jurisdiction to consider whether the statute conforms to the Constitution of the State.

The charter of the Amoskeag Manufacturing Company, which authorized it to erect and maintain its mills and dam, gave it no right to flow the lands of others. *Eastman* v. *Amoskeag Manufacturing Co.*, 44 N. H. 143. The proceedings in the State court were had under the general mill act of New Hampshire, which enacts that any person, or any corporation authorized by its charter so to do, may erect or maintain on his or its own land a water mill and mill-dam upon any stream not navigable, paying to the owners of lands flowed the damages which, upon a petition filed in court by either party, may be assessed, by a committee or by a jury, for the flowing of the lands to the depth and extent to which they may or can be flowed by the dam. N. H. Stat. 1868, ch. 20.

The plaintiff in error contends that his property has been taken by the State of New Hampshire for private use, and that any taking of private property for private use is without due process of law.

The defendant in error contends that the raising of a water power upon a running stream for manufacturing purposes is a public use; that the statute is a constitutional regulation of the rights of riparian owners; and that the remedy given by the statute is due process of law.

General mill acts exist in a great majority of the States of the Union. Such acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence; and exist at this day in each of these States, except Maryland, where they were repealed in 1832. One passed in North Carolina in 1777 has remained upon the statute book of Tennessee. They were enacted in Maine, Kentucky, Missouri and Arkansas, soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida, while they were yet Territories, and re-enacted after they became States. They were also enacted

in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterwards repealed in Georgia. The principal statutes of the several States are collected in the margin.*

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* For convenience of reference, the names of the States are arranged in alphabetical order. The Territorial Acts of Indiana and Illinois not being in the Library of Congress, the citations of those acts are taken from Gould on Waters, § 616, and notes.

ALABAMA. Terr. Stats. 1811, 1812, Toulmin's Dig. 1823, tit. 45; Clay's Dig. 1843, p. 376; Code 1852, §§ 2089–2115; Rev. Code 1867, §§ 2481–2508; Code 1876, §§ 3555–3579.

ARKANSAS. Rev. Stat. 1837, ch. 98; Dig. 1846, ch. 107; Dig. 1858, ch. 114; Gantt's Dig. 1873, ch. 95.

CONNECTICUT. Stat. 1864, ch. 26; Gen. Stat. 1866, tit. 1, ch. 16; Gen. Stat. 1875, tit. 19, ch. 17, pt. 6.

DELAWARE. Prov. Stats. 1719, 1760, 1773, 1 Laws 1700–97, p. 535, appx. pp. 53, 72; Rev. Stat. 1852, ch. 61; Stat. 1859, ch. 538; Rev. Code 1874, ch. 61.

FLORIDA. Terr. Stats. 1827, 1829, Duval's Compilation, pp. 51–55; Thompson's Dig. 1847, ch. 10; McClellan's Dig. 1881, ch. 152.

GEORGIA. Stat. 1869, ch 98. Repealed by Code of 1882, § 3018.

ILLINOIS. 2 Terr. Laws 1815, p. 456; Stat. 1819, p. 265; Rev. Code 1827, p. 297; Rev. Stat. 1845, ch. 71; Rev. Stat. 1869, ch. 71; Rev. Stat. 1874, ch. 92; Rev. Stat. 1880, ch. 92.

INDIANA. Terr. Stat. 1807, p. 194; Rev. Laws 1824, ch. 117; Rev. Laws 1831, chap. 1; Rev. Stat. 1838, ch. 1; Rev. Stat. 1842, ch. 48, art. 5; Rev. Stat. 1852, pt. 2, art. 41; Rev. Stat. 1881, §§ 882 *& seq.*

IOWA. Terr. Stats. 1839, p. 343, 1843, p. 437; Stat. 1855, ch. 92; Rev. Stat. 1860, tit. 11, ch. 54, art. 4; Code 1873, tit. 10, ch. 1; Code 1880, tit. 10, ch. 1.

KANSAS. Stat. 1867, ch. 87; Gen. Stat. 1868, ch. 66; Comp. Laws 1879, ch. 66.

KENTUCKY. Stat. February 22, 1797, 1 Littell Stat. 606; 2 Littell & Swigert's Dig. 1822, p. 933; Rev. Stat. 1852, ch. 67; Gen. Stat. 1883, ch. 77.

MAINE. Stat. 1821, ch. 45; Rev. Stat. 1840, ch. 126; Rev. Stat. 1857, ch. 92; Rev. Stat. 1871, ch. 93; Rev. Stat. 1883, ch. 92.

MARYLAND. Prov. Stat. 1719, ch. 15; Bacon's Laws 1765, and 1 Kilty's Laws. Repealed by Stat. 1832, ch. 56.

MASSACHUSETTS. Prov. Stat. 1714, ch. 15, 1 Prov. Laws (State ed.) 729, and Anc. Chart. 404; Stats. 1795, ch. 74, passed February 27, 1796; 1824, ch. 153, February 26, 1825; 1825, ch. 109, February 28, 1826; 1829, ch. 122, March 12, 1830; Rev. Stat. 1836, ch. 116; Gen. Stat. 1860, ch. 149; Pub. Stat. 1882, ch. 190.

MICHIGAN. Terr. Stats. 1824, 1828, 2 Terr. Laws, 192, 699; Stat. 1865, ch. 304; Comp. Laws 1872, ch. 221; Stat. 1873, ch. 196.

MINNESOTA. Terr. Stat. 1857, Pub. Stat. 1849–58, ch. 129; Rev. Stat. 1866, ch. 31; Gen. Stat. 1878, ch. 31.

In most of those States, their validity has been assumed, without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three States only, and for incompatibility with their respective Constitutions. *Loughbridge* v. *Harris* (1871), 42 Georgia, 500; *Tyler* v. *Beacher* (1871), 44 Vermont, 648; *Ryerson* v. *Brown* (1877), 35 Michigan, 333. The earlier cases in Tennessee, Alabama and New York, containing dicta to the same effect, were decided upon other grounds. *Harding* v. *Goodlett*, 3 Yerger, 40; *Memphis Railroad* v. *Memphis*, 4 Coldwell, 406; *Moore* v. *Wright*, 34 Alabama, 311, 333; *Bottoms* v. *Brewer*, 54 Alabama, 288; *Hay* v. *Cohoes Co.*, 3 Barb. 42, 47, and 2 N. Y. 159.

The principal objects, no doubt, of the earlier acts were grist mills; and it has been generally admitted, even by those courts

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Mississippi. Terr. Stat. 1811, 1812, p. 344; Rev. Code 1824, ch. 65; Rev. Code 1871, ch. 34; Rev. Code 1880, ch. 27.

Missouri. Stat. 1823; 2 Rev. Stat. 1825, p. 587; Rev. Stat. 1835, p. 405; Rev. Stat. 1845, ch. 121; Rev. Stat. 1855, ch. 112; Gen. Stat. 1865, ch. 101; Wagner's Stat. 1872, ch. 98; Rev. Stat. 1879, ch. 132.

Nebraska. Terr. Stat. 1861–62, p. 71; Rev. Stat. 1866, ch. 36; Gen. Stat. 1873, ch. 44; Comp. Stat. 1881, ch. 57.

New Hampshire. Prov. Stat. 1718, Prov. Laws (ed. 1771), ch. 60; Stat. 1868, ch. 20; Gen. Laws 1878, ch. 190.

North Carolina. Prov. Stat. 1758, ch. 5, Revision, 1773, p. 219; Stat. 1777, ch. 23, Laws 1791, p. 343; Stats. 1809, ch. 15; 1813, ch. 19; Rev. Laws 1821, ch. 122, 773, 863; Rev. Stat. 1837, ch. 74; Rev. Code 1854, ch. 71; Battle's Revisal 1873, ch. 72.

Oregon. Stat. December 19, 1865, Gen. Laws 1843–72, p. 679.

Pennsylvania. Stat. March 23, 1803, 4 Smith's Laws, p. 20; Purdon's Dig. (10th ed.), p. 1065.

Rhode Island. Col. Stat. 1734, Laws 1744, p. 180; Public Laws 1798, p. 504; Rev. Stat. 1857, ch. 88; Pub. Stat. 1882, ch. 104.

Tennessee. Rev. Laws 1809, ch. 23; Compilation 1836, p. 486; Code 1858, §§ 1908–1915; Code 1884, §§ 2651–2661.

Vermont. Stats. 1866, ch. 12; 1867, ch. 27; 1869, ch. 27; Gen. Stat. 1870, appx. pp. 906, 953, 1025; Rev. Laws 1880, ch. 148, §§ 3215–3224.

Virginia Col. Stat. 1667, ch. 4, 2 Henning's Stat. 260; Col. Stat. 1705, ch. 41, 3 Henning, 401; Col. Stat. 1745, ch. 11, 5 Henning, 359; Stat. 1785, ch. 82, 12 Henning, 187; Rev. Code, 1814, ch. 105; Rev. Code 1819, ch. 235; Code 1849, ch. 63; Code 1873, ch. 63.

West Virginia. Code 1870, ch. 44, §§ 29–36.

Wisconsin. Terr. Stat. 1840, ch. 48; Rev. Stat. 1858, ch. 56; Rev. Stat. 1878, ch. 146.

which have entertained the most restricted view of the legislative power, that a grist mill which grinds for all comers, at tolls fixed by law, is for a public use. See also *Blair* v. *Cuming County*, 111 U. S. 363.

But the statutes of many States are not so limited, either in terms, or in the usage under them. In Massachusetts, for more than half a century, the mill acts have been extended to mills for any manufacturing purpose. Mass. Stat. 1824, ch. 153; *Wolcott Woollen Manufacturing Co.* v. *Upham*, 5 Pick. 292; *Palmer Co.* v. *Ferrill*, 17 Pick. 58, 65. And throughout New England, as well as in Pennsylvania, Virginia, North Carolina, Kentucky, and many of the Western States, the statutes are equally comprehensive.

It has been held in many cases of high authority, that special acts of incorporation, granted by the legislature for the establishment of dams to increase and improve the water power of rivers and navigable waters, for mechanical and manufacturing purposes, are for a public use. *Scudder* v. *Trenton Delaware Falls Co.*, Saxton, 694, 728, 729; *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467; *Hazen* v. *Essex Co.*, 12 Cush. 475; *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 251, 252; *Hankins* v. *Lawrence*, 8 Blackford, 266; *Great Falls Manufacturing Co.* v. *Fernald*, 47 N. H. 444.

In some of those cases, the authority conferred by general mill acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others, for manufacturing purposes, has been considered as resting on the right of eminent domain, by reason of the advantages inuring to the public from the improvement of water power and the promotion of manufactures. See also *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 506, 507; *Beekman* v. *Saratoga & Schenectady Railroad*, 3 Paige, 45, 73; *Talbot* v. *Hudson*, 16 Gray, 417, 426. And the validity of general mill acts, when directly controverted, has often been upheld upon that ground, confirmed by long usage or prior decisions. *Jordan* v. *Woodward*, 40 Maine, 317; *Olmstead* v. *Camp*, 33 Conn. 532; *Todd* v. *Austin*, 34 Conn. 78; *Venard* v. *Cross*, 8 Kansas, 248; *Harding* v. *Funk*, 8 Kansas, 315; *Miller* v. *Troost*, 14 Minnesota,

282; *Newcomb* v. *Smith*, 1 Chandler, 71; *Fisher* v. *Horicon Co.*, 10 Wisconsin, 351; *Babb* v. *Mackey*, 10 Wisconsin, 314; *Burnham* v. *Thompson*, 35 Iowa, 421.

In New Hampshire, from which the present case comes, the legislature of the Province in 1718 passed an act (for the most part copied from the Massachusetts act of 1714), authorizing the owners of mills to flow lands of others, paying damages assessed by a jury. The act of 1718 continued in force until the adoption of the first Constitution of the State in 1784, and afterwards until June 20, 1792, and was then repealed, upon a general revision of the statutes, shortly before the State Constitution of 1792 took effect. The provisions of the Bill of Rights, on which the plaintiff in error relied in the court below, were exactly alike in the two Constitutions. Special acts authorizing the flowing of lands upon the payment of damages were passed afterwards from time to time; among others, the statute of July 8, 1862, authorizing the Great Falls Manufacturing Company to erect a dam upon Salmon Falls River, which was adjudged by the Supreme Judicial Court of New Hampshire in 1867, in an opinion delivered by Chief Justice Perley, to be consistent with the Constitution of that State, because the taking authorized was for a public use. *Great Falls Manufacturing Co.* v. *Fernald*, 47 N. H. 444. The statute now in question, the first general mill act passed by the legislature of the State, was passed and took effect on July 3, 1868; was held in *Ash* v. *Cummings*, 50 N. H. 591, after elaborate argument against it, to be constitutional, upon the ground of the decision in *Great Falls Manufacturing Co.* v. *Fernald*; and was enforced without question in *Portland* v. *Morse*, 51 N. H. 188, and in *Town* v. *Faulkner*, 56 N. H. 255. In the case at bar, and in another case since, the State court held its constitutionality to be settled by the former decisions. *Amoskeag Manufacturing Co.* v. *Head*, 56 N. H. 386, and 59 N. H. 332, 563; *Same* v. *Worcester*, 60 N. H. 522.

The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail him-

self at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.

In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or, in many States, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold. *King* v. *Reed*, 11 Gray, 490; *Bentley* v. *Long Dock Co.*, 1 McCarter, 480; *S. C.* on appeal, *nom. Manners* v. *Bentley*, 2 McCarter, 501; *Mead* v. *Mitchell*, 17 N. Y. 210; *Richardson* v. *Monson*, 23 Conn. 94. Water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds. *Smith* v. *Smith*, 10 Paige, 470; *De Witt* v. *Harvey*, 4 Gray, 486; *McGillivray* v. *Evans*, 27 California, 92.

At the common law, as Lord Coke tells us, "If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the

other will not, he that is willing shall have a writ *de reparatione facienda;* and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur;* whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Lit. 200 *b*; 4 Kent Com. 370. In the same spirit, the statutes of Massachusetts, for a hundred and seventy-five years, have provided that any tenant in common of a mill in need of repair may notify a general meeting of all the owners for consultation, and that, if any one refuses to attend, or to agree with the majority, or to pay his share, the majority may cause the repairs to be made, and recover his share of the expenses out of the mill or its profits or earnings. Mass. Prov. Stat. 1709, ch. 3, 1 Prov. Laws (State ed.) 641, and Anc. Chart. 388; Stat. 1795, ch. 74, §§ 5–7; Rev. Stat. 1836, ch. 116, §§ 44–58; Gen. Stat. 1860, ch. 149, §§ 53–64; Pub. Stat. 1882, ch. 190, §§ 59–70. And the statutes of New Hampshire, for more than eighty years, have made provision for compelling the repair of mills in such cases. *Roberts* v. *Peavey*, 7 Foster, 477, 493.

The statutes which have long existed in many States, authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Coomes* v. *Burt*, 22 Pick. 422; *Wright* v. *Boston*, 9 Cush. 233, 241; *Sherman* v. *Tobey*, 3 Allen, 7; *Lowell* v. *Boston*, 111 Mass. 454, 469; *French* v. *Kirkland*, 1 Paige, 117; *People* v. *Brooklyn*, 4 N. Y. 419, 438; *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54, 68, 518, 531; *O'Reiley* v. *Kankakee Valley Draining Co.*, 32 Indiana, 169.

By the maritime law, based, as Lord Tenterden observed, on the consideration that the actual employment of ships is "a matter, not merely of private advantage to the owners, but of public benefit to the State," and recognized in the decisions

and the rules of this court, courts of admiralty, when the part-owners of a ship cannot agree upon her employment, authorize the majority to send her to sea, on giving security to the dissenting minority, to bring back and restore the ship, or, if she be lost, to pay them the value of their shares; and in such case the minority can neither recover part of the profits of the voyage nor compensation for the use of the ship. Abbott on Shipping, pt. 1, ch. 3, §§ 2, 3; *The Steamboat Orleans*, 11 Pet. 175, 183; Rule 20 in Admiralty, 3 How. vii.; *The Marengo*, 1 Lowell, 52. If the part-owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law, recognized and applied by Mr. Justice Washington, the ship may be ordered to be sold and the proceeds distributed among them. *The Seneca*, 18 Am. Jur. 485; *S. C.* 3 Wall. Jr. 395. See also Story on Partnership, § 439; *The Nelly Schneider*, 3 P. D. 152.

But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us.

The right to the use of running water is *publici juris*, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the mill acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies

of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.

This view of the principle upon which general mill acts rest has been fully and clearly expounded in the judgments delivered by Chief Justice Shaw in the Supreme Judicial Court of Massachusetts.

In delivering the opinion of the court in a case decided in 1832, he said: "The statute of 1796 is but a revision of a former law, and the origin of these regulations is to be found in the provincial statute of 1714. They are somewhat at variance with that absolute right of dominion and enjoyment which every proprietor is supposed by law to have in his own soil; and in ascertaining their extent it will be useful to inquire into the principle upon which they are founded. We think they will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property, which is often so situated that it could not be beneficially used without the aid of this power. A stream of water often runs through the lands of several proprietors. One may have a sufficient mill-site on his own land, with ample space on his own land for a mill-pond or reservoir, but yet, from the operation of the well-known physical law that fluids will seek and find a level, he cannot use his own property without flowing the water back more or less on the lands of some other proprietor. We think the power given by statute was intended to apply to such cases, and that the legislature meant to provide that, as the public interest in such case coincides with that of the mill-owner, and as the mill-owner and the owner of lands to be flowed cannot both enjoy their full rights, without some interference, the latter shall yield to the former, so far that the former may keep up his mill and head of water, notwithstanding the damage done to the latter, upon payment of an equitable compensation for the real damage sustained, to be ascertained in the mode provided by the statute." "From this view of the object and purpose of the statute, we think it quite mani-

fest that it was designed to provide for the most useful and beneficial occupation and enjoyment of natural streams and watercourses, where the absolute right of each proprietor to use his own land and water privileges, at his own pleasure, cannot be fully enjoyed, and one must of necessity, in some degree, yield to the other." *Fiske* v. *Framingham Manufacturing Co.*, 12 Pick. 68, 70–72.

In another case, decided almost twenty years later, he said: "The relative rights of land-owners and mill-owners are founded on the established rule of the common law, that every proprietor, through whose territory a current of water flows, in its course towards the sea, has an equal right to the use of it, for all reasonable and beneficial purposes, including the power of such stream for driving mills, subject to a like reasonable and beneficial use, by the proprietors above him and below him, on the same stream. Consequently, no one can deprive another of his equal right and beneficial use, by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially, so as to cause it to flow back on the land of the proprietor above. This rule, in this Commonwealth, is slightly modified by the mill acts, by the well-known provision, that when a proprietor erects a dam on his own land, and the effect is, by the necessary operation of natural laws, that the water sets back upon some land of the proprietor above, a consequence which he may not propose as a distinct purpose, but cannot prevent, he shall not thereby be regarded as committing a tort, and obliged to prostrate his dam, but may keep up his dam, paying annual or gross damages, the equitable assessment of which is provided for by the acts. It is not a right to take and use the land of the proprietor above, against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." *Bates* v. *Weymouth Iron Co.*, 8 Cush. 548, 552, 553.

Other opinions of Chief Justice Shaw illustrate the same view.

Williams v. *Nelson*, 23 Pick. 141, 143; *French* v. *Braintree Manufacturing Co.*, 23 Pick. 216, 218–221; *Cary* v. *Daniels*, 8 Met. 466, 476, 477; *Murdock* v. *Stickney*, 8 Cush. 113, 116; *Gould* v. *Boston Duck Co.*, 13 Gray, 442, 450. It finds more or less distinct expression in other authorities. *Lowell* v. *Boston*, 111 Mass. 464–466; *United States* v. *Ames*, 1 Woodb. & Min. 76, 88; *Waddy* v. *Johnson*, 5 Iredell, 333, 339; *Jones* v. *Skinner*, 61 Maine, 25, 28; *Olmstead* v. *Camp*, 33 Conn. 547, 550; Chief Justice Redfield, in 12 Am. Law Reg. (N. S.) 498–500. And no case has been cited in which it has been considered and rejected.

Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other States, maintaining the validity of general mill acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hurtado* v. *California*, 110 U. S. 516; *Hagar* v. *Reclamation District*, 111 U. S. 701. *Judgment affirmed.*

Mr. Justice Blatchford did not sit in this case, or take any part in its decision.

BARBIER *v.* CONNOLLY.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Submitted November 25, 1884.—Decided January 5, 1885.

A municipal ordinance prohibiting from washing and ironing in public laundries and wash-houses within defined territorial limits, from ten o'clock at night to six in the morning, is a purely police regulation, within the competency of a municipality possessed of the ordinary powers.

The Fourteenth Amendment of the Constitution does not impair the police power of a State.

In error to a State court, this court cannot pass upon the question of the conformity of a municipal ordinance with the requirements of the Constitution of the State.

On the 8th of April, 1884, the Board of Supervisors of the city and county of San Francisco, the legislative authority of that municipality, passed an ordinance reciting that the indiscriminate establishment of public laundries and wash-houses, where clothes and other articles were cleansed for hire, endangered the public health and the public safety, prejudiced the well-being and comfort of the community, and depreciated the value of property in their neighborhood; and then ordaining, pursuant to authority alleged to be vested in the Board under provisions of the State Constitution, and of the act of April 19, 1856, consolidating the government of the city and county, that after its passage it should be unlawful for any person to establish, maintain or carry on the business of a public laundry or of a public wash-house within certain designated limits of the city and county, without first having obtained a certificate, signed by the health officer of the municipality, that the premises were properly and sufficiently drained, and that all proper arrangements were made to carry on the business without injury to the sanitary condition of the neighborhood; also a certificate signed by the Board of Fire Wardens of the municipality, that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, were in good condition, and that their use was not dangerous to the sur-

rounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance defining the fire limits of the city and county, and making regulations concerning the erection and use of buildings therein.

The ordinance required the health officer and Board of Fire Wardens, upon application of any one to open or conduct the business of a public laundry, to inspect the premises in which it was proposed to carry on the business, in order to ascertain whether they are provided with proper drainage and sanitary appliances, and whether the provisions of the fire ordinance have been complied with; and, if found satisfactory in all respects, to issue to the applicant the required certificates without charge for the services rendered. Its fourth section declared that no person owning or employed in a public laundry or a public wash-house within the prescribed limits shall wash or iron clothes between the hours of ten in the evening and six in the morning or upon any portion of Sunday; and its fifth section, that no person engaged in the laundry business within those limits should permit any one suffering from an infectious or contagious disease to lodge, sleep, or remain upon the premises. The violation of any of these several provisions was declared to be a misdemeanor, and penalties were prescribed differing in degree according to the nature of the offence. The establishing, maintaining, or carrying on the business, without obtaining the certificates, was punishable by fine of not more than $1,000, or by imprisonment of not more than six months, or by both. Carrying on the business outside of the hours prescribed, or permitting persons with contagious diseases on the premises, was punishable by fine of not less than $5 or more than $50, or by imprisonment of not more than one month, or by both such fine and imprisonment.

The petitioner in the court below, the plaintiff in error here, was convicted in the Police Judge's Court of the City and County of San Francisco, under the fourth section of the ordinance, of washing and ironing clothes in a public laundry, within the prescribed limits, between the hours of ten o'clock in the evening of May 1, 1884, and six o'clock in the morning of the following day, and was sentenced to imprisonment in

the county jail for five days, and was accordingly committed, in execution of the sentence, to the custody of the sheriff of the city and county, who was keeper of the county jail. That court had jurisdiction to try him for the alleged offence, if the ordinance was valid and binding. But, alleging that his arrest and imprisonment were illegal, he obtained from the Superior Court of the city and county a writ of *habeas corpus*, in obedience to which his body was brought before the court by the sheriff, who returned that he was held under the commitment of the police judge upon a conviction of a misdemeanor, the commitment and sentence being produced.

The petitioner thereupon moved for his discharge on the ground that the fourth section of the ordinance violates the Fourteenth Amendment to the Constitution of the United States, and certain sections of the Constitution of the State. The particulars stated in which such alleged violations consist were substantially these—omitting the repetition of the same position—that the section discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property; that it was not within the power of the Board of Supervisors of the city and county of San Francisco; and that it was unreasonable in its requirements. The Superior Court overruled the positions and dismissed the writ, and the petitioner brought this writ of error.

Mr. A. C. Searle, *Mr. H. G. Sieberst* and *Mr. Alfred Clarke* for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court. He recited the facts as above stated, and continued:

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in con-

flict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the State. Our jurisdiction is confined to a consideration of the federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and Board of Fire Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation

discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed,

not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual.

Judgment affirmed.

LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMSHIP COMPANY *v.* COMMISSIONERS OF EMIGRATION.

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

Argued March 24, 25, 1884.– Decided January 5, 1885.

In an action of *indebitatus assumpsit*, to recover money alleged to have been illegally exacted, a declaration, which avers the fact of indebtedness, and a promise in consideration thereof, is sufficient on general demurrer, unless it appears that the alleged indebtedness was impossible in law.

To such a declaration, treated as a complaint according to the New York Code, an answer was filed, setting up, as a defence, an act of Congress to legalize the collection of head moneys already paid, approved June 19, 1878. The Circuit Court refused to hear evidence in support of the plaintiff's case, and gave judgment, on the pleadings, in favor of the defendant.

Held, That this was error, because it did not appear from the record that the money sued for was within the description of the act of Congress.

This was an action of assumpsit to recover back moneys paid to the Commissioners of Emigration of the State of New York by the steamship company, a carrier of emigrants to the United States. The case was elaborately argued, but the question on which the case is remanded was not discussed in the briefs. The facts in respect of it are stated in the opinion of the court.

Mr. Ashbel Green for plaintiff in error.

Mr. George N. Sanders (*Mr. Lewis Sanders* was with him), for defendants in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error was plaintiff below, and, being a corporation under the laws of Great Britain and an alien, brought this action in the Circuit Court of the United States for the Southern District of New York, the defendant being a corporation of that State.

The action was in form *indebitatus assumpsit*, and the substance of the declaration was as follows:

"3d. And the said plaintiff, by its said attorneys, complains of the said defendant in a plea of assumpsit upon implied promise for that whereas the said defendant on the 10th day of February, 1875, at the city of New York, in the Southern District of New York aforesaid, was indebted to the said plaintiff in the sum of one million and ninety-three thousand dollars and upwards, lawful money of the United States of America, for certain commutation moneys from the plaintiff unlawfully demanded, exacted, and received at the city of New York by the said defendant under color of certain laws in the State of New York concerning passengers in vessels coming to the State of New York, and concerning the powers and duties of Commissioners of Emigration, and for the regulation of marine hospitals, and paid by the said plaintiff under the inducement of certain representations of the defendant, this plaintiff being an alien and not knowing the laws of the State of New York, and under protest at various times preceding the said 10th day of February, 1875, and in various sums, and to and for the use of the plaintiff.

"4th. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff, the said sum of money when," &c., and alleging a breach thereof.

To this declaration, treating it as a complaint according to the procedure under the New York Code, the defendant filed an answer, setting up several distinct defences, and among others the following:

"VII. That by an act of Congress entitled 'A bill to legalize the collection of head moneys already paid,' approved June 19th, 1878, the acts of every state and municipal officer or corporation in the several states of the United States in collection of head moneys for every passenger brought to the United States prior to the first day of January, 1877, under then existing laws of the several States, were declared valid, and the

said acts were ratified, adopted, and confirmed by the United States; and it was further declared that no suits for the recovery of the moneys so paid should be maintained against any state or municipal officer or corporation.

"That plaintiff, in prosecuting this action, is maintaining it for the recovery of head moneys paid prior to 1st January, 1877, pursuant to the then existing laws of the State of New York, for passengers, by the master, consignee, or owner of vessels bringing passengers to the United States from a foreign port, against this defendant as a state corporation of New York, against the form of the statute aforesaid, which said statute this defendant pleads in bar of plaintiff's right to maintain this action and of the jurisdiction of this court to entertain the same."

The bill of exceptions, taken at the trial, shows the following proceedings:

"The counsel for the said plaintiff opened the cause to the jury. The defendant's counsel moved to dismiss on the grounds that the court had no jurisdiction, and that an act of Congress entitled 'A bill to legalize the collection of head moneys already paid,' approved June 19, 1878, was a bar to any recovery on any of the alleged causes of action set forth in the complaint.

"Whereupon the court, being of opinion that said bill was a bar to any recovery on any of the alleged causes of action set forth in the complaint, upon that ground refused to hear evidence, and directed a verdict for the defendants, and that the defendants have judgment against the plaintiff with costs.

"Whereupon the counsel for the plaintiffs, in due time, then and there duly excepted to the ruling, opinion, decision, and direction of the said judge," &c.

Judgment was accordingly rendered for the defendant, to review which this writ of error is prosecuted.

The act of Congress of June 19, 1878, referred to in the bill of exceptions by its title, is as follows:

"Be it enacted, &c., That the acts of every State and municipal officer, or corporation of the several States of the United States, in the collection of head moneys, prior to the first day

of January, eighteen hundred and seventy-seven, from the master, consignee, or owner of any vessel bringing passengers to the United States from a foreign port, pursuant to the then existing laws of the several States, shall be valid, and no action shall be maintained against any such State or municipal officer, or corporation, for the recovery of any moneys so paid or collected prior to said date." 20 Stat. 177.

It is contended by counsel for the plaintiff in error that the sole question open for argument here, because the only one passed on by the Circuit Court, is whether this act of Congress is a valid enactment, though it is admitted that this question divides itself into two; whether Congress had constitutional power to make valid, by subsequent ratification, those laws of the States, which had been previously declared to be void, as regulations of commerce with foreign nations; and whether, if not, it nevertheless could forbid resort to the courts of the United States to those otherwise entitled, claiming redress for what had been done, to their damage, under such statutes of the States.

On the other hand, it has been argued in support of the judgment by counsel for the defendant in error:

1. That the payments alleged to have been made in the complaint were voluntary, for which no recovery can be had on general principles of law.

2. That the defendant in error, being sued in its official capacity, is not suable, being merely the official representative of the State of New York, and that, at least, its relation to the subject is such under the laws of New York, under which it assumed to act, that it is not chargeable upon any principles of implied contract for the moneys alleged to have been paid.

3. And that the act of Congress referred to is a valid enactment and a bar to the action.

These questions, particularly that which challenges the constitutionality of the act of Congress, it is manifest, are of very grave importance; and, after much consideration, we feel constrained to reverse the judgment, without deciding any of them. The reasons, which seem to us to require this course, may be very briefly stated.

Opinion of the Court.

The bill of exceptions states that the counsel for the plaintiff below, after the jury had been sworn to try the issues, opened the cause to the jury, that is, made a statement of the facts constituting the cause of action which he expected to prove; but it does not show what that statement was, nor what were the facts which the plaintiff relied on and expected to prove. In this respect the case differs from that of *Oscanyan* v. *Arms Co.*, 103 U. S. 261, where it was held to be entirely proper for the trial court to direct a verdict for the defendant upon the opening statement of counsel for the plaintiff, when, as in that case, such statement is full, exact, and explicit. "Of course," said the court in that case, "in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action." The practice under that rule is not objectionable. On the contrary, it is convenient to court and parties, and not only saves time and expense in shortening trials, but has the merit of presenting the whole case, in a condensed and precise form, for the consideration of a court of review.

In the present case, the fact that a statement was made of the plaintiff's case, without disclosing in the bill of exceptions the facts supposed to constitute it, is referred to for the purpose of showing that the court below did not act upon that statement, and that it is not open to this court to conjecture what it was. The legal inference only is, that it was any case which he was at liberty to prove under his complaint and the issues framed upon it.

What the Circuit Court did was to refuse to hear evidence, not on the ground that the opening statement of the counsel disclosed no right of action, but because it was of opinion that the act of Congress "was a bar to any recovery on any of the alleged causes of action set forth in the complaint;" that is, that, in view of the act of Congress, the complaint was substantially defective in not stating a cause of action, so that it

would be bad on general demurrer; and thereupon judgment was rendered for the defendant on the pleadings alone.

The complaint, upon examination, shows the allegation of an indebtedness from the defendant to the plaintiff, for money unlawfully demanded, exacted and received by the defendant under color of law, and paid by the plaintiff in ignorance of its rights, in consequence of representations made by the defendant, and under protest; and this indebtedness is alleged as the consideration of an implied promise to repay the same. This statement, it is quite true, is general and vague. It does not allege with particularity the laws under color of which the exactions were made, nor the circumstances attending the payment. But it is sufficient; for an actual indebtedness is alleged, and there is nothing in the complaint to contradict the fact, or to demonstrate its impossibility as matter of law. And, although the complaint states that the money was exacted "under color of certain laws in the State of New York concerning passengers in vessels coming to the State of New York, and concerning the powers and duties of Commissioners of Emigration, and for the regulation of marine hospitals," this does not necessarily identify the moneys alleged to have been thus exacted and paid with the "head moneys," the collection of which it was the professed object of the act of Congress to legalize. If it be said that it is matter of judicial cognizance that there were in New York at the time no other laws, under color of which such exactions and payments could have been made—which we do not admit—nevertheless, it remains, that, consistently with the allegations of the complaint, the moneys paid may have been illegally exacted in violation of the laws under color of which, it is alleged, their payment was demanded and made. And the allegation in the answer, that the moneys sued for are, in fact, the "head moneys" which the act of Congress prohibits the recovery of, does not cure the difficulty, for that may have been the very issue to be tried. Taking the complaint to be true, which is what we are bound to do in the present state of the record, the indebtedness alleged to exist must be admitted to exist in fact, if it is possible to exist in law; and this, we may affirm, even though the act of Congress

pleaded and adjudged to be a bar, be a valid law; for it is not apparent on the record that the money sued for was "head money," nor that it was exacted and paid in accordance with the laws of the State. It will certainly not be denied that, if the moneys sued for were exacted and paid in violation of the laws of New York, under color of which, it is said, they were demanded, and the exaction and payment were made under circumstances authorizing a recovery under the laws of that State, or of the common law in force there, it was not the intention of Congress to interpose a bar to the suit. It is impossible for us on this record to say that this is not such a case.

If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

In the present case, the main and ultimate question is whether the defendant is legally liable to repay the moneys sued for, and, as incidental to that, whether the act of Congress pleaded as a bar to the action is valid. The solution of these questions depends upon facts not apparent upon the present record. That these may be made to appear there must be a new trial.

For these reasons

The judgment of the Circuit Court is reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

DAVISON & Another *v.* VON LINGEN & Others.

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

Argued December 12, 1884.—Decided January 5, 1885.

A stipulation in the charter-party of a steamer, that she is "now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia," is a stipulation that she has her cargo on board and is ready to sail.

A charter-party with the above stipulation was made on the 1st of August, in Philadelphia. The steamer was at Benizaf, in Morocco, only three-elevenths loaded, and did not sail for Philadelphia till August 7, and left Gibraltar August 9. Before signing the charter-party, the charterers asked to have in it a guaranty that the steamer would reach Philadelphia in time to load a cargo for Europe in August, but this was refused. They declined to have inserted the words "sailed from, or loading at Benizaf." On learning when the steamer left Gibraltar, they proceeded to look for another vessel. The unloading of the steamer at Philadelphia was completed September 7, but the charterers repudiated the contract: *Held*,

(1.) The stipulation was a warranty or a condition precedent, and not a mere representation;

(2.) Time and the situation of the vessel were material and essential parts of the contract;

(3.) The charterers had a right to repudiate the contract, and to recover from the owners of the steamer the increased cost of employing another vessel.

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

Mr. A. Stirling, Jr., for appellants, submitted on his brief.

Mr. T. Wallis Blakistone (*Mr. John H. Thomas* was with him) for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

On the 1st of August, 1879, a charter-party was entered into between the owners of the steamship Whickham and the firm of A. Schumacher & Co., composed of George A. Von Lingen, Carl A. Von Lingen, and William G. Atkinson, of which the parts material to this case are as follows:

Opinion of the Court.

"*Grain Charter Party*, —— *Steamer.*

PHILADELPHIA, *Aug.* 1*st*, 1879.

It is this day mutually agreed between T. H. Davison, Esq., owner of the Br. steamship 'Whickham,' of London, built 1876, at Newcastle, of 1124 net tons register or thereabouts, classed 100 A 1 in Br. Lloyds, now sailed or about to sail from Benizaf with cargo for Phila., and Mess. A. Schumacher & Co.: That the said steamship, being tight, staunch, and strong, and in every way fitted for the voyage, with liberty to take outward cargo to Phila. for owners' benefit, shall, with all convenient speed, sail and proceed to Philada. or Balto., at charterers' option, after discharge of inward cargo at Phila., or as near thereunto as she may safely get, and there load afloat from said charterers, or their agents, a full and complete cargo of grain, and or other lawful merchandise, excluding petroleum or its products. Vessel to load under inspection of either American or British Lloyd's surveyors, at her expense, and to comply with their rules. The cargo to be brought to and taken from alongside at merchants' risk and expense, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to Queenstown, Falmouth, or Plymouth, for orders to discharge at a safe port in the United Kingdom, or on the continent between Bordeaux and Hamburg, both included, (Rouen excluded,) also Holland excluded, or as near thereunto as she may safely get, and deliver the same, always afloat, on being paid freight as follows: six shillings and three pence sterling per quarter of 480 lbs. delivered, of wheat or maize, other grain or stowage goods to pay in full and fair proportion thereto as customary at loading port; ten per cent. extra if discharged on the continent as ordered from port of call in the United Kingdom as above; if ordered to a direct port of discharge on the continent as above, on signing bills of lading, the rate to be the same as to the United Kingdom for orders. In full of port charges and pilotages (the act of God, restraints of princes and rulers, the dangers of the seas and navigation, accidents to boilers, machinery, etc., always excepted),

freight being paid on unloading and right delivery of the cargo, in cash, without discount or allowance. . . . Fifteen (15) running days, (if the vessel be not sooner dispatched,) commencing when vessel is all ready and prepared to receive cargo and written notice thereof given to charterers, to be allowed for loading and discharging vessel, and, if longer detained, charterers to pay demurrage at the rate of forty (£40) pounds British sterling, or its equivalent, per day. . . .

GEO. BLASSE,
Witness to the signature of H. L. GREGG & Co.
By cable authority from T. H. Davison.

A. ALBERT,
Witness to the signature of A. SCHUMACHER & Co."

On the 10th of September, 1879, the charterers filed a libel *in personam*, in Admiralty, in the District Court of the United States for the District of Maryland, against the owners of the Whickham, to recover $2,000 damages for a breach of the charter-party. The libel sets forth a copy of the charter-party, as Exhibit A, and avers, that, on the 1st of August, 1879, the libellants, "having previously made a contract, which required them to ship during that month a cargo of grain to Europe, and requiring a vessel for that purpose, communicated these facts" to the agents of the respondents, and the charter-party was made; that the vessel had not sailed from Benizaf at the time of the execution of the charter-party, and was not then about to sail therefrom; that, by reason of such breach of the contract and warranty, and the delay in the arrival of the vessel at Philadelphia, arising therefrom, the libellants were not afforded an opportunity of loading the vessel with grain, either in Philadelphia or Baltimore, during the month of August, 1879, and she did not in fact arrive in Baltimore until after the expiration of that month, nor did she arrive in Philadelphia in time to discharge her inward cargo and load with grain during that month; that the respondents did not notify the libellants of the arrival of the vessel in, and her readiness to receive cargo at, Philadelphia; and that, in consequence thereof, the

libellants were compelled, at higher rates of freight, to charter another vessel for that purpose.

The respondents filed an answer, on the 1st of December, 1879, alleging that, at the time the charter-party was executed, the vessel was about to sail from Benizaf, within the meaning of its language; that she did, with all convenient speed, sail and proceed to Philadelphia, and there, without delay, discharge her inward cargo, and, as soon as discharged, proceed without delay to Baltimore, and was, without delay, tendered to the libellants to load according to the charter-party, and was refused by the libellants, for the sole cause, as alleged by them, that the respondents had broken the charter-party, because the vessel was not at Benizaf, about to sail, on the 1st of August, 1879; and that the libellants were aware of her arrival in Philadelphia, and of the time she finished the discharge of her inward cargo. The fact of the prior contract by the libellants to ship grain to Europe, and of the communication of knowledge thereof to the agents of the respondents, is put in issue. The answer also alleges, that it is not material or competent to prove the existence of such prior contract or knowledge of it by the respondents, or the inability of the libellants to fulfil it, or the chartering of another vessel.

On the same day, the owners of the vessel filed a cross-libel *in personam*, in Admiralty, in the same court, against the charterers, setting forth the charter-party, and alleging, that the vessel, at its date, was about to sail from Benizaf; that she did, in pursuance of the charter-party, proceed, with all convenient speed, to Philadelphia, with inward cargo, and, being discharged thereof, did, in accordance with the charter-party, proceed to Baltimore, and was ready to receive cargo from the charterers, of which written notice was given to them, but they, without cause, refused to receive and load the vessel, and repudiated the charter-party, on the sole ground, as by them alleged, that the vessel was not, on August 1, about to sail from Benizaf; and that the vessel, as soon as possible after such refusal, was re-chartered for a voyage from New York to Europe, at a freight less by $1,912.58, and with an increase of expense of $1,000 and more. The cross-libel claims $3,000 damages.

Opinion of the Court.

The answer to the cross-libel, filed in January, 1880, avers that the vessel had not sailed, and was not about to sail, from Benizaf, on the 1st of August, 1879, but, on the contrary, had not her cargo on board, and did not complete the loading of it till the evening of August 7, and did not sail from Benizaf till the evening of August 8; that, when she sailed from Benizaf, she was not provided, and in every way fitted, for the voyage, and did not proceed to Philadelphia or Baltimore with all convenient speed, but sailed without a supply of coal for the voyage, and stopped at Gibraltar to obtain a proper supply; that the charterers received no written notice of the vessel's arrival and readiness to receive cargo from them at Philadelphia; that she did not arrive in Philadelphia or Baltimore, and the charterers did not receive written notice of her readiness to receive cargo from them until it was too late for them to use the vessel for the purposes for which they had chartered her, which purposes they communicated to the agents of the vessel at the time the charter-party was executed; and that, in consequence of such delay and default, they were compelled, before the arrival of the vessel, to charter another in her place, at a loss of $2,000, and, when she did arrive, they refused to accept and load her.

It was stipulated between the parties, that the allegations made in the answer to the cross-libel should be treated as averments in the original libel, and that, under the answer to the original libel, any evidence might be offered, and any evidence taken, which might be admissible under any proper state of the pleadings.

Proofs were taken, and the District Court dismissed the original libel, and decreed a recovery of $4,093.18 in favor of the libellants in the cross-libel. 1 Fed. Rep. 178. The decision of the District Court proceeded on the ground that the words "about to sail with cargo," in the charter-party, meant that the vessel was to sail as soon as, with reasonable diligence, she could get her cargo on board.

The charterers appealed to the Circuit Court from the decrees. Further proofs were taken, and that court found the following facts:

"1. The British steamer Whickham, owned by T. H. Davison and others, the defendants in the original libel, sailed from Shields on the 9th of July, 1879, bound for Lisbon, where she arrived on the 16th, and, having discharged her cargo, sailed again in ballast, on the 23d, for Benizaf, on the coast of Morocco, to take a load of iron ore, under a charter for Philadelphia. She passed Gibraltar on the 25th, and arrived at Benizaf at 4.30 P.M. of Saturday, the 26th. She began taking in cargo under the charter for Philadelphia during the forenoon of Monday, the 28th. On that day she took on board 115 tons, and on the 29th about 90 tons; but on the 30th none; and on the 31st only four boat loads. During this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading. After the 31st the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the 7th of August, at 5.30 P.M. An hour later the vessel sailed, and, stopping five hours at Gibraltar, for coal, on the 9th, arrived at Philadelphia on the 2d of September. She completed her unloading at that port on the 7th.

2. The usual cargo at Benizaf is iron ore. In loading, a vessel lies out in the stream about a quarter of a mile from the shore, and the ore is taken to her in small boats of from five to seven tons burden each. It is then passed up the ship's side in baskets. Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets. This is the only way of loading such cargo at that port.

3. About the first of August, Gregg & Co., a firm of ship brokers in Philadelphia, were authorized, by cable message from the owners in England, to get a charter for the Whickham, to carry grain from the United States, on her return voyage. Not being able to do this in Philadelphia, the firm, on the first of August, telegraphed Mr. Erickson, a ship broker in Baltimore, to look for a charter in that city. In their telegram it was said that the vessel 'had sailed, or was about to sail, from Benizaf, with cargo, for Philadelphia.' The precise form of the authority given by the owners to Gregg & Co. is no-

where shown from the evidence, further than may be inferred from the telegram to Erickson.

4. A short time before the first of August, Schumacher & Co., of Baltimore, the original libellants, employed Mr. Foard, another ship broker in that city, to procure for them a vessel to take a cargo of grain to Europe, which they were under contract to ship in August. He, finding that the steamers for that month were scarce, and hearing of the Whickham, took Mr. Erickson to the office of Schumacher & Co., and suggested that she might do. At the interview which then took place, it was understood by all parties that a vessel was wanted that could be loaded in August, and that no other would answer the purpose. Schumacher & Co., doubting whether the Whickham could arrive in time, wanted a guaranty that she would, but this was declined. All parties then made their calculations as to the probable time of her arrival, upon the basis of the language in the telegram, and finally Schumacher & Co. agreed to take her, first, however, providing that she might be loaded in Philadelphia or Baltimore, at their option, intending, if she did not arrive in time for Baltimore, to get her cargo, under their contract, in Philadelphia. In these calculations it was assumed by all that she would get away from Benizaf not later than the second of August, and that her voyage across would probably be about twenty days. This all occurred in Baltimore on the first of August, and it does not appear from the evidence that any of the parties, either in Philadelphia or Baltimore, knew anything of the movements of the vessel except as they were to be inferred from the telegram. There was no communication with Benizaf by telegraph, the nearest telegraphic station being at Gibraltar, which was a day's sail away.

5. As soon as the bargain was concluded, Erickson sent to Gregg & Co. for a charter-party in form. They immediately sent the draft of one, in which the vessel was described as 'sailed from, or loading at, Benizaf.' This Schumacher & Co. declined to accept, on the ground that their agreement was for a vessel that 'had sailed, or was about to sail, from Benizaf, with cargo, for Philadelphia.' This being communicated to

Gregg & Co., they at once sent forward a new draft, to meet the wishes of Schumacher & Co., and using the language they insisted upon. This new draft reached Baltimore on the second of August, and was duly executed by all parties. This is the instrument a copy of which is marked Exhibit A, and filed with the original libel. From this it appears, that, in the printed blank which was used, there were the following words: 'Charterers to have option of cancelling this charter-party should vessel not have arrived at loading port prior to ——.' These words were erased by drawing a pen through them, before signing

6. Schumacher & Co., having ascertained, on the 9th of August, that the steamer passed Gibraltar outwards from Benizaf on that day, and being then satisfied that she would not arrive in time to load, either at Baltimore or Philadelphia, in August, at once set about securing another vessel, and on the 16th got one, which they afterwards loaded at an increased cost of freight to them over what they would have been compelled to pay the Whickham, of one thousand nine hundred and eighty-eight $\frac{25}{100}$ dollars. It is agreed that this new charter was effected on as favorable terms as it could have been in the month of August, and that, if Schumacher & Co. are entitled to recover at all, it must be for the increase in the cost of freight which they paid.

7. The discharge of the cargo of iron ore from the Whickham was completed with dispatch, at Philadelphia, and on the 7th of September she sailed for Baltimore, where she arrived on the 9th, and was tendered Schumacher & Co., under the charter, on the 11th. They declined to accept her, for the reason that, as they claimed, when the charter-party was entered into, she had neither sailed nor was about to sail from Benizaf, within the meaning of that provision in the charter, as understood by the parties. Another charter was then obtained, but at a loss to her of four thousand and ninety-three $\frac{18}{100}$ dollars, as of May 10, 1880. It is agreed that this charter was as favorable as any that could have been effected, and that, if her owners are entitled to recover at all, it must be for the above amount, as their loss."

The Circuit Court stated the following conclusions of law:

"1. That the Whickham was not about to sail from Benizaf on the 1st of August, within the meaning of that term as used in the charter-party.

2. That Schumacher & Co. are entitled to recover from the defendants to their libel the sum of $1,988.25, and the interest thereon from September 11, 1879.

3. That the cross-libel of T. H. Davison and others must be dismissed."

A decree was entered in the two suits, reversing the decrees of the District Court, and adjudging a recovery of $2,128.07, with interest until paid, in favor of the charterers, and dismissing the cross-libel. 5 Hughes, 221, and 4 Fed. Rep. 346. The owners of the vessel have appealed to this court.

The decision of the Circuit Court proceeded on the ground that the language of the charter-party must be interpreted, if possible, as the parties in Baltimore understood it when they were contracting. In view of the facts, that all the contracting parties understood that the vessel was wanted to load in August, that, as soon as the charterers learned that she did not leave Gibraltar until the 9th, they took steps to get another vessel, and that they declined to sign a charter-party which described the vessel as "sailed from, or loading at, Benizaf," the court held that the language of the charter-party meant that the vessel had either sailed, or was about ready to sail, with cargo; and that the vessel was not in the condition she was represented, being not more than three-elevenths loaded.

The argument for the appellants is, that the words of the charter-party "about to sail with cargo" imply that the vessel has some cargo on board but is detained from sailing by not having all on board, and that she will sail, when, with dispatch, all her cargo, which is loading with dispatch, shall be on board; and that this vessel fulfilled those conditions. As to the attendant circumstances at Baltimore, it is urged that the charterers asked for a guaranty that the vessel would arrive in time for their purposes, and it was refused, and that the printed clause as to an option in the charterers to cancel was stricken

out, and that then the charterers accepted the general words used.

The words of the charter-party are, "now sailed, or about to sail, from Benizaf, with cargo for Philadelphia." The word "loading" is not found in the contract. The sentence in question implies that the vessel is loaded, because the words "with cargo" apply not only to the words "about to sail," but to the word "sailed," and as, if the vessel had "sailed with cargo," she must have had her cargo on board, so, if it is agreed she is "about to sail with cargo," the meaning is, that she has her cargo on board, and is ready to sail. This construction is in harmony with all that occurred between the parties at the time, and with the conduct of the charterers afterwards. The charterers wanted a guaranty that, even if the vessel had already sailed, or whenever she should sail, she would arrive in time for them to load her with grain in August. This was refused, and the charterers took the risk of her arriving in time, if she had sailed, or if, having her cargo then on board, she should, as the charter-party says, "with all convenient speed, sail and proceed to Philadelphia or Baltimore." Moreover, the charterers refused to sign a charter-party with the words "sailed from or loading at, Benizaf," and both parties agreed on the words in the charter-party, which were the words of authority used by the agents in Philadelphia of the owners of the vessel. The erasing of the printed words, as to the option of cancelling, was in harmony with the refusal of the owners to guarantee the arrival by a certain day. So, also, when the charterers learned, on the 9th of August, that the vessel did not leave Gibraltar till that day, they proceeded to look for another vessel. It was then apparent that the vessel had not left Benizaf by the 1st of August, or with such reasonable dispatch thereafter, that she could have had her cargo on board, ready to sail on the 1st of August.

That the stipulation in the charter-party, that the vessel is "now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia," is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independent agreement,

serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor. The case falls within the class of which *Glaholm* v. *Hays*, 2 Man. & Gr. 257; *Ollive* v. *Booker*, 1 Exch. 416; *Oliver* v. *Fielden*, 4 Exch. 135; *Gorrissen* v. *Perrin*, 2 C. B. N. S. 681; *Croockewit* v. *Fletcher*, 1 H. & N. 893; *Seeger* v. *Duthie*, 8 C. B. N. S. 45; *Behn* v. *Burness*, 3 B. & S. 751; *Corkling* v. *Massey*, L. R. 8 C. P. 395, and *Lowber* v. *Bangs*, 2 Wall. 728, are examples; and not within the class illustrated by *Tarrabochia* v. *Hickie*, 1 H. & N. 183; *Dimech* v. *Corlett*, 12 Moore P. C. 199, and *Clipsham* v. *Vertue*, 5 Q. B. 265. It is apparent, from the averments in the pleadings of the charterers, of facts which are established by the findings, that time and the situation of the vessel were material and essential parts of the contract. Construing the contract by the aid of, and in the light of, the circumstances existing at the time it was made, averred in the pleadings and found as facts, we have no difficulty in holding the stipulation in question to be a warranty. See Abbott on Shipping, 11th ed. by Shee, pp. 227, 228. But the instrument must be construed with reference to the intention of the parties when it was made, irrespective of any events afterwards occurring; and we place our decision on the ground that the stipulation was originally intended to be, and by its terms imports, a condition precedent. The position of the vessel at Benizaf, on the 1st of August—the fact that, if she had not then sailed, she was laden with cargo, so that she could sail—these were the only data on which the charterers could make any calculation as to whether she could arrive so as to discharge and reload in August. They rejected her as loading; but, if she was in such a situation, with cargo in her, that she could be said to be "about to sail," because she was ready to sail, they took the risk as to the length of her voyage.

The decree of the Circuit Court is affirmed.

DRENNEN & Others *v.* LONDON ASSURANCE COMPANY.

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

Submitted December 2, 1884.—Decided January 5, 1885.

An agreement by the members of a firm to admit a person into their business, on condition that the company shall become incorporated, and that he shall pay into the firm for its use, a stated sum of money which is to be put into the corporation, it being understood that no change shall be made in the name or character of the firm until the corporation shall be formed; and the subsequent payment of the agreed sum, do not make such person a member of the firm, or give him an interest in the partnership property in advance of the creation of the corporation.

This action was brought on two policies of fire insurance, issued March 10, 1883, by the London Assurance Corporation of London on certain goods, wares and merchandise, which, it was admitted, were, at the time of insurance, the property of the firm of Drennen, Starr & Everett, doing business in the city of Minneapolis, Minnesota. The loss occurred on the 29th of July, 1883, and there was no dispute, at the trial, as to its amount.

Each policy contained a provision that it should be void if the property insured "be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process, or judicial decree, or voluntary transfer or conveyance." Also, that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, . . . it must be so represented to the corporation, and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate."

The defendant disputed its liability on the ground that Drennen, Starr & Everett, on the 24th of May, 1883, before the loss, admitted one Arndt as a partner in their firm, and that thereby, without its knowledge or consent, and by the voluntary act of the plaintiffs, the title, interest and possession of the insured in the property were changed, and the policies became void. The plaintiffs denied that Arndt ever became a member of their firm, or acquired any interest in the property insured. Upon this issue the proof was, substantially, as will be now stated.

Arndt resided in Sandusky, Ohio. He visited Minneapolis in May, 1883, and first became acquainted with plaintiffs, Drennen and Starr, on or about the 20th day of that month. Negotiations then commenced with Drennen and Starr, who acted for their firm, and resulted in the making of the following agreement:

"This agreement, made and entered into this 24th day of May, A.D. 1883, by and between E. J. A. Drennen, F. W. Starr, and Edward D. Everett, who are now members of and constitute the firm of Drennen, Starr & Everett, all of the city of Minneapolis, Minnesota, parties of the first part, and D. M. Arndt, of the city of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first part hereby agree to receive into their business said Arndt on the following terms and conditions:

"1st. Said company is to become incorporated.

"2d. Said Arndt is to pay into said firm for its use, on or before June 14th, 1883, five thousand dollars.

"3rd. Said Arndt is to pay into said firm for its use, on or before January 1st, 1885, an additional sum of five thousand dollars.

"4th. Said Arndt is to pay said firm interest at the rate of 8 per cent. per annum on each of said sums of five thousand dollars from January 1st, 1883, till each of said sums shall be paid as aforesaid, the interest on last-mentioned sum to be paid semi-annually.

"5th. If said Arndt shall be unable to pay said second $5,000 by January 1st, 1885, his interest shall be decreased 50

per cent. and until said last-mentioned sum of $5,000 shall be paid, or interest decreased as aforesaid, the liability of said Arndt therefor shall be evidenced by his promissory note executed to said firm bearing interest as aforesaid, and dated January 1st, 1883. The business to be carried on by the new company to be formed as aforesaid shall be of the same nature as that now conducted by Drennen, Starr & Everett; the name of the new company to be formed shall be determined hereafter.

"It is understood and agreed that of the effects and rights of the firm of Drennen, Starr & Everett, said Drennen owns one-half and said Starr and Everett each one-fourth thereof. All said rights and effects shall be put into the corporation to be formed as aforesaid, at their value as shown by the inventory taken January 1st, 1883, less any loss by reason of nonpayment of any claim for goods sold by them before that time, and that to the amount to be contributed as aforesaid shall be added said sum of ten thousand dollars to be paid by said Arndt as aforesaid.

"The interest and shares of the several parties to this agreement in the new company shall be in proportion to the amount contributed by each to its capital stock according to the plan aforesaid.

"When a charter shall be procured as aforesaid 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000, with accruing interest thereon, shall be paid. It is understood said Arndt is to attend to the book-keeping and office work of said business, and that each remaining partner of the firm of Drennen, Starr & Everett shall actively engage in the business of the new company; that no change in the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed.

"In testimony whereof, said parties hereto set their signatures, the day and year first herein written.

"E. J. A. Drennen.
"Fred. W. Starr.
"David M. Arndt."

Argument for Defendant in Error.

Everett, one of the plaintiffs, was then absent from Minneapolis, but upon his return soon after, was informed by his partners of the contents of the written agreement with Arndt. The latter, immediately after the agreement was signed, went to Sandusky, but returned to Minneapolis about the 17th of June, 1883. This was after Everett learned from his partners what had occurred between them and Arndt. On the 18th of June, 1883, plaintiffs received from Arndt the sum of $5,000, which was placed to his individual credit upon the account books of the firm, and was by plaintiffs deposited in their bank; and on July 3, 1883, he made and delivered to them his promissory note for $5,000, which was also entered upon their account books to his individual credit. It was accepted by them as other bills receivable in their business.

This constituted the whole evidence upon which the case went to the jury. There was a verdict and judgment for the defendant. The plaintiffs sued out this writ of error.

Mr. L. J. C. Drennen and *Mr. George B. Young* for plaintiffs in error.

Mr. C. K. Davis for defendant in error.—The contract constituted Arndt a partner upon the payment of $5,000 and giving his note for $5,000. The language when analyzed shows this. If not a partner, he became a creditor, and nothing can be clearer than that the parties did not intend such a result. The case of *Syers* v. *Syers*, 1 L. R. App. Cas. 174, is precisely in point. Suppose from some reason—as death of one of the parties—the corporation had never been formed. Could Arndt have sued for his money? Obviously not. His remedy would have been a bill in equity for winding up the partnership. If the plaintiffs' contention is correct, Arndt paid in $10,000 on a mere executory promise to form a corporation, which could not be enforced. *Stocker* v. *Wedderburn*, 3 K. & J. 393; *Maxwell* v. *Port Tenant Co.*, 24 Beav. 495; *Sheffield Gas Co.* v. *Harrison*, 17 Beav. 294; *Bluck* v. *Mallalue*, 27 Beav. 398. The conduct of the parties, too, taken in connection with the agreement, is reconcilable with no theory other

than that Arndt purchased a present interest. If it be doubtful, on the face of an instrument, whether a present demise or future letting was meant, the intention of the parties may be gathered from their conduct. *Chapman* v. *Bluck*, 4 Bing. N. C. 187, 195. See also *Doe* v. *Ries*, 8 Bing. 181; *Drummond* v. *Attorney-General*, 2 H. L. Cas. 861; *Nash* v. *Towne*, 5 Wall. 689; *Railroad* v. *Trimble*, 10 Wall. 367. If these conclusions are correct, it follows that a change had taken place in the title and possession of the property, and that the interest of the assured became other than the entire, unconditional and sole ownership of the same, and the policies were therefore avoided under each of the conditions contained in them. Any process by which a new party is introduced, by which the insured shifts the moral hazard from himself to a stranger, creates a new contract and a new relation, which the company has not consented to assume. *Malley* v. *Insurance Co.* (Supreme Ct. Connecticut, June T. 1883), 13 Insurance Law Journal, 38. This is not the case of one partner retiring, leaving the insured property with the firm, which is held in some States not to affect the policy. *Lockwood* v. *Insurance Co.*, 47 Conn. 564; *Hoffman* v. *Insurance Co.*, 32 N. Y. 405. It is the introduction of a stranger as custodian of the property, which cannot be done. *Malley* v. *Insurance Co.*, cited above. *West* v. *Insurance Co.*, 22 Ohio St. 11; *Dix* v. *Insurance Co.*, 22 Ill. 272; *Barnes* v. *Insurance Co.*, 51 Maine, 110; *Insurance Co.* v. *Rice*, 23 Ind. 179; *Finley* v. *Insurance Co.*, 30 Penn. St. 311; *Insurance Co.* v. *Richer*, 10 Mich. 279. See also *Day* v. *Insurance Co.*, 23 Barb. 623; *Wood* v. *Insurance Co.*, 31 Vt. 552; *Keeler* v. *Insurance Co.*, 16 Wisc. 523; *Insurance Co.* v. *Hauslein*, 60 Ill. 521; *Card* v. *Insurance Co.*, 4 Missouri App. 424; *Oakes* v. *Insurance Co.*, 118 Mass. 164.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated, and continued:

At the trial below the plaintiffs asked the court to instruct the jury that the written agreement with Arndt, followed by his payment of $5,000 in money, the delivery of his note for a like amount, and the entry of the money and notes to his

individual credit upon the books of Drennen, Starr & Everett, did not constitute him a partner with plaintiffs, as between themselves, and did not have the effect to assign or transfer to him any title or interest in the property insured. The court refused to give that instruction, but charged the jury that "said agreement so signed, if assented to by Everett, and the receipt by plaintiffs of the money and note and the credit thereof on their books to Arndt, would and did constitute Arndt a partner with plaintiffs, as between themselves, from the time of the receipt by plaintiffs of said money, and had the effect to convey and transfer to and vest in Arndt a joint and undivided interest and title with plaintiffs in the insured property."

The instruction refused, as well as the one given by the court, assumes that the admission of Arndt at any time before the loss as a partner in the firm to which the policies were issued, would have involved such a transfer of the property or such a change in its title or possession as would render the policies void. Without considering whether that assumption is justified by a proper interpretation of the policies, we have now only to determine whether there was error in holding that Arndt, by virtue of the agreement of May 24, 1883, and the facts recited in the charge to the jury, became a partner in the firm of Drennen, Starr & Everett. This question is within a very narrow compass; for our inquiry is restricted to the ascertainment of the real intention of the parties as disclosed by the written agreement, considered as a whole, and by their conduct in execution of its provisions.

It appears, in the forefront of the agreement, that Arndt did not acquire an interest in the firm property immediately upon its execution; for, the plaintiffs only agreed to receive him into their business on certain terms and conditions thereafter to be performed. The first of those conditions was, that the company—the one to be formed by the proposed connection between the plaintiffs and Arndt—should become incorporated; then, he was to pay into the firm for its use, on or before June 14, 1883, the sum of $5,000, and a like sum on the 1st of January, 1885, the latter to be evidenced by his note, each sum to bear interest from January 1, 1883, until paid; finally,

his interest was to be decreased fifty per cent. if he failed to pay the second $5,000 by January 1, 1885; "the business"—that in which Arndt was to have an interest—"to be carried on by the new company to be formed as aforesaid shall be of the same nature as that now conducted by Drennen, Starr & Everett." Then follows a declaration as to the property upon the basis of which the new company was to be organized, viz.: all the rights and effects, owned by Drennen, Starr & Everett, in the proportion of their respective interests to be put into the corporation to be formed, according to their value as shown by the inventory of January 1, 1883, less any loss, by reason of non-payment for goods sold before that date, to which was to be added the $10,000 which Arndt agreed to pay—the interest of the several parties in the new company to be according to the amounts contributed by them, respectively, to its capital stock.

These provisions all plainly point to an interest that Arndt was to acquire, not presently, nor immediately upon the agreement being signed, but at some future period, when the conditions distinctly set out in the agreement, not some, but all of them, were performed. When those conditions were satisfied, and not before, he would have been entitled to demand, as of right, the execution of the stipulation that he be received into the business then represented by Drennen, Starr & Everett, but thereafter to be represented by the new or incorporated company. The parties appear, *ex industria*, to have excluded the possibility of his acquiring an interest in or control over the insured property in advance of the formation of an incorporated company. Upon no other ground can the clause, "that no change in the name or *character* of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed," be satisfactorily accounted for. It may be that Drennen, Starr & Everett were unwilling to establish the confidential relations of partner with Arndt, but were willing to unite their property with his money, to be owned by a corporation in which all would become stockholders, according to the amounts respectively contributed to its capital stock. Hence, perhaps, the wording of the clause last quoted. If, as

the jury were in effect instructed, Arndt became a partner in the firm of Drennen, Starr & Everett prior to the loss, then the character of that firm was essentially changed; for, as partner, he would have become, at and before the proposed corporation was formed, at least as to third parties, a general agent of his copartners, in respect of all matters within the scope and objects of the partnership, with authority, implied from the relation itself, to participate in the control and management of the property, and, in the name of the firm, even to dispose of the entire right of all the partners for partnership purposes. The agreement is not, in our judgment, fairly susceptible of a construction which is attended by such results. The requirement that Arndt was to be received into the business upon the condition, among others, that the company should be incorporated, and the further requirement that neither the name nor the character of the firm was to be changed until the proposed corporation was formed, cannot be satisfied by any other interpretation than one which excludes him from all control or management of, or legal interest in, the property insured, prior to the formation of such corporation.

It is suggested that Arndt would not have paid $10,000 in cash and notes "into the firm for its use" unless he supposed that he would thereby acquire a present interest in the firm's property. The answer is, that the want of business sagacity in such an arrangement, if such there was, cannot control the interpretation of the written agreement between the parties. Arndt, in effect, agreed to pay Drennen, Starr & Everett $5,000 on June 14, 1883, and a like sum on January 1, 1885, with interest on each sum from January 1, 1883, until paid, for the privilege of becoming, to the extent of such payments, a stockholder in a corporation thereafter to be formed, whose capital stock should represent all the effects and rights of that firm, as of the date from which Arndt was to pay interest (less any loss arising from the non-payment of goods previously sold), increased by the $10,000 which Arndt agreed to pay into the old firm. Such was the whole extent of the agreement.

Syllabus.

The instruction by the court below proceeded upon the ground that the payment by Arndt in cash and notes of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest as partner in the business; whereas such facts only established the performance of some, not of all, the conditions prescribed; for, by the agreement, the formation of the proposed corporation was expressly made a condition, with the others named, to Arndt's becoming interested in the business.

In our judgment, looking at the whole agreement, the parties did not contemplate a partnership, and none was ever established between them. The agreement looked only to a corporation, the payments and other things specified being in preparation for its ultimate formation, which was an adequate, as it was the actual, consideration; consequently, there was, prior to the loss, and under the most liberal interpretation of the policies, no change in the title or possession of the property, nor any transfer thereof, that avoided the policies.

This is sufficient to dispose of the case. For the reasons given

The judgment must be reversed and a new trial had.

HOLLISTER, Collector, *v.* BENEDICT & BURNHAM MANUFACTURING COMPANY.

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

Argued November 11, 12, 1884.—Decided January 5, 1885.

Novelty and increased utility in an improvement upon previous devices do not necessarily make it an invention.

A device which displays only the expected skill of the maker's calling, and involves only the exercise of ordinary faculties of reasoning upon materials supplied by special knowledge and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work of inventive

faculty, such as the Constitution and the patent laws aim to encourage and reward.

The third claim in the specification and claims of the patent issued to Edward A. Locke, August 3, 1869, for an improvement in revenue stamps, although new and useful, is not such an improvement upon the devices previously in use, as entitles it to be regarded as an invention.

While it would seem clear that a suit may be maintained in the Court of Claims against the United States to recover for the use of a patented invention by an officer of the government for its benefit, if the right of the patentee is acknowledged; *Semble*, that it may even be maintained when the exclusive right of the patentee is contested.

This was a bill in equity brought by the assignees of a patent granted to Edward A. Locke, August 3, 1869, for an "improvement of a revenue stamp for barrels, and identifying marks, stamps, or labels, for revenue purposes," against a collector of internal revenue. The bill alleged infringements by the defendant, and prayed for a temporary injunction, a perpetual injunction, an accounting, and damages. The answer set up the official position of the defendant in the use of the stamps alleged to be infringements; denied that he had infringed; denied that the alleged invention was new or useful, or that it was patentable; and averred that so much of it as related to the cancellation, affixing, and removal of stamps, and identification of packages was not patentable.

The court below sustained the patent, and found that the defendant had infringed it, and decreed a perpetual injunction, and an accounting, and the payment of what might be found due as profits. From this decree the collector appealed.

Mr. Assistant Attorney-General Maury for appellant.

Mr. S. W. Kellogg and *Mr. John S. Beach* for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity to enjoin the alleged infringement of letters patent No. 93, 391, issued to Edward A. Locke for certain improvements in identifying revenue marks or labels, dated August 3, 1869, the appellees being assignees of the patentee,

and the appellant, the collector of internal revenue for the Second Collection District of Connecticut.

The specification and claims, with the accompanying drawings, are as follows:

Fig. 1.

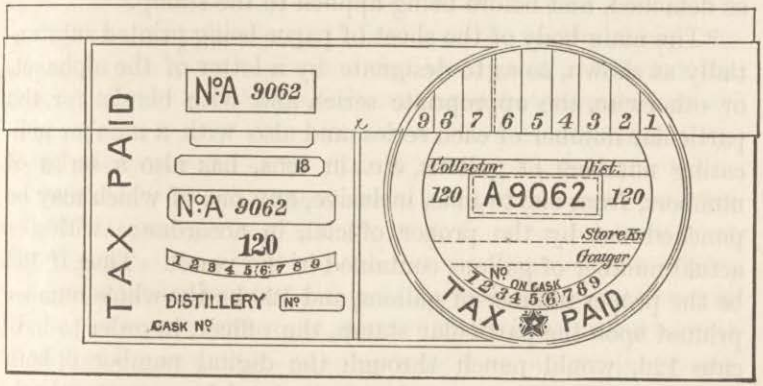


Fig. 2.

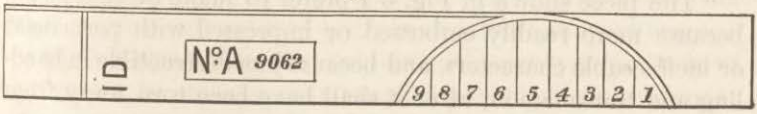
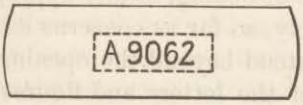


Fig. 3.



"This invention is designed more especially for use in sealing liquor casks with identifying marks or labels for revenue purposes, and in such a manner that while truly designating the contents of the cask, or giving such other indication as may be demanded, they cannot be fraudulently removed.

"Fig. 1 represents a printed paper revenue stamp, the circular portion at the right hand being the stamp proper, which is applied to the cask or box, and the portion at the left hand being the 'stub,' or that portion retained by the government official.

Fig. 2 represents a separate strip, which is shown in Fig. 1 as attached at its left end to the stub of the paper stamp proper, in such manner that its coupons may be readily cut off and permanently affixed to the stamp proper when the latter is secured to the cask. Fig. 3 represents a metallic piece or strip, shown as detached, and before being applied to the stamp.

"The main body of the sheet of paper being printed substantially as shown, so as to designate by a letter of the alphabet, or otherwise, the appropriate series, and with blanks for the particular number of each series, and also with a number indicating numbers of gallons, &c., in tens, has also a series of numbers, from one to nine, inclusive, any one of which may be punched out by the proper official, in accordance with the actual number of gallons contained in the vessel. Thus, if 126 be the proper number of gallons, and 120 be the whole number printed upon the particular stamp, the officer, in order to indicate 126, would punch through the digital number 6, both upon the circular stamp, and upon its 'stub' or counter-check.

"The piece shown in Fig. 3 I prefer to make of thin metal, because more readily embossed or impressed with permanent or ineffaceable characters, and because less destructible in handling and transmission, after it shall have been torn away from the stamp. This piece (also shown in part in Fig. 1) may be conveniently made of oblong, or any appropriate form, its conditions being merely, so far as concerns its shape, that it be of sufficient size to extend beyond the opening made in the paper for the exposure of the letters and figures made on it, and be capable of being retained in its place between the paper and another backing-piece of paper, the two pieces of paper being gummed together for this purpose. This backing-piece I prepare with dried gum on its outer face, that the stamp may be always ready by merely moistening the gum for instant application to the cask.

"The strip shown in Fig. 2 I secure in part to the left side of the paper, by gumming its remaining portion, upon which are coupons for the units, being dry-gummed on its under side, so that when the proper number of gallons has been deter-

mined, the officer, upon cutting off the coupons at the figure designating the unit or digital number required, may, by moistening it, instantly, and without cutting or injuring the stamp, apply it to the stamp, while the stub or remaining portion of the slip will correspondingly indicate thereon just what has been so detached and applied to the stamp. Thus, to indicate 126 gallons, 120 being the whole number of the stamp, the coupon slip is cut off between the numbers 6 and 7, and the piece so cut off is moistened on the back and permanently attached to the face of the stamp, the 6 being the significant figure of the coupon.

"The mode of applying a stamp so made to a cask may be, by way of greater protection against liability to damage or accident, as shown and described in my patent No. 58,847—that is, by boring a shallow depression in the wood of the cask or case, and after affixing the stamp by its gum to the bottom of this depression, then placing over it a ring having down-turned edges, and, by pressing the same, forcing its outer edge into the wood. Or the wood may have an annular groove cut therein to receive the edge of the ring when so forced home.

"Instead of making the removable piece out of metal, or of making it in a piece separate from the stamp, it may be made of the same piece of paper of which the stamp is composed, by simply having its outline perforated after the manner of postage stamps, but ungummed at its back, so as readily to be torn away and detached from the stamp.

"Although I have shown and described a lining-paper, between which and the stamp or surface-paper the metal slip is held, yet I may dispense with such lining and employ a thicker paper for the stamp, the metal strip in such cases, if preferred, being confined or held to it by having its ends pass through slits made in the paper for such purpose. Or the metal piece may have points or projections at its ends or corners, or elsewhere, which may be forced or passed through the paper and clinched on the under side.

"For the purpose of readily separating the circular stamp from the sheet, I perforate it about its periphery with any

suitable slits, cuts, or openings adapted to the thickness or texture of the paper. I also prefer to have the stamps prepared with blanks and dotted lines, on which the collector, gauger, and storekeeper may place their signatures, as shown in Fig. 1.

"It is to be understood that the metallic or other slip, the stub or check part of the stamp paper, and also the stub of the coupon piece, are all to be consecutively numbered alike for each alphabetical series, the capital letter A in the drawings indicating the alphabetical series, and the number immediately to the right thereof indicating a number in the consecutive numbers of such series.

"For convenience I prefer to have the stamps, after being printed, bound up in book form, after the manner of merchants' or bankers' check books, so that each stamp, as cut out, shall leave in the book its corresponding marginal piece or stub, having thereon a record of letters, figures, marks, &c., according with those upon such stamps.

"I claim—

"1. A stamp, the body of which is made of paper or other suitable material, and having a removable slip of metal or other material, displaying thereon a serial number or other specific identifying mark corresponding with a similar mark upon the stub, and so attached that the removal of such slip must mutilate or destroy the stamp.

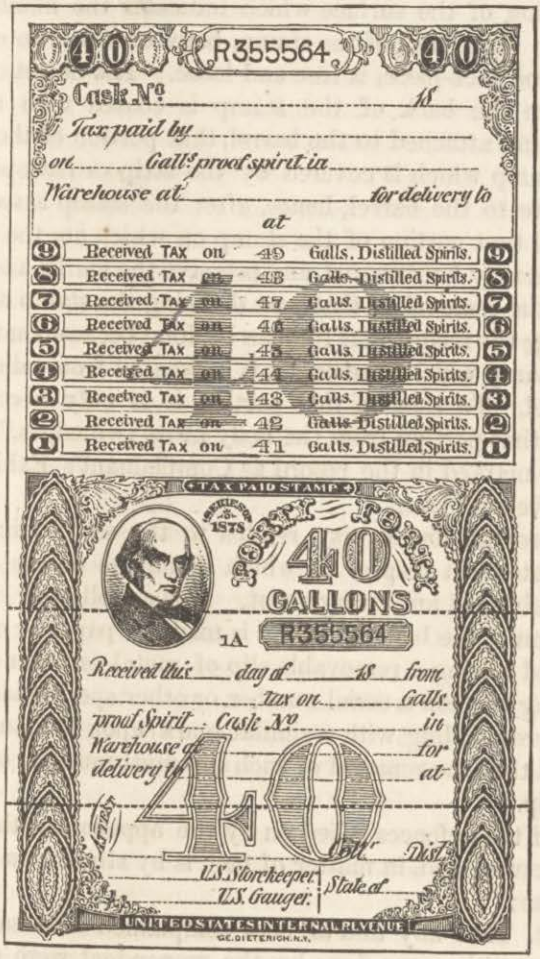
"2. In a paper revenue stamp for indicating the contents of a cask, and having thereon a number designating the number of gallons or other measure, providing the stamp, and also its stub or check-piece, with corresponding digital numbers, to be punched out to indicate the units, substantially as described.

"3. In combination with a paper stamp having a check-piece or stub, from which it is detached when applied for use, a coupon slip, whose coupons are to be secured to the face of the stamps, as and for the purpose described."

The following is a copy of the face of the tax-paid internal revenue stamp used by the appellant and claimed to be an infringement of the patent:

COPY OF HOLLISTER REVENUE STAMP.

Removable part is indicated by lines.



As described by the complainant's witnesses, this stamp "is composed of a single thickness of paper, on the face of which the number and registering marks are conveniently placed. On the back of this stamp is a piece of paper somewhat wider

than the surface on which the number and registering marks are printed. The two edges of this back-piece are caused to adhere to the back of the stamp, one above and the other below that portion of the surface which indicates the number, contents, etc. The back of the stamp, between the two edges of this strip or back-piece, is free and loose. The object of this is that when the back of the stamp is coated with adhesive material and attached to the barrel, that portion of the surface of the stamp which is covered by the strip or back-piece will not adhere to the barrel, hence, after the stamp is secured to the barrel that portion of the stamp on which are the registering marks may be removed, and preserve the marks and figures thereon, the removal of that part defacing the stamp as well as preserving the record, and this can be done because that portion of the stamp which is removed is prevented from adhering to the barrel. To remove this portion it is only necessary to separate that portion from the body at its two edges."

This is marked in the record as Complainant's Exhibit Hollister Revenue Stamp.

The present controversy relates to the first claim of the Locke patent, in respect to which alone the decree appealed from established an infringement. It is as follows:

"A stamp, the body of which is made of paper or other material, and having a removable slip of metal or other material, displaying thereon a serial number or other specific identifying mark corresponding with a similar mark upon the stub, and so attached that the removal of such slip must mutilate or destroy the stamp."

One of the defences relied on by the appellant is thus stated in the answer, and, in matter of fact, is by stipulation admitted to be true:

"First. That any and all acts complained of in said bill by the said petitioner as done by the respondent were done and performed by him in the discharge of his duties as collector of internal revenue for the United States for a designated collection district of the State of Connecticut, and by direction of the Commissioner of Internal Revenue, an officer of the Treasury Department of the United States; that any revenue stamps by

him used have been furnished by the Bureau of Internal Revenue, of which said Commissioner is the official head, for use in the discharge of said duties as collector, and the same have been used solely as a means of collecting the taxes due to the United States, which said taxes have been imposed by the laws of the United States, and the manner of said collection, as followed by said collector, regulated and authorized by such laws; that said respondent has acted as such collector by virtue of legal appointments thereto by the President of the United States, duly confirmed by the Senate of the United States, for and during all the times mentioned in said bill of complaint."

It was authoritatively declared in *James* v. *Campbell*, 104 U. S. 356, that the right of the patentee, under letters patent for an invention granted by the United States, was exclusive of the government of the United States as well as of all others, and stood on the footing of all other property, the right to which was secured, as against the government, by the constitutional guaranty which prohibits the taking of private property for public use without compensation; but doubts were expressed whether a suit could be sustained, such as the present, against public officers, or whether a suit upon an implied promise of indemnity might not be prosecuted against the United States by name in the Court of Claims. If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the Court of Claims, such as was entertained and sanctioned in the case of *The United States* v. *The Great Falls Manufacturing Co.*, 112 U. S. 645. And it may be, that, even if the exclusive right of the patentee were contested, such an action might be brought in that court, involving all questions relating to the validity of the patent; but, as we have concluded to dispose of the present appeal upon other grounds, it becomes unnecessary to decide the question arising upon this defence. It is referred to only for the purpose of excluding any infer-

ence that might be drawn from our passing it over without notice.

The course of business in the collection of the revenue upon distilled spirits, so far as the use of these stamps is involved, is explained by Mr. Chapman, a witness for the defendant below, who had been chief of the stamp division in the Internal Revenue Office. He says:

"After spirits have been produced they are drawn from the cistern into the barrels, and there is attached to each barrel a stamp, called a warehouse stamp, together with certain marks and brands put on simultaneously with the stamp; this stamp is an oblong piece of paper, properly engraved, with blanks, in which are inserted the numbers of the package, the number of wine and proof gallons contained therein, name of the distiller, location of the distillery, and are signed by the storekeeper and gauger on duty at the distillery; this stamp is merely used as a check, and does not represent a tax; the stamp consists of but one piece of paper about three by two inches, and is attached by paste or other adhesive material, and by tacks at the corner and centre, by the gauger on duty at the distillery; this stamp (warehouse) has been in use from 1868 to the present time, and no change has been made in the construction of the same, the only changes being in the quality and kind of paper used and the designs of the engraving.

"The package is then removed to the bonded warehouse of the distillery, where it remains until the distiller files with the collector of the district a paper, called an entry for withdrawal; this paper is accompanied by the amount of the tax upon the spirits contained in the package; the collector thereupon fills out, signs, and forwards to the gauger the tax-paid stamp, which is a piece of paper nearly square, upon the face of which is engraved the body of the stamp, together with nine coupons, of which stamp and coupons, with the stub that remains in the books from which the stamp is cut, complainant's Exhibit Hollister Revenue Stamp is a copy.

"From 1868 until about 1871 this stamp, which has always been called the tax-paid stamp, was constructed of two pieces of paper; before the stamp was printed, the paper of which the

body of the stamp was composed was perforated with a round aperture, about one and a half inches in diameter; to the back of the paper was then attached, by paste or mucilage, a piece of tissue paper, completely covering said aperture; the stamp was then printed, the engraving covering both the body of the paper and so much of the tissue paper as appears through the aperture. From about 1871 to 1875 the stamp was composed of but one piece of paper, the use of the tissue paper and the aperture having been abandoned. In August, 1871, there was added to the tax-paid stamp a piece of paper, which was pasted by its edges upon the back thereof, as shown in complainant's Exhibit, Hollister Revenue Stamp. Stamps of the latter character have been in use from August, 1875, to this date.

"On receipt of the tax-paid stamps by the gauger, he proceeds to affix them to the head of the barrel, together with certain marks and brands; he, together with the storekeeper, having first signed the same at the places indicated in complainant's Exhibit, Hollister Revenue Stamp. The gauger puts this stamp on the barrel by means of some adhesive material and tacks; he then cancels it by the use of a stencil-plate, imprinting across the face of the stamp and extending over each side upon the head of the barrel waved lines; he also imprints upon the head with a stencil-plate his name and official designation. The whole surface of the stamp is then varnished with a transparent varnish; no varnish can be used which is oily enough to affect the paste.

"The package is then removed from the warehouse and passes into the custody of the distiller or owner. If the owner desires to purify the contents of the package it is then taken to the establishment of a duly authorized rectifier of distilled spirits. The rectifier then notifies the collector of the district that he desires to dump, for rectification, the contents of certain specified packages, whereupon the collector directs a gauger to proceed to the rectifying establishment and gauge the specified packages. When the packages are gauged the gauger is required by regulations to cut from the tax-paid stamp a designated portion thereof, and transmit the same to the collector, with a report of his operations. The packages are then dumped

into the tubs of the rectifier, and the identity of their contents lost. . . .

"The portion of the tax-paid stamp detached or cut and forwarded by the gauger, as heretofore described, includes the serial number of the stamp, the date on which the tax was paid, and the number of proof gallons; the number of the cask, the location of the warehouse, and the person or firm to whom delivered, and the signature of the collector; the part so cut out is over the paper back."

The employment of the paper backing in the stamp used by the appellant, whereby the part to be cut out is prevented from adhering to the head of the barrel, and the arrangement of a part of the stamp so as to identify the package with that described in the stub, the removal of which destroys the stamp so that it cannot be used again, constitutes the alleged infringement of the first claim of the Locke patent, which covers every stamp within that description.

The counsel for the appellee describes "the Locke stamp as a combination of three parts: 1st, a part which is designed to become a stub when the stamp proper is separated therefrom, and displays a serial number; 2d, a constituent part of the stamp proper which is designed for permanent attachment to the barrel; 3d, a constituent part of the stamp proper displaying the same identifying serial number as the stub, which part, after the stamp proper has been affixed to the barrel, bears such relation to the permanent part, that it can be so removed therefrom as to retain its own integrity, but mutilates and thereby cancels the stamp by its removal."

In this combination it will not be questioned that the first and second elements were well known, and that the third, so far as its contents are identical with those on the stub, is not new. The question turns on that feature of the third element whereby a removable part of the stamp proper, the contents of which identify the stamp with the stub after the stamp has been attached, can be so removed as to retain its own integrity, but mutilates and thereby cancels the stamp by its removal.

This is what we ascertain to be the precise idea embodied in

the invention described and claimed in the patent, and which, although we find to be new in the sense that it had not been anticipated by any previous invention, of which it could therefore be declared to be an infringement, yet is not such an improvement as is entitled to be regarded in the sense of the patent laws as an invention.

In reaching this conclusion we have allowed its due weight to the presumption in favor of the validity of the patent arising from the action of the Patent Office in granting it; and we have not been unmindful of the fact, abundantly proven, and indeed not denied, that the adoption of the present tax-paid stamp, in lieu of that previously in use by the Internal Revenue Bureau, has proven its superior utility in the prevention of frauds upon the revenue. The testimony on that point of the Commissioner of Internal Revenue from his official reports is quite conclusive. In his report for 1875 he mentions the adoption of "new regulations in regard to the use of tax-paid stamps, by which a portion of the stamp is cut out at the time of dumping and returned with the gauger's report," and says: "This effectually destroys the stamp and prevents its re-use, while at the same time, a sufficient amount of the engraving is shown upon the slip to determine whether the stamp is genuine;" and, in 1876, that official reported that "the plan of requiring the return of a portion of the tax-paid stamps, whenever a package to which it is attached is dumped for rectification, has been found to be such a valuable prevention of fraud that it has been extended to include all stamps for rectified spirits and wholesale liquor dealers' stamps.

"These three varieties of stamps for distilled spirits are now prepared at a trifling additional cost, with a paper back affixed to each in such a way that the portion of the stamp containing all the important data can be cut therefrom and filed with the commissioner or collector, thus furnishing conclusive evidence of the destruction of the stamp (rendering its re-use impossible), and furnishing also evidence as to the contents of the package bearing the stamp.

"It is believed that this system affords the government a very effectual protection against the perpetration of fraud

in connection with the collection of the tax on distilled spirits."

Such an increased utility, beyond what had been attained by devices previously in use, in cases of doubt, is usually regarded as determining the question of invention. But in the present case we are not able to give it such effect.

No change, it will be observed, was made in the character of the stamp, so far as the relation between the stamp proper and the stub is concerned, nor in the identifying marks which constituted the written and printed matter upon both; and the expedient of using a paper backing which prevented the adhesion to the package of the part intended to be detached and removed, it is manifest would be adopted by any skilled person having that end in view.

The idea of detaching that portion of the stamp, with the double effect of destroying the stamp by mutilation and preserving the evidence of the identity of the package on which it had been first placed in use, which is all that remains to constitute the invention, seems to us not to spring from that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal. Cutting out a portion of the stamp, as a means of defacing and mutilating it, so as to prevent a second use, was matter of common knowledge and practice, before the date of this patent; and cutting out a particular portion, on which the identifying marks had been previously written or printed, was simply cutting a stub from the stamp, instead of cutting the stamp from the stub, as before. So that, when the frequency and magnitude of the frauds upon the revenue, committed by the removal of tax-paid stamps from packages, on which they had been originally placed by the officer, to others surreptitiously substituted for them, or by emptying the packages of their original contents, and fraudulently refilling them with spirits on which no tax

had been paid, attracted the general attention of the revenue department, the answer to the problem of prevention was found by immediate inference from the existing regulations, in the adoption of the expedient now in question. As soon as the mischief became apparent, and the remedy was seriously and systematically studied by those competent to deal with the subject, the present regulation was promptly suggested and adopted, just as a skilled mechanic, witnessing the performance of a machine, inadequate, by reason of some defect, to accomplish the object for which it had been designed, by the application of his common knowledge and experience, perceives the reason of the failure, and supplies what is obviously wanting. It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward.

On this ground

The decree of the Circuit Court is reversed, and the cause remanded, with directions to enter a decree dismissing the bill.

HESS *v.* REYNOLDS, Administrator.

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

Submitted December 9, 1884.—Decided January 5, 1885.

A proceeding in a State court against an administrator, to obtain payment of a debt due by the decedent in his lifetime, is removable into a court of the United States, when the creditor and the administrator are citizens of different States, notwithstanding the State statute may enact that such claims can only be established in a Probate Court of the State, or by appeal from that court to some other State court.

The act of March 3, 1875, to determine the jurisdiction of the Circuit Courts

Argument for Defendant in Error.

and regulate the removal of causes from State courts, does not repeal or supersede all other statutes on those subjects, but only such as are in conflict with this latter statute. The third clause of section 639 of the Revised Statutes is not, therefore, abrogated or repealed.

An application for removal under that clause is in time, if made before the trial or final hearing of the cause in the State court.

The report of commissioners to whom a claim has been referred by a Probate Court under the statutes of Michigan, is not such final hearing within the meaning of that section.

The removal in all cases is into the Circuit Court of the District, which embraces territorially the State court in which the suit is pending at the time of the removal, without regard to the place where it originated.

The record shows that plaintiff in error, who was a citizen of Missouri, prosecuted his claim in the Probate Court of Ionia County, Michigan, against the estate of Warren Sherwood, deceased, of which William Reynolds had been appointed administrator. The claim being resisted, was, in due course of proceeding, referred to commissioners appointed by the probate judge, who reported against its allowance. Thereupon Hess, as the Michigan statute authorized, appealed to the Circuit Court of Ionia County, where he was entitled to a trial by jury. The judge of that court having been counsel for the administrator in the case, it was, by proper order, removed to the Circuit Court of Jackson County after a delay of several years, and from that court into the Circuit Court of the United States, on the affidavit of Hess that he had reason to believe, and did believe, that, from prejudice and local influence, he would not be able to obtain justice in said State court.

The Circuit Court remanded the cause to the State court from which it had been removed; and this writ of error was brought to that judgment.

Mr. Henry Newbegin, and *Mr. B. B. Kingsbury* for plaintiff in error.

Mr. Edgar M. Marble for defendant in error.—Under the statutes of Michigan, no process can issue from the State court to collect the claim. The determination of the State court is certified to the Probate Court and claims paid upon the basis

of the allowance made. This adjustment of each claim is in no sense a suit between parties in the meaning of the Removal Act. *West* v. *Aurora*, 6 Wall. 139, 142; *Du Vivier* v. *Hopkins*, 116 Mass. 125, 128. When a case is legally removed, the jurisdiction of the State court ceases for all purposes, and the suit cannot be remanded to the State court for any purpose. *Kanouse* v. *Martin*, 15 How. 198; *Insurance Co.* v. *Dunn*, 19 Wall. 214; *Mahone* v. *Railroad Co.*, 111 Mass. 72; *Partridge* v. *Insurance Co.*, 15 Wall. 573; *Du Vivier* v. *Hopkins*, above cited. In this case a remand would be necessary, in order to enforce, according to Michigan laws, any judgment which might be rendered. Even if the cause was removable, the application for the removal came too late. The statutes of Michigan provided for the appointment of commissioners by the Probate Court to examine and adjust claims against estates of deceased persons. All claims must be presented to the commissioners. They act judicially, and their judgment is final if not appealed from. *Streeter* v. *Paton*, 7 Mich. 341, 346; *Fish* v. *Morse*, 8 Mich. 34; *Clark* v. *Davis*, 32 Mich. 154, 157; *Sherburn* v. *Hooper*, 40 Mich. 503. The claimant presented his claim to such commissioners. They passed upon it. This brings his case within *Stevenson* v. *Williams*, 19 Wall. 572, which is decisive. The late Mr. Justice Swayne, at Circuit for the Eastern District of Michigan in August, 1878, decided this point in accordance with our views. *In re Fraser*, 18 Albany Law Journal, 353. The case of *Du Vivier* v. *Hopkins*, above cited, is also exactly in point, as the Michigan and Massachusetts statutes are substantially alike. See also *Gaines* v. *Fuentes*, 92 U. S. 10; *Broderick's Will*, 21 Wall. 503; *Yonley* v. *Lavender*, 21 Wall. 276; *Tarver* v. *Tarver*, 9 Pet. 174; *Fouvergne* v. *New Orleans*, 18 How. 470.

Mr. Justice Miller delivered the opinion of the court. He recited the facts as above stated, and continued:

The first objection to the removal is that the proceeding in the State court, which was commenced in the Probate Court to obtain payment of a claim against the estate of a decedent, then under administration in that court, was within the exclusive

jurisdiction of the State court, and could not be transferred to a court of the United States.

This proposition has been often asserted here and as often denied.

It is not denied that the laws of the States are valid which provide for the descent and distribution of property of a decedent, for the proof and registration of wills, for the collection of debts due to the decedent, and the payment of the debts which he owed at the time of his death. Nor is it denied that such courts as are usually called probate courts are rightfully vested in a general way with authority to supervise the collection of these debts and other assets, the payment of the debts of the decedent, and to make distribution of the remainder.

But the estate of a decedent is neither a person nor a corporation. It can neither sue nor be sued. It consists of property, or rights to property, the title of which passes on his death, with right of possession, according to the varying laws of the States, to executors of a will, administrators of estates, heirs or devisees, as the case may be.

These parties represent in their respective characters the rights which have devolved on them in any controversy, legal or equitable, which may become a matter of judicial contest with other parties having conflicting interests. In regard to controversies with debtors and creditors, the executor, if there be a will, or the administrator, if one has been appointed, represents the rights and the obligations which had been those of the deceased. The right of the administrator or executor to sue in the ordinary courts of the country to enforce the payment of debts owing the decedent in his lifetime, and unpaid at his death, has always been recognized; and it is believed that no system of administering the estates of decedents has changed this principle.

The courts of the United States have always been open to such actions when the requisite citizenship exists, and for this purpose the citizenship of the administrator or executor controls, and not that of the decedent.

So, also, until recent times, the administrator or executor was

liable to be sued in the ordinary courts, whether State or national, on obligations contracted by the decedent, and such is probably the law of most of the States of the Union at this day. To such a suit the administrator could, at common law, have pleaded that there were no assets in his hands unadministered, or he could have denied the cause of action set up by plaintiff. How far a denial of assets would be a good plea now, depends on the statutes of the various States and the various modes of obtaining equality of distribution among creditors, where there is not enough to pay all.

Such suits, in the absence of any controlling law, can be brought, and have been brought, in the courts of the United States, where the requisites of jurisdiction between the parties exist. This jurisdiction of the courts of the United States, in controversies between citizens of different States, cannot be ousted or annulled by statutes of the States, assuming to confer it exclusively on their own courts.

It may be convenient that all debts to be paid out of the assets of a deceased man's estate, shall be established in the court to which the law of the domicil has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statutes of a State, can deprive them of jurisdiction to hear and determine a controversy between citizens of different States, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by State statutes enacted for the more convenient settlement of estates of decedents.

These views have been expressed by this court in many cases,

where they were proper grounds for the decisions made. The latest of them, in which the others are reviewed with care, is that of *Ellis* v. *Davis*, 109 U. S. 485, in which the opinion was delivered by Mr. Justice Matthews. Among the cases there cited with approval is that of *Gaines* v. *Fuentes*, 92 U. S. 10. That was a suit brought in the Second District Court for the Parish of Orleans, which, by the laws of Louisiana, was vested with jurisdiction over estates of deceased persons and probate of wills. It was brought to annul the will of Daniel Clark, and to set aside the decree of the court by which it was admitted to probate.

Application for removal of the case into the Circuit Court for the United States, on the ground of prejudice and local influence, under the act of 1867, as in the case now before the court, was refused, though the requisite citizenship of the parties was shown. The action of the District Court having been affirmed in the Supreme Court of that State, the case was brought here on the allegation of error in refusing to grant the order of removal. The same argument was advanced in favor of the exclusive jurisdiction of the State court as in the brief of the counsel in the present case. But this court said: "The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary. . . . And if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court where the parties are, on the one side, citizens of Louisiana, and on the other, citizens of other States." This court reversed the judgment of the Louisiana courts, and held that the application for the removal should have been granted, and ordered the case to be remanded to the Parish District Court, with directions to make the transfer. The cases of *Payne* v. *Hook*, 7 Wall. 425, and *Hyde* v. *Stone*, 20 How. 170, are to the same effect. In

the latter case the court said, with much force and propriety, that it had "repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power."

The case of the *Boom Co.* v. *Patterson*, 98 U. S. 403, is also in point. That was a special proceeding to condemn property under laws of the State of Minnesota in the exercise of the right of eminent domain, which, commencing before special commissioners to assess damages, was by appeal brought into a court of general jurisdiction, and from there removed, rightfully as this court held, into the Circuit Court of the United States.

The case before us was one removable into the court of the United States.

The next objection to the removal is, that the application was made too late.

If the case is only removable under the act of 1875, and if that statute repeals or supersedes all other statutes for the removal of causes from the State courts into the Circuit Courts of the United States, then the motion was made too late, for there was a period of five years in the Circuit Court of Ionia County during all which time the case stood for trial. See *Pullman Palace Car Co.* v. *Speck and others*, *post*, 84.

But though such has often in argument been asserted to be the effect of the act of 1875, the language of the repealing clause of it is not so comprehensive. That language is, "That all acts and parts of acts in conflict with the provisions of this act are hereby repealed." This implies very strongly that there may be acts on the same subject which are not thereby repealed.

The usual formula of a repealing clause intended to be universal is, that all acts on this subject, or all acts coming within its purview, are repealed, or the acts intended to be repealed are named or specifically referred to. In this case the effect of the statute as a repeal by implication, arising from inconsistency of provisions, or from the supposed intention of the legis-

lature to substitute one new statute for all prior legislation on that subject, is not left to its usual operations, but the statute to be repealed must be in conflict with the act under consideration or that effect does not follow. And this was wise, for Congress well knew that there were many provisions of the laws for such removals, which might or might not come under the provisions of the act of 1875, and which might be exercised under regulations different from that statute, and accordingly these were left to stand, so far as they did not conflict with that act.

The provisions of the act of 1867, by which removals are authorized on the ground of prejudice and local influence, are embodied in the Revised Statutes in the third clause of section 639. It declares that in such a case, with the requisite citizenship, when the non-resident party files the proper affidavit, at any time before the trial or final hearing of the suit, it shall be removed. We do not think this provision is embraced in the act of 1875, which says nothing about prejudice or local influence, and is not in conflict with that act. We are of opinion that this clause of section 639 remains, and is complete in itself, furnishing its own peculiar cause of removal, and prescribing, for reasons appropriate to it, the time within which it must be done. One of these reasons is, that the prejudice may not exist at the beginning, or the hostile local influence may not become known or developed at an earlier stage of the proceedings. Congress, therefore, intended to provide against this local hostility, whenever it existed, up to the time of the trial.

It is said, however, that the trial spoken of had taken place before the commissioners of Ionia County, to whom the case had been referred. But we do not look at that proceeding as a trial within the meaning of the statute. It was merely a report, subject to be affirmed or rejected by the probate judge, and, by the express terms of the statute, subject to a right of appeal to a court in which a trial by jury could be had. The latter was the trial or final hearing of the suit which would conclude the right of removal, and until such trial commenced the right of removal under this provision remained.

It is argued that the cause should have been removed to the

Circuit Court for the Western District of Michigan instead of the Eastern, because the county of Ionia, in which the suit originated, is in the former.

But the language of the removal statute is, that suits shall be removed into the Circuit Court of the district where such suits are pending. Undoubtedly this means where they are pending at the time of removal. This suit was not then pending in the Western District of Michigan, but in the County of Jackson, which is in the Eastern District of that State.

We are of opinion that the case was properly removed from the Circuit Court of Jackson County into the Circuit Court of the United States for the Eastern District of Michigan, and that *that* court erred in remanding it.

Its judgment is therefore reversed, with instructions to proceed in the case according to law.

Mr. Justice Gray dissented.

POLLEYS *v.* BLACK RIVER IMPROVEMENT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF WISCONSIN FOR THE COUNTY OF LACROSSE.

Submitted November 17, 1884.—Decided January 12, 1885.

In error to a State court, the writ may be directed to an inferior court if the Supreme Court of the State, without retaining a copy, remits the whole record to that court with direction to enter a final judgment in the case.

The Statute of Limitations for writs of error, § 1008 Rev. Stat., begins to run from the date of the entry and filing of the judgment in the court's proceedings, which constitutes the evidence of the judgment.

This was a motion to dismiss a writ of error, as brought too late. The case is stated in the opinion of the court.

Mr. S. U. Pinney for the motion.

Mr. M. P. Wing and *Mr. I. C. Sloan* opposing.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Circuit Court of Wisconsin for the County of La Crosse, and a motion is made to dismiss it.

The first ground of the motion is that the writ should have been directed to the Supreme Court of the State, and cannot be rightfully directed to the Circuit Court of the county.

It appears that the defendant in error here was plaintiff in the Circuit Court of La Crosse County, and brought its action against Polleys and others for relief in regard to their obstructing the navigation of Black River and its branches. The Circuit Court denied the relief and dismissed the bill. On appeal, the Supreme Court of the State reversed this judgment and delivered an opinion that plaintiff was entitled to relief in the premises; and it made an order remanding the case to the Circuit Court, with directions "to enter judgment in accordance with the opinion of this (that) court."

It appears by the cases cited to us, and by the course of proceedings in such cases in the Wisconsin courts, that the record itself is remitted to the inferior court, and does not, nor does a copy of it, remain in the Supreme Court. Though the judgment in the Circuit Court was the judgment which the Supreme Court ordered it to enter, and was in effect the judgment of the Supreme Court, it is the only final judgment in the case, and the record of it can be found nowhere else but in the Circuit Court of La Crosse County.

To that court, therefore, according to many decisions of this court, the writ of error was properly directed to bring the record here for review. *Gelston* v. *Hoyt*, 3 Wheat. 246; *Atherton* v. *Fowler*, 91 U. S. 143, 146.

It is insisted that the writ of error was not brought within time.

§ 1008 of the Revised Statutes declares that "No judgment, decree, or order of a circuit or district court, in any civil action at law, or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken within two years after the entry of such judgment, decree, or order."

This rule is applicable to writs of error to the State courts

in like manner as to Circuit Courts. *Scarborough* v. *Pargoud*, 108 U. S. 567.

In the case of *Brooks* v. *Norris*, 11 How. 204, construing the same language in the judiciary act of 1789, it is said "that the writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." This language is repeated in *Mussina* v. *Cavazos*, 6 Wall. 355, and in *Scarborough* v. *Pargoud*, *supra*.

Though the writ of error in this case seems to have been issued by the clerk of the Circuit Court of the United States on the 10th day of May, 1884, and is marked by him for some reason as filed on that day, it is marked by the clerk of the court to which it is directed, namely, the Circuit Court of La Crosse County, as filed on the 29th day of that month. It is not disputed that this is the day it was filed in his office. This must be held to be the day on which the writ of error was brought.

The judgment which we are asked to review by this writ was entered in the Circuit Court of La Crosse County, May 24, 1882. It is signed by the judge on that day, and is expressly dated as of that day, and it is marked filed on that day over the signature of the clerk of that court. This is the judgment —the entry of the judgment—and on that day the plaintiff in error had a right to his writ, and on that day the two years began to run within which his right existed.

It seems that the courts of Wisconsin, either by statute or by customary law, keep a book called a judgment docket. In this book are entered, in columns, the names of plaintiffs who recovered judgments, and the defendants against whom they are recovered. In another column is entered the amount of the principal judgment and the costs and the date of the judgment itself.

This record is kept for the convenience of parties who seek information as to liens on real estate or for other purposes. This docket, however, is made up necessarily after the main

judgment is settled and entered in the order book, or record of the court's proceedings, and it may be many days before this abstract of the judgment is made in the judgment docket, according to the convenience of the clerk.

It is the record of the judicial decision or order of the court found in the record book of the court's proceedings which constitutes the evidence of the judgment, and from the date of its entry in that book the statute of limitation begins to run.

It follows that the writ of error in this case was brought five days after the two years allowed by law had expired; and it must be *Dismissed.*

PULLMAN PALACE CAR COMPANY & Others *v.* SPECK & Others.

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

Submitted December 18, 1884.—Decided January 5, 1885.

Within the meaning of § 3, act of March 3, 1875, 18 Stat. 471, regulating removals of causes from State courts, a suit in equity may be "first tried" at the term of the State court, at which, by the rules of that court the respondent is required to answer, and the complainant may be ordered to file replication.

This suit in equity, begun in the State courts of Illinois, was removed to the Circuit Court of the United States, and thence remanded to the State court. The defendants appealed from the order remanding it.

Mr. Edward S. Isham and *Mr. Huntingdon W. Jackson* for appellants.

Mr. A. M. Pence for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from an order of the Circuit Court for the

Northern District of Illinois, remanding to the State court a case which had been removed from that court into the Circuit Court.

The removal was prayed for in the petition on the ground that the controversy was between aliens and citizens of the State of Illinois, and one of the points argued before us is that other parties to the suit, with interest opposed to that of the appellants, at whose instance the removal was made, are citizens also of Illinois, and for that reason the suit was not removable.

But we do not pass on this point, because we are of opinion that the application for removal came too late.

The act of March 3, 1875, under which this removal was asked, requires of the party seeking it that he or they "make and file a petition in such suit, in such State court, before or at the term at which such cause could be first tried, and before the trial thereof, for the removal of such suit into the Circuit Court."

Under the act of 1789, § 12, 1 Stat. 79, the right of removal could only be exercised by a defendant in a court of a State of which he was not a citizen, and he was required to make his application for the removal at the time of entering his appearance. The reasons for this were obviously that the plaintiff, who had selected the State court as his forum, should not be permitted to change it after calling his adversary there, and that the defendant, who had a right of removal, and failed to exercise it at the earliest period possible, should be presumed to have acquiesced in the forum chosen by the plaintiff. The law remained in this condition until an act of Congress of July 27, 1866, 14 Stat. 306, authorized an alien, or citizen of a State other than that in which the suit is brought, to remove the cause, though there be other defendants who are citizens of that State, when there can be a final determination of the controversy, so far as he is concerned, without the presence of the other defendants. In this class of cases the petition for removal could be filed at any time before the trial or final hearing of the cause. An act to amend this act, approved March 2, 1867, 14 Stat. 558, authorized either plaintiff or defendant in a

State court, when they were citizens of different States, to remove the suit, on account of prejudice or local influence, into the Circuit Court of the United States, if he filed in the State court an affidavit of the existence of this cause of removal, at any time before the final hearing or trial of the suit. These latter acts do not speak of terms of the courts, or of the appearance of the moving party, but, using the words hearing and trial in their appropriate sense of a hearing in chancery and a trial at law, permit the removal at *any* time before the hearing or the trial is begun. *Removal Cases*, 100 U. S. 457.

The act of 1875 which governs the case before us, while superseding by its general provisions nearly all the removal statutes, prescribes a rule which is neither so stringent as the act of 1789, nor so lax as those of 1866 and 1867. While the party who has a case for removal is not put to his election to exercise or abandon the right to remove at the moment of entering his appearance, he is not permitted unreasonably to delay this election during all the period incident to the preparation of the case, until both parties find themselves in condition to go to trial at law, or are ready for a hearing in chancery. The later act clearly requires more diligence in making the election than this. If it had intended to enact that the removing party had until the case was ready for trial on both sides, or was fully at issue, or was noticed or set down for trial, it would have been easy to indicate this in words. The language, however, which was adopted means a very different thing. It is not the *time* when the case stands ready for trial on the calendar, but the *term* at which it could be *first* tried. Not the term at which the party can no longer *delay* a trial, but the term at which it *could* be first tried. These words have no meaning if they do not mean the first term after the commencement of the suit at which a trial was in order, when such trial was a thing which the urging or pursuing party had a right to look for, and to put his adversary to a showing if he desired a continuance. In the language of this court, "the election must be made at the first term at which the cause is in law triable." *Babbitt* v. *Clark*, 103 U. S. 606. In other words, at that term in which, according to the rules of procedure of the court,

whether they be statutory or rules of the court's adoption, the cause would stand for trial if the parties had taken the usual steps as to pleading and other preparations. This term at which the case could be first tried is to be ascertained by these rules, and not by the manner in which the parties have complied with them, or have been excused for non-compliance by the court or by stipulation among themselves.

On this point the language of McCrary, circuit judge, in *Murray* v. *Holden*, 1 McCrary, 341, is very pertinent.

"One of the objects," he says, "of the act of 1875 was to prevent the abuses which had been practised under the acts of 1866 and 1867, which allowed a removal at any time before the final hearing. It was evidently the purpose of Congress to fix an earlier and a definite time, which would not permit the litigant to experiment in the State court until satisfied he would fail there, and then change his forum. In all the States there is by law or rule a trial term—*i. e.*, a term at which a cause may for the first time be called for trial. In practice but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading, so that, as in this case, no issues of fact are joined at that term. It is nevertheless the term at which, within the meaning of the law, such cases first could be tried, and therefore is the term at or before which the petition for removal must be filed."

The case of *Babbitt* v. *Clark*, *supra*, in this court, is also in point. The court there says: "The act of Congress does not provide for the removal of a cause at the first term at which a trial can be had on the issues as finally settled by leave of court or otherwise, but at the first term at which the cause, as a cause, could be tried."

Under this construction of the statute, which is undoubtedly sound, there is no difficulty in deciding this case. While it is a chancery cause, the same principles must govern it, though it may require a little more care in determining when it could be first tried.

It appears by a stipulation in the case that the first Monday in every month is the beginning of a new term of the Superior Court of Cook County, from which this suit was removed. It

also appears that the suit was brought to the September term, 1883, of that court, and the defendants, who were the removing party and are also appellants here, obtained an extension of time by order of the court for thirty days from September 20, to answer the original bill, and like time was granted to the defendants in a cross-bill to answer that. This time was extended afterwards in both cases by agreement of counsel until January 11, 1884, and on that day they were filed. The application for this removal was made in the February term, 1884.

It thus appears that, including the appearance term at which the case might have been tried, if appellant had answered according to rule instead of obtaining an extension of thirty days by order of the court, there were five terms of the court at which the motion could have been made for removal, in which no such motion was made. We see no reason why this case was not triable at any of those terms according to the due course of proceedings in such cases. The only reason why it was not so tried, was the time beyond that of the usual course prescribed by rule, which was obtained by order of the court or by agreement of the parties. The case was certainly triable at the January term, after the answers were all in, for it could have been then tried on bill and answer, or the plaintiff have been forced to file replication, which could have been done instanter.

The decree of the Circuit Court remanding the case to the State court is affirmed.

GRIFFITH *v.* GODEY & Another.

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

Argued December 15, 1884.—Decided January 12, 1885.

A probate settlement of an administrator's account does not conclude as to property fraudulently withheld from it.

In 1870, aliens, residents in California, had the same rights as citizens, to hold and enjoy real estate.

A trustee receiving money from the sale of real estate is bound to account for it, without regard to the quality of title conveyed by him.

The facts of this case disclose a case of deception and fraud, practised upon a person of weak intellect, and a conspiracy to obtain his property for a consideration so grossly inadequate, as to warrant the intervention of a court of equity.

This was a suit in equity to charge the defendants as trustees of certain property in which the complainant was interested, and which they received and disposed of. The facts out of which the case arose, briefly stated, were as follows: For some years previous to 1870 the complainant Ellis Griffith and his brother John Griffith were partners, engaged in the business of cattle raising, and resided in Kern County, California, where they occupied what is called a stock range—a tract of country on which cattle are permitted to roam and graze. It may be termed a feeding ground—the pasture land of the cattle. Although the title to the land constituting the range was in the United States, and the land was not inclosed, the right of the Griffiths to use it for the pasturage of their cattle was recognized and respected by their neighbors and other stock raisers in the county. It had excellent springs, furnishing water to cattle roaming over a large extent of country, and was capable of supporting from one to three thousand head. It had, therefore, a great value, proportionate to the number it could support. In April, 1870, one Pedro Altube, a member of the firm of Peres & Co., large cattle dealers in California, who was familiar with Kern County and with the

character of the range, desired to purchase it for his firm, and offered for it, with the stock, $12,000.

John Griffith died on May 21, 1870, intestate, leaving surviving him two brothers, the complainant and Morris Griffith, his only heirs at law. The partnership property of the deceased and the complainant remained in the latter's possession. It consisted, principally, of horned cattle, horses and the range mentioned. The brother Morris, who would have been a proper party complainant, declined to take part in the suit. Ellis Griffith, the surviving partner, was a man of weak mind, without any knowledge of business, and barely able to read and write. Among his neighbors were the defendants Godey and Williams. Godey was an old resident of the county, a man of means, and had the entire confidence of the complainant. On the 9th of June, within a month after the death of the intestate, Altube spoke to Godey about purchasing the range, and stated that he would give for it, with the stock, $12,000—the sum he had offered previously in April—but Godey then had no control over the range and could therefore give no title to it. The complainant and the deceased were aliens, and on the 15th of July, 1870, upon the advice of Godey, the complainant declared his intention to become a citizen of the United States, and soon afterwards, upon similar advice, filed an affidavit in the office of the clerk of the county, to the effect that he had taken up one hundred and sixty acres of the range where the springs were. This proceeding was had under a statute of California passed in 1852, which gave the claimant a standing in the courts of the State, and enabled him to maintain possession as against any one not having the title of the United States. The bill alleges that the complainant did not know the nature of the affidavit he had filed, but supposed that by the statement he had made in court he had become a citizen. On the day following, July 16, Godey filed in the Probate Court of the county a petition for special letters of administration on the estate of the deceased, and on the 19th of July he was appointed special administrator. The complainant, as surviving partner, was entitled to wind up the affairs of the partnership; but he consented that

Godey should receive full letters of administration, and, as administrator, settle the estate of the deceased, without prejudice, however, to his rights as surviving partner to an undivided half of the proceeds of the estate after the payment of its debts and the expenses of administration. Godey thereupon resigned as special administrator, and was appointed full administrator. He seems to have considered the consent of the complainant as authorizing him to settle up the partnership business as administrator, and accordingly he at once took possession of all its personal property. In August following he filed his inventory, accompanied with his affidavit that it was a statement of "all the estate of the deceased" which had come to his knowledge and possession. He did not include in it the range or any land. The property mentioned was valued by appraisers appointed by the court at $3,283.50, and consisted of one hundred and forty-two horses valued at nine dollars each, one hundred and twenty-seven cattle valued at fifteen dollars each, a wagon and harness valued at one hundred dollars, and a branding-iron valued at fifty cents. On the 16th of that month, upon representations of Godey, an order was obtained from the court, that the horses and cattle be sold, as perishable property, and, on the 27th of the same month, they were accordingly sold, together with thirty-one horses not mentioned in the inventory, but subsequently found to belong to the partnership, and a few articles of little value also omitted from the inventory, all of which were bid off by the defendant Williams for $2,077.50. No portion of this sum was paid by Williams at the time. Three weeks afterwards he paid $600 on account; the balance was not paid until after the sale to Altube, as hereinafter mentioned. The sale was, however, reported by Godey under oath to the Probate Court as having been made for cash. On the 17th of September, 1870, the complainant executed a conveyance of his claim of one hundred and sixty acres to the defendant Godey for the sum of $500. In the bill he alleged that he did not know the contents of the instrument, but signed it at Godey's request without intending to convey any interest in the range, and that he received no consideration for it. He was not then, nor at any

other time, informed of the offer made for the range and stock by Altube, of the firm of Peres & Co.

Soon after this conveyance Godey informed Altube that he and Williams would sell him the range and stock for $13,000. Altube accepted the offer on condition that a certain squatter on the land should be removed. They bought off the squatter for $500, and, on the 7th of November, 1870, Altube paid the $13,000 for the range and stock, which sum was equally divided between them.

In the accounts filed by the administrator, the sum bid by the defendant, Williams, and the amount of $450 obtained from the sale of cattle in another county, were stated as the proceeds of the whole estate, and they were applied to various claims, the largest of which was held by the administrator, and to meet sundry expenditures, until a balance of only $453.05 was left. On the 8th of July, 1872, the Probate Court made a decree approving of the accounts and directing that three-fourths, that is $339.78, be awarded to the complainant, a receipt for which was given by Mr. Brundage, who appears to have been an attorney, acting under an agreement that he should receive, as his compensation, one-half of what he should collect. No money was actually paid to the complainant, but the amount was indorsed on a note of his held by Godey.

The present bill was filed to charge the defendants as trustees of the partnership property which came into their hands, and compel them to account for the proceeds obtained by them on its sale to Altube. Its prayer was not in form for this specific relief, but for an accounting for the value of the property or such other relief as might be just.

The court below was of opinion that as the two Griffiths, who composed the partnership, were both aliens and had never taken any steps to become citizens of the United States, and as the range was on unsurveyed public lands of the United States, which they had never enclosed, they had in it no such property interest as to require the administrator to include the claim in his inventory of the property of the deceased. The court also held that the proofs did not sustain the allegations as to the

misappropriation of the other property, or of its sale at an inadequate price. The bill was accordingly dismissed, and from that decree the case was brought by appeal to this court.

Mr. Frank W. Hackett for appellant.

No appearance for appellee.

Mr. Justice Field delivered the opinion of the court. He recited the facts as above stated, and continued:

It is well established that a settlement of an administrator's account, by the decree of a Probate Court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the Probate Court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity. Here, all the property of which the defendant Godey, as administrator of the deceased, took possession belonged to the partnership of which the complainant was the surviving partner. The portion coming to the deceased was merely the one undivided half after payment of the debts of the partnership. Only upon such portion could the court properly authorize administration. The administrator, however, interpreted the consent of the complainant that he might settle the estate of the deceased, as authority to take the whole partnership property under his control, equally as if it were the separate property of the deceased, though the consent expressly reserves the rights of the complainant as surviving partner.

The complainant, it appears, was a man of weak intellect, without any knowledge of business, and hardly able to read and write; and it is evident that he was ignorant of the nature and extent of his rights over the partnership property after the death of his brother, who had had the principal management

of it. Under such circumstances, the administrator was bound to the utmost good faith in his dealings with the property, and should be held, in its disposition, to the responsibilities of a trustee of the complainant, though we leave the proceedings of the Probate Court undisturbed.

The cattle range, which constituted the property of greatest value belonging to the partnership, was not taken possession of by the administrator, though by the law of California, then in force, all property of an intestate, real or personal, went into the hands of that officer, for purposes of administration. *Curtis* v. *Sutter*, 15 Cal. 259, 264. He plainly had a design to secure the range to himself at a trifling cost, knowing that a large price was offered for it, and could at any time be obtained. The whole administration seems to have been conducted by him to carry out this design. He first takes steps to have the cattle and horses of the partnership sold as perishable property, upon the representation that they were likely to decrease in value, become worse by keeping, and were subject to loss and expense, and, therefore, that their sale would be best for the estate; yet he well knew that a sale of the cattle, separate from the range, would be much less advantageous than with it, and the falsehood of the alleged necessity appears from the fact that the range was amply sufficient for the support of the cattle, and that they were never removed from it. He next persuades the complainant to declare his intention to become a citizen, and to file a claim to one hundred and sixty acres of the range, enclosing the springs, and then obtains a deed from him for the trifling consideration of $500. The complainant alleges that he never knew the contents of the instrument he signed, and never received the consideration named. But, assuming that he is mistaken in this particular, he was not informed of the value of the range; nothing was said to him of the price offered for it, and which Godey knew was ready to be again offered.

No sooner was this conveyance obtained than Godey opened communication with Altube, offering to sell the range and stock for $13,000. The offer was accepted on a condition which was complied with by an expenditure of $500. A sale was then

effected, and the $13,000 paid to the defendants, and, as if to show that the transaction was the result of a conspiracy, the proceeds were equally divided between them. It was a case of deception and fraud practised upon a man of weak intellect, and the rule which is stated in *Allore* v. *Jewett*, 94 U. S. 506, 511, to be settled law is applicable: "That, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside." The complainant does not ask to have the conveyance to Godey set aside, but he asks that Godey may be compelled to account to him for the amount received for the property, of which he had thus fraudulently obtained a conveyance.

It is plain, also, that the defendant Williams participated in the fraudulent design. He never paid anything on his bid for the horses and cattle at the probate sale until weeks afterwards, and then less than one-fourth of the amount; it was not until after the cattle and horses were purchased by Altube that he paid the balance, although he knew that the probate sale could be made only for cash, and that the amount bid by him had been reported to the court as cash paid. He knew, also, that the property did not belong to the deceased, but to the partnership between him and the complainant, and that the latter had not relinquished his partnership rights. He therefore took the property with notice of those rights and of the relation as trustee which the administrator bore to the complainant. The record shows that all the partnership property was sold within six months after the death of the deceased, so as to net over $12,000, and that out of that sum the complainant received only $500. The defendants made a large profit out of the transactions, which they divided between them. They should, therefore, be required to account to the complainant, as surviving partner of the deceased, for their unjust gains. In such accounting they should be charged with the amount received

by them from the sale to Altube, and be credited with the amount paid by defendant Williams for the property purchased at the probate sale, the sum of $500 paid by defendant Godey for the conveyance of the possessory claim, and the $500 paid to remove the squatter from the land, the balance to draw interest until decree.

The error of the court below arose from treating the possessory right to the cattle range on the public lands—as it was then held by the partnership on the death of John Griffith—as not constituting any property of value which could be recognized as such by the courts, the claimants being both aliens who had never taken any steps to be naturalized. But the Constitution of California then in force invested foreigners, who were *bona fide* residents of the State, with the same rights, in respect to the possession and enjoyment of property, as native born citizens. Art. I. § 17. And the possessory right to the range, though held by aliens, was respected by their neighbors and all cattle dealers of the country, and had a market value; as shown by the price which others were ready to pay for it.

The responsibility of trustees does not depend upon the validity of the title of the grantor of the trust property. If the right or interest transferred to them can be sold for a valuable consideration, it is to be treated as property; and corresponding duties devolve upon the trustees with respect to its sale as upon the sale of property, the title of which is undisputed.

The decree of the court below is reversed, and the cause remanded with directions to enter a decree in conformity with this opinion.

ROWELL & Another *v.* LINDSAY & Another.

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

Argued December 15, 16, 1884.—Decided January 5, 1885.

A patent for a combination of separate parts does not cover each part when taken separately.

A patent for a combination is not infringed by use of one of the parts which, united with others, makes the combination, unless other mechanical equivalents, known to be such when the patent was granted, are substituted for the omitted parts.

Seeding machines manufactured according to the specifications in patent No. 152,706, for a new and useful improvement in seeding machines, granted to John H. Thomas and Joseph W. Thomas, June 30, 1874, do not infringe the reissued letters patent, No. 2,909, granted to John S. Rowell and Ira Rowell, for a new and useful improvement in cultivators.

This was a suit in equity brought by the plaintiffs in error as plaintiffs below, to restrain the defendants in error from infringing reissued patent No. 2,909 for a new and useful improvement in cultivators, granted to the plaintiffs, March 31, 1868. The defendants denied the infringement, and justified the manufacture of the machines alleged to be such by patent No. 152,706 granted to John H. Thomas and Joseph W. Thomas, June 30, 1874, for a new and useful improvement in seeding machines. A decree was made below in favor of the defendants, from which the plaintiffs appealed.

Mr. James J. Dick for appellants.

Mr. E. E. Wood for appellees.

Mr. Justice Woods delivered the opinion of the court.

The appellants, John S. Rowell and Ira Rowell, were the plaintiffs in the Circuit Court. They brought their bill in equity against Edmund J. Lindsay and William Lindsay, the appellees, to restrain the infringement of reissued letters patent No. 2,909, dated March 31, 1868, granted to the plaintiffs for

"a new and improved cultivator." The invention was illustrated by the annexed drawings, and was described in the specification as follows:

Fig. 1.

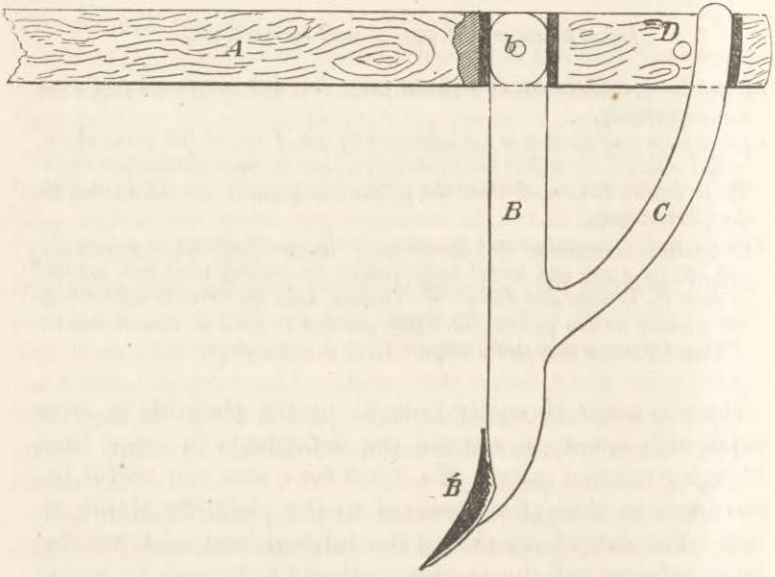
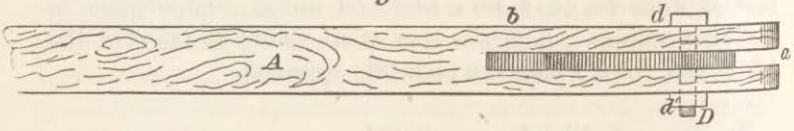


Fig. 2.



"Figure 1 is a side elevation of the tooth, in a beam shown in longitudinal section.

"Figure 2 is a top view of the beam, with the tooth in position.

"This invention consists in applying to the shank of the tooth a curved brace-bar, the upper end of which passes through a slot or mortise in the beam, and is held in position by a clamping-bolt, which passes transversely through the slot or mortise near the brace-bar, and forces the sides of the beam

together against the brace-bar, so as to clamp it in any required position, and thereby adjust the tooth in any inclination, at the same time allowing it to yield to immovable obstacles without breaking.

"In the drawings, *A* represents one of the beams of a cultivator; *B*, the shank, pivoted at *b*; *B'*, the tooth; *C*, a curved brace-bar, extending in the arc of a circle outward and upward from the rear side of the shank *B*, and its upper end passing vertically through a longitudinal slot or mortise, *a*, in the beam *A*; and *D* a bolt, passing transversely through the slot or mortise, and having a head, *d*, on one end, and a nut, *d'*, on the other, by which the side walls of the slot or mortise can be clamped against the brace-bar with any required force, thereby holding the latter in position when operating in the field.

"It is evident that in a device thus constructed and operating, the brace-bar *C* can be so clamped that the tooth will retain its position when working in arable soil, but will yield when coming in contact with an immovable obstacle, and pass over it without breaking, the shank turning back upon its pivot, *b*, and the brace-bar being forced up through the slot. The same arrangement also allows the shank to be adjusted in any position for deep or shallow cultivating.

"Having thus described our invention, what we claim as new, and desire to secure by letters patent, is—

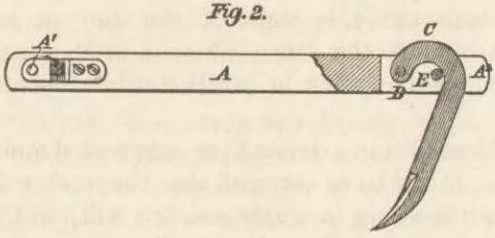
"The combination of the slotted beam *A*, shank *B*, brace-bar *C*, and bolt *D*, when the parts are constructed and arranged to operate as and for the purposes herein specified."

The answer of the defendants, among other defences, denied infringement of the letters patent. The plaintiffs contended that infringement of their letters patent was made out by the evidence, which tended to show that the defendants constructed and sold seeding machines made according to the specification of letters patent granted to John H. Thomas and Joseph W. Thomas, dated June 30, 1874, for "an improvement in sowing machines." This invention related to the drag-bars and shovel standards of broad-cast seeders, and consisted mainly in the manner of attaching the standards to the drag-bar. The inven-

tion can be readily understood from the annexed drawings, by which the specification was illustrated.

Fig. 1.

Fig. 2.



The bar *A* is cut so as to leave a slit in the rear end as at A^2 to receive the shank of the shovel *C*. This is secured in the slit by the bolt *D*. Another threaded bolt is passed through the bar *A* in such place as to sustain the shovel when in proper position. The ends of the bifurcated bar are drawn down by the bolt *E* or by the united action of the bolts *E* and *D* until clamped against the standard of the shovel with such force that the friction shall maintain the shovel in position while passing through mellow earth, but not so tight but that it will yield to an excessive resistance before force enough is applied to break the shovel. The advantages of the invention are thus stated: "By the form given to the standard we obtain not only the gripe on the pivoted end, but also a gripe against the sides of the standard, so that from its form it must be moved in the direction of its length. A much less restraining force will then hold the standard with requisite tenacity. Our device has its distinguishing feature in that construction, as shown, by which the shank is itself so bent as to give effect to the double action of the joint at the eye and the compressing

bolt *E*. By making it in one piece its construction is greatly cheapened as compared with that class where an arm has to be welded into the shank."

The claim of this patent was as follows: "In combination with the drag-bar *A*, bifurcated at A^2, the curved shovel standard *C* bent as shown and pivoted by a bolt at *D* and clamped by bolt *E*, substantially as shown and described."

Upon final hearing upon the pleadings and proofs the Circuit Court dismissed the bill, see 6 Fed. R. 290, and the plaintiffs appealed.

The evidence shows that the shanks or standards of ploughs, cultivators, and seeding machines have been used in a great variety of forms. In some the upper end of the brace entered the beam in the rear and in others in front of the shank. In some the upper end of the shank and the brace were so formed and united as to present an elliptical figure. Many, perhaps the majority, were without braces. In some the upper end of the shank was made with a head in the form of an elliptical or circular plate, called an enlarged head. This performed the function of a brace. The patent of the plaintiffs, therefore, stands on narrow ground, and to sustain it it must be so construed as to confine it substantially to the form described in the specification.

The patent of the plaintiffs is for a combination only. None of the separate elements of which the combination is composed are claimed as the invention of the patentee, therefore none of them standing alone are included in the monopoly of the patent. As was said by Mr. Justice Bradley in the case of *The Corn-Planter Patent*, 23 Wall. 181, 224: "Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device, or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old or common

and public." See also *Merrill* v. *Yeomans*, 94 U. S. 568, 573; *Water Meter Co.* v. *Desper*, 101 U. S. 332, 337. *Miller* v. *Brass Co.*, 104 U. S. 350. These authorities dispose of the contention of the plaintiff's counsel that their patent covers one of the separate elements which enters into the combination, namely, a slotted wooden beam, because, as they contend, that element is new, and is the original invention of the patentees.

The patent being for a combination, there can be no infringement unless the combination is infringed. In *Prouty* v. *Ruggles*, 16 Pet. 336, 341, it was said: "This combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plough in the manner therein described, is stated to be the improvement and is the thing patented. The use of any two of these parts only, or of two combined with a third which is substantially different, in form or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts. The jogging of the standard into the beam, and its extension backward from the bolt, are both treated by the plaintiffs as essential parts of their combination for the purpose of brace and draft. Consequently, the use of either alone, by the defendants, would not be the same improvement nor infringe the patent of the plaintiffs." To the same effect see also *Stimpson* v. *Baltimore & Susquehanna Railroad Co.*, 10 How. 329; *Eames* v. *Godfrey*, 1 Wall. 78; *Seymour* v. *Osborne*, 11 Wall. 516; *Dunbar* v. *Myers*, 94 U. S. 187; *Fuller* v. *Yentzer*, 94 U. S. 288.

But this rule is subject to the qualification, that a combination may be infringed when some of the elements are employed and for the others mechanical equivalents are used which were known to be such at the time when the patent was granted. *Seymour* v. *Osborne*, *ubi supra*; *Gould* v. *Rees*, 15 Wall. 187; *Imhaeuser* v. *Buerk*, 101 U. S. 647.

In the light of these principles, we are to inquire whether the defendants use the combination described in the patent of the plaintiffs. The contention of the defendants is that the brace-bar, which is one of the elements of the combination

covered by the patent of the plaintiffs, is not, nor is its equivalent, found in the machines made and sold by them. It is plain, upon an inspection of the drawings, that the defendants do not use a brace-bar similar in shape or position to that described in the plaintiff's patent.

But the plaintiffs insist that the top of the shank, curved as shown in the Thomas patent, is the equivalent of the brace-bar forming one of the elements of their invention; and as the contrivance of the defendants embodies this equivalent device in combination with all the other elements covered by the plaintiffs' patent, that the infringement is established. Whether the first-mentioned device is the equivalent of the latter is the question for solution. We think the contention of the defendants that it is not, is well grounded. The specification and drawings of the plaintiffs' patent, and the testimony of the plaintiffs' witnesses, show that one purpose of the brace-bar, used in the plaintiffs' combination, was to strengthen and support the shank between the tooth and the beam. The use of the brace-bar enabled the plaintiffs to make the shank with less material, and, at the same time, to increase its strength. This function is not performed by the curved portion of the shank used by the defendants, which has not the slightest tendency to support and strengthen the shank between the tooth and the beam, where the greatest strain comes. On the contrary, the defendants, by reason of the absence of the brace-bar, are forced to make their shank of larger diameter than that used by the plaintiffs in order to give it the requisite strength to prevent bending. Instead of stiffening the shank between the tooth and the beam, it rather brings an increased strain upon that part of the shank. We find, therefore, that the curved upper part of the shank used by defendants does not perform one of the material functions of the brace-bar of the plaintiffs' combination. It cannot, therefore, be the equivalent of the latter. For where one patented combination is asserted to be an infringement of another, a device in one to be the equivalent of a device in the other must perform the same functions.

As, therefore, there is one element of the plaintiffs' patented combination which the defendants do not use and for which

they do not employ an equivalent, it follows that they do not infringe the plaintiffs' patent.

The decree of the Circuit Court, which dismissed the plaintiffs' bill, is affirmed.

FINDLAY *v.* McALLISTER & Others.

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

Submitted December 2, 1884.—Decided January 12, 1885.

The confederating together of divers persons with a purpose of preventing the levy of a county tax, levied in obedience to a writ of mandamus, in order to pay a judgment recovered against the county upon its bonds; and the prevention of the sale of property seized under the levy by threats, menaces, and hostile acts, which deterred persons from bidding for the property levied on, and intimidated tax-payers and influenced them not to pay the tax, whereby the judgment creditor was injured to the amount of his judgment, constitute good cause of action in his favor against the parties so conspiring.

The plaintiff in error was the plaintiff in the Circuit Court. He brought his suit against Thomas McAllister and fourteen other defendants to recover damages upon a cause of action, which was stated in his petition substantially as follows: The plaintiff, being the holder and owner of certain bonds issued by the County of Scotland, in the State of Missouri, and of certain interest coupons detached therefrom, recovered, on September 25, 1877, in the same Circuit Court in which the present action was brought, a judgment on his coupons against the county for the sum of $4,008.86. The county failing to pay the judgment, the Circuit Court issued a peremptory writ of mandamus commanding the County Court of Scotland County to levy and cause to be collected a special tax upon all the taxable property within the county, sufficient to pay the judgment, with the interest thereon and costs. At the same time writs of mandamus were issued by the same Circuit Court, directing the same

Statement of Facts.

County Court to levy similar special taxes to pay various other judgments rendered against the county, upon like demands, in favor of several other plaintiffs. In obedience to these writs the County Court levied a special tax, denominated "judgment tax," sufficient to pay off all the judgments, and caused the same to be placed on the tax books of the county, and the tax books to be delivered to the collector of the county for the collection of the tax. A part of this tax so levied was levied in obedience to the writ of mandamus in the case of this plaintiff against the county, and for the purpose of raising money to pay off his judgment. "Wherefore the plaintiff," the petition averred, "had a vested right and interest in said special tax to the amount of his judgment, interest and costs."

After the special tax had been levied, and the tax book placed in the hands of the collector for collection, the defendants, with about two thousand other evil-disposed persons, residents of Scotland County, for the purpose of depreciating the value of the bonds held by the plaintiff, and thereby inducing and compelling him to compromise his judgment and bonds at much less than their value, did unlawfully and maliciously, and in contempt of the orders and mandates of the Circuit Court, combine and conspire to hinder and prevent the County Court and the collector, from performing the things required by the mandate of the Circuit Court, to wit, the collection and payment of the special tax.

To this end the defendants and their confederates organized themselves into an association called "The Tax-payers' Association of Scotland County," with branch organizations in various school districts of the county, for the purpose, among other things, of resisting the collection of the special tax, and the defendants and their confederates did pledge themselves to contribute of their means and influence, and to protect each other in all efforts made to resist the payment thereof.

In furtherance of their design, the defendants and their confederates, members of said association, made and published threats of violence against the attorneys of the plaintiff, who were employed to represent him in the collection of his judgment; and gave out and circulated the threat that no person

would be allowed to bid upon, or purchase any property that might be offered for sale by the collector to enforce the payment of the special tax, intending thereby to intimidate any person from bidding upon or purchasing any property offered for sale by the collector for the payment thereof.

To induce the tax-payers of the county to join the association and aid in carrying out their unlawful conspiracy, the defendants and their confederates falsely and fraudulently gave out and published, that such bonds and special tax were illegal, null and void, and that they were under no obligation, legal or moral, to pay the same, well knowing that such declarations were false.

During the month of February, 1878, the collector of the county, for the purpose of collecting the special tax, levied upon a large number of horses and mules, and advertised them to be sold on February 28, 1878, at Memphis, in said county of Scotland; whereupon the defendants and their confederates, in order to prevent the sale of the property so levied on, and prevent the payment of plaintiff's judgment, and so to harass and wrong him as to induce him to compromise his judgment and bonds at much less than their value, assembled in vast numbers at the time and place advertised for the sale, and, by their combined influence, threats and hostile demonstrations, did so overawe and intimidate the persons who had gone to the place of sale, for the purpose of and with intent to bid on the property, as to prevent them from bidding when the same was offered for sale; and, by reason of such combined influence, threats and menaces, the defendants and their confederates, members of said association, acting under its orders, did prevent any person from bidding on the property when so offered for sale, and did prevent it from being sold.

The unlawful combination and conspiracy of the defendants, to injure and defraud the plaintiff, and prevent the collection of his judgment, still exists; and, by reason of the combined influence, threats, menaces and hostile demonstrations of the defendants, the tax-payers of Scotland County are overawed and intimidated, and so influenced that they do not pay the special tax, nor has the collector, by reason of said combination

and association, been able to collect the same. The plaintiff, by reason of the premises, has been damaged to the amount of his judgment, to wit, $4,008.86, with interest thereon from September 25, 1877, and costs; for which, with $3,000 exemplary damages, he demands judgment against the defendants.

The defendants demurred to the petition. In support of their demurrer they assigned and argued, both in the Circuit Court and this court, the following grounds:

1. That the plaintiff had no such legal property interest in the taxes in question as to entitle him to maintain actions for conspiracy.

2. That he had sustained no legal damages by the alleged acts of the defendants.

The court sustained the demurrer, and rendered a judgment for the defendants, to reverse which the plaintiff brought this writ of error.

Mr. A. J. Baker and *Mr. F. T. Hughes*, for plaintiff in error.

Mr. H. A. Cunningham and *Mr. James O. Broadhead*, for defendants in error.—There are two main propositions, either one of which ought to conclusively determine this case in favor of the defendants. 1. The plaintiff has no such legal property interest in the taxes in question as to entitle him to maintain actions for conspiracy. 2. The plaintiff has sustained no legal damages by the alleged acts of the defendants. These propositions will be considered together. The judgments are against the county, an artificial person. Individual tax-payers are not liable, nor are the judgments liens on their property. The responsibility of tax-payers is to the tax officers, not to creditors of the county to whom the money may or may not go when collected. True, when the law says that taxes may be levied by certain officers, as county courts, to pay certain debts, and collected by certain county collectors, the courts may by mandamus compel those officers to proceed to the performance of their duties, but this in nowise enlarges the

scope of their official powers. The courts can only command them to proceed according to the law defining their duties. See *Rees* v. *Watertown*, 19 Wall. 107; *Heine* v. *Levee Commissioners*, 17 Wall. 655; *Barkley* v. *Levee Commissioners*, 93 U. S. 258. Mandamus is the remedy against an officer in such case, simply because there is no other. But mandamus will not lie against the tax-payer to compel him to pay the tax. That is a question between him and the collector. There is no relation between the tax-payer and the plaintiff which warrants an action for conspiracy. No action lies for a simple conspiracy to do an unlawful act. The act itself and the resulting damage are the only grounds of action. *Kimbal* v. *Harmon*, 34 Maryland, 401, 407; *Adler* v. *Fenton*, 24 How. 408 is much in point. See *Saville* v. *Roberts*, 1 Ld. Raymond, 374; *Hutchins* v. *Hutchins*, 7 N. Y. 104; *Lamb* v. *Stone*, 11 Pick. 527; *Wellington* v. *Small*, 3 Cush. 145; *Smith* v. *Blake*, 1 Day, 258; *Barnet* v. *Davidson*, 10 Ired. 94; *Green* v. *Kimble*, 6 Blackford, 552; *Cowles* v. *Day*, 30 Conn. 406, 410. In an action for conspiracy to injure, the damage, and not the conspiracy, is the gist of the action. *Laverty* v. *Van Arsdale*, 65 Penn. St. 507; *Parker* v. *Huntingdon*, 2 Gray, 124; *Jones* v. *Baker*, 7 Cowen, 445; *Hutchins* v. *Hutchins*, 7 Hill, 104; specially *Adler* v. *Fenton*, 24 How. 408. If the plaintiff may have redress by any of the forms of action now known or practised it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be foreseen. *Lamb* v. *Stone*, cited above; *Randall* v. *Hazelton*, 12 Allen, 412; *Anthony* v. *Slaid*, 11 Metcalf, 290 (Shaw, Ch. J.). These taxes can only be collected in the manner and by the officers designated by law, and this court cannot indirectly collect them. The plaintiff's judgment against the county remains unaffected, with full right to enforce it in a legal way. The tax-payers, not being debtors of the plaintiff, these actions will not lie.

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

The facts stated in the petition are admitted by the demurrer, and, for the present consideration of the case, must be taken as

true. The statutes of Missouri, which were in force when the bonds mentioned in the petition were issued, and which still remain in force, provide as follows: There shall be a collector of revenue for every county, who shall give bond conditioned that he will faithfully and punctually collect and pay over all State, county and other revenue for the two years next ensuing the first day of March thereafter. After the tax book for the year has been corrected, and the amount of the county tax stated therein, the County Court shall cause the same to be delivered to the collector, and he shall be charged with the whole amount of the tax book so delivered to him. The collector shall diligently endeavor and use all lawful means to collect the taxes which he is required to collect in his county. After the first day of October he shall have power to seize and sell the goods and chattels of any person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under executions issued in judgments at law; and no property shall be exempt from seizure and sale for taxes due on lands and personal property. The collector, having made settlement according to law of the revenue collected by him, shall pay the amount found due into the county treasury.

When a demand against a county is presented to the County Court, the court shall ascertain the amount due and order it to be paid out of the particular fund—designating it—applicable to the payment of such demand, and order their clerk to issue a warrant therefor on the treasurer of the county, which shall designate the particular fund out of which the same is to be paid.

The treasurer of the county is required to make an entry in a book to be kept by him of all warrants for money lawfully drawn by the County Court presented to him for payment; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment. See sections 5370, 5394, 6733, 6754, 6774, 6821, 6822, Revised Statutes of Missouri of 1879.

The question presented by the demurrer to the petition is not one of the measure of damages. If the plaintiff has sustained any substantial injury by reason of the wrongful acts of

the defendants set out in the petition, for which he is entitled to his action against them, the demurrer to the petition should have been overruled.

It is evident from the provisions of the statutes of Missouri, whose substance has been given, that the money received by the collector of Scotland County in payment of the special tax ordered by the County Court to be collected for the payment of the judgment of the plaintiff and other judgment creditors, would, when collected, constitute a separate fund in the county treasury, applicable to this purpose. If the special tax had been collected, the plaintiff would have had such an interest therein that a court of equity would at his instance enjoin its diversion to any purpose save that for which it had been levied and collected, and compel its payment to the satisfaction of the judgment of the plaintiff. *Meriweather* v. *Garrett*, 102 U. S. 472, 514, 515; *Attorney-General* v. *Dublin*, 1 Bligh N. S. 312. And see *Davies* v. *Corbin*, 112 U. S. 36. The use of the money by the county, except for the payment of the judgments, which the writ of mandamus had been issued to enforce, would have been a clear contempt of the orders and process of the Circuit Court, as well as a violation of the law of the State.

The writ of mandamus under which the collector, according to the averments of the petition, was proceeding to collect the money to pay the judgment of the plaintiff, was a substitute for the writ of *fieri facias*, and was the only remedy by which the plaintiff could enforce satisfaction. He had, therefore, as clear an interest in the money to be raised by the special tax for the payment of his judgment, as he would have had in the money to be collected by the sheriff on execution if his judgment had been against an individual. It would seem fairly to follow that he had the same rights in the one case as in the other, against those who, to prevent the satisfaction of his judgment, unlawfully interfered with the officer in the discharge of his duties.

It is plain that the injury of which the plaintiff complains is not one common to himself and the public at large, as it would have been had the defendants interfered to prevent the collection of the general taxes of the county. The alleged unlawful

acts of the defendants could injure only the plaintiff and the other judgment creditors of Scotland County, for whose benefit the special tax was levied. If there is any cause of action against the defendants, it belongs to the plaintiff and other judgment creditors individually, and the public has no share in it. The objection that the plaintiff is only injured in common with all the other members of the body politic, and has no separate and individual cause of action, cannot be successfully urged.

The right of a judgment creditor to proceed by action against those who rescue the person of his debtor arrested on mesne or final process, or interfere with the goods of his debtor so as to prevent a levy or sale by the sheriff to satisfy his judgment, is well recognized at common law.

Thus, in *Smith* v. *Tonstall*, Carthew, 3, 4, adjudged on demurrer in the King's Bench and affirmed in the House of Lords: A, a judgment creditor, sued B for procuring J. S., the judgment debtor, to confess a judgment in favor of one J. N., to whom he did not owe anything, and J. N. sued out execution on this feigned judgment by virtue of which he seized all the goods and chattels of J. S., which he esloined to places unknown and converted to his own use, by reason whereof the plaintiff lost his debt. Held, that the action lay.

In Comyns's Digest, under the head of Action on the Case for Misfeasance, A. 5, it is stated that an action will lie for rescue of a person arrested upon mesne or judicial process, citing 2 Cro. 419, 486; Cro. Car. 109; or of goods taken in execution. And the action lies by the party to the suit in which the arrest was, citing 2 Cro. 486; Cro. Car. 109; 2 Rolle's Ab. 556, pl. 14, 15.

Under the head of Rescous, D. 2, the same author says: "So, if a person arrested upon *mesne* process be rescued, an action upon the case lies against the rescuers by the plaintiff in the suit; for he has the loss and no remedy against the sheriff," referring to 2 Cro. 485–6, above cited, and also to 3 Bulst. 200.

In 2 Rolle's Ab. 556, pl. 14, 15, it is said: If a sergeant of London or bailiff of the counter take a man on a capias in process at my suit, and J. S. rescues him out of his possession,

I may have a general writ of trespass against him, because the sergeant is, for this purpose, my servant as well as the King's, and because the taking out of the sergeant's possession, he being my servant, is a taking out of mine. Trin. 15, Jac. I., *Wheatley* v. *Stone*, adjudged on a writ of error at Sergeant's Inn. But I may have action in the case as well. Trin., Jac. I., *Speere* v. *Stone*, affirmed same time; *S. C.* Hobart, 180, *sub nom. Wheatley* v. *Stone*.

So in *Mynn* v. *Coughton*, Cro. Car. 109, cited in Bac. Ab., Execution O, it was held that, if a defendant be rescued after being taken on a *capias ad satisfaciendum*, the plaintiff may have an action for the misfeasance against the rescuers, for he is the party who hath the loss, and to whom the injury is done, and he ought not to be compelled to sue the sheriff, who may be dead, and if he recover, the rescuers may plead it if sued by the sheriff, so that there is no danger of being double charged. 3 to 7. *S. C.* Hutton, 98, *sub nom. Congham's Case.*

In *May* v. *Sheriffs of Middlesex*, Cro. Jac. 419, which was an action on the case for escape on mesne process, it was held that rescue may be pleaded in bar, but not for escape on final process. On mesne process, the sheriff was not bound to take *posse comitatus*, and on rescues returned by sheriff on mesne process, process may be awarded against the rescuers, and an action on the case lies against them. *S. C.* 3 Bulst. 198–201, where a full argument by Coke and Doddridge is reported. The latter refers to Fitz. N. B. 102, to show that the party may sue rescuers.

Hodges v. *Marks*, Cro. Jac. 485, was an action on the case for rescuing plaintiff's debtor out of sheriff's possession after arrest on mesne process whereby the debtor escaped and went to places unknown. Held good, for the loss is the plaintiff's, as he cannot sue the sheriff; and therefore it is reason that he should have action against those who did the injury to him whereby he lost his process and his means to recover his debt. *S. P. Kent* v. *Elwis*, Cro. Jac. 241. See also 3 Bulst. 200; 5 Mod. 217; 2 T. R. 5, 126.

In *Bentley* v. *Donnelly*, 8 T. R. 127, which was an action by

plaintiff in primer action against rescuers of defendant after arrest on mesne process, the action was sustained.

These principles have been recognized by courts of high authority in this country.

In *Yates* v. *Joyce*, 11 Johns. 136, Yates, the assignee of a judgment against John Joyce, which was a lien on the prop erty of the latter, was about to take out execution and seize a certain lot of land, and the defendant, G. Joyce, knowing this, pulled down and carried away certain buildings from off the land, whereby Yates was deprived of the benefit of his judgment. It was held that Yates might maintain an action on the case against G. Joyce for fraudulently removing the property of John Joyce and converting it to his own use, with intent to defeat the judgment of Yates. In giving judgment on a demurrer to the declaration, the court said: "It is obvious, from the statement of the plaintiff's case in the declaration, the truth of which is admitted by the demurrer, that he has sustained damage by the act of the defendant which, he alleges, was done fraudulently and with intent to injure him. It is the pride of the common law that, whenever it recognizes or creates a private right, it gives a remedy for the wilful violation of it. . . . It is a sound principle, that where the fraudulent misconduct of a party occasions injury to the private rights of another, he shall be responsible in damages for the same, and such is the case presented by the pleadings in this cause.

Penrod v. *Mitchell*, 8 S. & R. 522, was an action on the case in the nature of a writ of conspiracy for fraudulently withdrawing the goods of the defendant in an execution, from the reach of the plaintiff. It was not questioned that the action would lie. The court held that the measure of damages was the value of the goods thus withdrawn, and not the amount of the judgment on which the execution was issued. In *Mott* v. *Danforth*, 6 Watts, 304, it was held that a creditor, without judgment or execution, and even before his debt was due, might sue parties at law who conspire to defeat his right of collection by fraudulently concealing and converting the debtor's goods. See also, to the same effect, *Kelsey* v. *Murphy*, 26 Penn. St. 78. And see *Meredith* v. *Benning*, 1 Hen. & Munf. 585.

The three cases last cited extend the rule further than the exigency of the present case requires, and further than this court has been disposed to go.

These authorities establish the right of a judgment creditor to his action against rescuers of the person or goods of the debtor, seized by the sheriff to satisfy the judgment, or against one who prevents the seizure of the debtor's goods on execution; and the principle on which they rest is directly in the face of the contention of the defendants in error, that the plaintiff has no legal interest in the taxes to be collected to pay his judgment, and has sustained no legal damages by the alleged acts of the defendants. We think they support the action in the present case.

Of the authorities cited by the counsel for the defendants in error in support of the demurrer, the principal case is *Adler* v. *Fenton*, 24 How. 407, where it was held that an action would not lie by a creditor, whose debt was not yet due, against his debtors and two others for a conspiracy carried into effect to enable the debtors fraudulently to dispose of their property, so as to hinder and defeat the creditor in the collection of his debt. Mr. Justice Campbell, who delivered the opinion, put the decision of the court on the ground that to sustain the action it must be shown not only that there was a conspiracy, but that there were tortious acts in furtherance of it and consequent damage; that Adler & Schiff, the judgment debtors, were the lawful owners of the property, and had the legal right to use and enjoy or sell it at their pleasure, and the plaintiffs, being general creditors, had no interest in or lien upon it. There was, therefore, no wrong of which the plaintiffs could complain.

In the other cases cited by the defendants* the plaintiff was merely a general creditor, and had no judgment, attachment, or lien, the enforcement of which was obstructed by the de-

* *Lamb* v. *Stone*, 11 Pick. 527; *Wellington* v. *Small*, 3 Cush. 145; *Smith* v. *Blake*, 1 Day, 258; *Burnet* v. *Davidson*, 10 Ired. 94; *Green* v. *Kimble*, 6 Blackf. 552; *Austin* v. *Barrows*, 41 Conn. 287; *Cowles* v. *Day*, 30 Conn. 406, 410; *Moody* v. *Burton*, 27 Maine, 427; and *Bradley* v. *Fuller*, 118 Mass. 239.

fendant, or the cases were otherwise inapplicable to the question in hand.

In the present case there was a conspiracy, tortious acts in furtherance of it, and consequent damage to the plaintiff. The property seized by the collector was in the custody of the law. The tax-payers, for whose unpaid taxes it had been seized, had no longer any right to its possession or use, and could not sell or otherwise dispose of it. It was devoted by the law to be sold to raise a fund to pay the plaintiff's judgment. The plaintiff had, therefore, an interest, which the law gave him, in the property and its sale, and suffered a direct damage from the alleged acts of the defendants by which a sale was prevented.

The plaintiff, according to the averments of his petition, had recovered his judgment against the county; and he had obtained his mandamus to the County Court directing it to levy and cause to be collected a special tax to pay the judgment. The collector of the county, in obedience to the orders of the County Court, which were themselves in obedience to the mandamus of the Circuit Court, was proceeding to collect the tax, and had levied on property to that end, and was about to sell it when the threats and hostile demonstrations of the defendants defeated the sale, and the petition averred the defendants continued to overawe and intimidate the tax-payers of the county, so that they did not pay the tax, and the collector had not been able, by reason thereof, to collect the tax.

The plaintiff cannot sue the collector, for he has done his duty, and no suit lies against him. Unless the plaintiff has a cause of action against the defendants, he is without remedy. To hold that the facts of this case do not give a cause of action against them would be to decide that a citizen might be subjected to a wilful and malicious injury at the hands of private persons without redress; that an organized band of conspirators could, without subjecting themselves to any liability, fraudulently and maliciously obstruct and defeat the process of the courts, issued for the satisfaction of the judgment of a private suitor, and thus render the judgment nugatory and worthless. Such a conclusion would be contrary to the principles of the common law and of right and justice.

Syllabus.

It is no answer to the case made by the petition to say, as the defendants, by their counsel do, that the judgment of the plaintiff is still in force and bearing interest, and the liability of the county still remains undisturbed. What is a judgment worth that cannot be enforced? The gravamen of the plaintiff's complaint is that the defendants have obstructed, and continue to obstruct, the collection of his judgment, and he avers that he has been damaged thereby to the amount of his judgment and interest; in other words, that by reason of the unlawful and malicious conduct of the defendants, his judgment has been rendered worthless. To reply to this that the judgment still remains in force on the records of the court is an inadequate answer to the plaintiff's cause of action.

It follows from the views we have expressed that the Circuit Court erred in sustaining the demurrer to the petition.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice Miller and Mr. Justice Field dissented.

CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA *v.* PETTUS & Others.

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

Argued April 14, 15, 1884.—Decided January 5, 1885.

Certain unsecured creditors of a railroad company in Alabama instituted proceedings in equity, in a court of that State, on behalf of themselves and of all other creditors of the same class who should come in and contribute to the expenses of the suit, to establish a lien upon the property of that company in the hands of other railroad corporations which had purchased and had possession of it. The suit was successful, and the court allowed all unsecured creditors to prove their claims before a register. Pending the reference before the register the defendant corporations bought up the claims of complainants, and other unsecured creditors. Thereupon the solicitors of complainants filed their petition in the cause to be allowed reasonable compensation in respect of the demands of unsecured creditors (other than their

Statement of Facts.

immediate clients), who filed their claims under the decree, and to have a lien declared therefor on the property reclaimed for the benefit of such creditors. The suit between the solicitors and such defendant corporations was removed to the Circuit Court of the United States: *Held*—

(1) Within the principle announced in *Trustees* v. *Greenough*, 105 U. S. 527, the claim was a proper one to be allowed.

(2) It was, also, proper to give the solicitors a lien upon the property brought under the control of the court by the suit and the decree therein, such lien being authorized by the law of Alabama.

(3) That under the circumstances of this case the amount allowed by the court below was excessive.

This was an appeal from a decree of the Circuit Court of the United States for the Middle District of Alabama in favor of the appellees—Pettus & Dawson and Watts & Sons—adjudging them entitled to the sum of $35,161.21, and interest thereon at eight per cent. per annum from March 7, 1881, with lien, to secure its payment, upon the road-bed, depots, side tracks, turnouts, trestles, and bridges owned and used by the appellants—corporations of the State of Georgia—in operating the railroad formerly belonging to the Montgomery and West Point Railroad Company, an Alabama corporation, and which extends from Montgomery to West Point, with a branch from Opelika to Columbus. This property was directed to be exposed to sale, unless, within a given time, the said amount was paid.

This suit was the outgrowth of certain litigation in the courts of Alabama relating to the before-mentioned and other railroad property, in which the appellants were interested. A statement of its history is necessary to a clear understanding of the questions now presented for determination.

On the 1st of September, 1870, the Western Railroad Company, an Alabama corporation, purchased and took possession of the railroad (main line and branch) and all other property of the Montgomery and West Point Railroad Company,—one of the terms and conditions of such purchase being, as was claimed, that the former company assumed the payment of all outstanding debts and obligations of the latter, and agreed to issue its capital stock, dollar for dollar, in exchange for stock of the Montgomery and West Point Railroad Company out-

standing. It was a part of that arrangement that the last named company should, as it subsequently did, surrender its charter to the State.

When this purchase was made there were, upon the franchises and property of the latter company, two mortgages to secure bonds proposed to be issued; one, June 6, 1866, for $750,000, bonds for the whole of which were issued; the other, May 1, 1868, for $400,000, bonds for $45,000 of which were issued. It had also outstanding bonds issued in 1866 and 1867, not secured by mortgage or otherwise. The Western Railroad Company had, at the time of its purchase, a mortgage, of date September 15, 1868, upon its own property and franchises, to secure $600,000 of bonds then, or at some subsequent period, guaranteed by the present appellants.

On the 15th of September, 1870, that company executed to Morris and Lowery, trustees, a mortgage upon its property and franchises, (including the property transferred to it by the Montgomery and West Point Railroad Company,) to secure the payment of $1,200,000 of bonds, thereafter to be issued—and of which a large amount was issued—and their payment was also guaranteed by the appellants.

Subsequently, on March 31, 1874, those trustees commenced a suit in the Chancery Court of Montgomery County, Alabama, against the Western Railroad Company, the present appellants; the surviving trustees in the mortgages executed by the Montgomery and West Point Railroad Company; and others. Its object was to procure a sale of the property of the former company, including that purchased from the latter company. A final decree was passed December 18, 1874, ordering a sale, subject, however, to a lien, in respect of the property formerly owned by the last named company, in favor of the holders of its mortgage bonds, according to their respective priorities; and, in respect of the property of the Western Railroad Company, to a lien in favor of the holders of bonds secured by its mortgage of September 15, 1868. The sale was had—the present appellants becoming the purchasers.

On the 8th of May, 1875, Branch, Sons & Co., H. P. Hoadley, and C. S. Plank—holding bonds of the (old) Montgomery

and West Point Railroad Company, not secured by mortgage —through Pettus & Dawson and Watts & Sons, their solicitors, exhibited a bill in equity in the same court, against the present appellants, the Western Railroad Company, the Montgomery and West Point Railroad Company, and others. They sued for themselves as well as for all other creditors of the last named company who should come in and make themselves complainants and contribute to the expenses of the suit. Such proceedings were had—the Georgia corporations appearing and making defence—that, on the 1st day of May, 1877, a final decree was entered, by which it was, among other things, adjudged that "the unsecured creditors of the Montgomery and West Point Railroad Company, to which class complainants belong, have a lien" upon the property transferred by it to the Western Railroad Company; that such lien was subordinate to those for the bonds issued under the several mortgages executed by the Montgomery and West Point Railroad Company that were outstanding and unpaid, but superior to that of the mortgage executed by the Western Railroad Company after its said purchase, so far as the property of the Montgomery and West Point Railroad Company was covered by that mortgage; and that the property of all kinds, belonging to the latter company, be sold to satisfy its debts according to priority.

The cause was referred to a register to ascertain and report the amounts due to the complainants, and to such other unsecured creditors of the Montgomery and West Point Railroad Company as should prove their claims pursuant to the decree: also, the amounts due to holders of bonds issued under its several mortgages. Upon appeal by the two Georgia corporations to the Supreme Court of Alabama, that decree was affirmed. The register thereafter proceeded with its execution. Numerous parties, including the complainants, appeared before him and had their claims registered, the creditors in each instance retaining in their own custody the evidence of their respective demands. The aggregate amounts of such claims was very large.

On the 15th of April, 1879, the register not having made his

report upon these claims, Pettus & Dawson and Watts & Sons, by leave of the court, filed in the cause their joint petition, alleging, in substance, that, as solicitors specially employed by the complainants, Branch Sons & Co., Hoadley, and Plank, they prepared and filed the original bill, as well in behalf of themselves as of all other unsecured creditors of the Montgomery and West Point Railroad Company who should come in and contribute to the expenses of the suit; conducted the proceedings to a final decree; represented the same interests in the Supreme Court of Alabama; that their relations to the suit were well known to the Georgia corporations during the whole period of the litigation; that pending the reference before the register, after the rights of complainants and all creditors of the same class had been established by the final decree, those corporations made a secret arrangement with their immediate clients, whereby the claims of the latter were paid in full, principal and interest, and whereby, also, Branch, Sons & Co., and their co-complainants, agreed to withhold from their solicitors the fact of such settlement until the Georgia corporations could buy or settle all other claims of the unsecured creditors of the Montgomery and West Point Railroad Company; that "afterwards said two Georgia companies, defendants to this suit, did buy up or settle the other claims, which had been filed in the cause, under said decree," and, "either jointly or separately, thereby acquired possession and control of said claims so filed;" that they, also, purchased and settled a large amount of claims, which might have been, but were not, filed with the register; that, at the time of such purchases, said Georgia corporations had actual notice that petitioners, as solicitors in that suit, claimed reasonable compensation for such services as they rendered in behalf of the unsecured creditors of the Montgomery and West Point Railroad Company (other than complainants) who should come in and take the benefit of the final decree, and, also, the benefit of any lien upon said property that should be declared in favor of those creditors; and that in equity they "were the assignees of a part of each claim as filed to the amount of the reasonable value of the services rendered in said cause by petitioners for the benefit of each holder and owner of

such claims respectively." The prayer of the petition was, that an account be taken of the sums thus due to them as solicitors representing the unsecured creditors of the Montgomery and West Point Railroad Company (except the complainants and other named creditors with whom they had special contracts for fees), who received the benefit of their services; that they be declared to have a lien for the value of such services on all the property of that company, which had come into the possession of the Georgia corporations; and that so much of it as may be necessary for that purpose be sold to meet the amounts due them.

The register reported, on the 22d of April, 1879, that there were then no bonds or claims in the registry, except one claim, filed in court, as to which he did not report because no one had appeared and requested that it be audited.

Subsequently, April 24, 1879, the Georgia corporations presented their joint petition for the removal of the suit commenced against them by Pettus & Dawson and Watts & Sons—they being the only defendants to the petition filed by the latter—to the Circuit Court of the United States, in which court it was docketed, see 3 Woods, 620, and, after answer by the defendants and proof taken, proceeded to final decree. When the cause was removed from the State court nothing practically remained for determination between the parties to the record, except the claim of appellees, citizens of Alabama, to a lien upon the property in question, owned by the two Georgia corporations.

Mr. H. C. Semple and *Mr. A. R. Lawton* for appellants cited *Thompson* v. *Cooper*, 2 Colby, 87; *Trustees* v. *Greenough*, 105 U. S. 527; *Stanton* v. *Hatfield*, 1 Keene, 361; *Nave* v. *Weston*, 3 Atk. 557; *Mason* v. *Codwise*, 6 Johns. 300; *Thompson* v. *Brown*, 4 Johns. 637; *Pascal's Case*, 10 Wall. 483; *Grimball* v. *Cruse*, 70 Ala. 544; *Roselius* v. *Delachaise*, 5 La. Ann. 481.

Mr. W. L. Bragg for appellees cited *Trustees* v. *Greenough*,

105 U. S. 527: *Stanton* v. *Hatfield*, 1 Keene, 371–3; *Nave* v. *Weston*, 3 Atk. 557; *Hunt* v. *McClanahan*, 1 Heisk. 503; *Warfield* v. *Campbell*, 38 Ala. 527, 531–2; *Andrews* v. *Morse*, 12 Conn. 444; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Wyley* v. *Cox*, 15 How. 415; *Carter* v. *Bennett*, 6 Florida, 214, 257–8; *Martin* v. *Hawks*, 15 Johns. 405; *Ex parte Plitt*, 2 Wall. Jr. 453; *Bradt* v. *Koon*, 4 Cowen, 416; *Mumma* v. *Potomac Co.*, 8 Pet. 281; *Montgomery & West Point Railroad Co.* v. *Branch*, 59 Ala. 139; *VanMeter Ex'rs* v. *VanMeter*, 3 Gratt. 148, 162; *Dargan* v. *Waring*, 11 Ala. 988; *Brown* v. *Bigley*, 3 Tenn. Ch. 618.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated, and continued:

In *Trustees* v. *Greenough*, 105 U. S. 527, we had occasion to consider the general question as to what costs, expenses and allowances could be properly charged upon a trust fund brought under the control of court by suits instituted by one or more persons suing in behalf of themselves and of all others having a like interest touching the subject-matter of the litigation. That suit was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders, to save from waste and spoliation certain property in which he and they had a common interest. It resulted in bringing into court or under its control a large amount of money and property for the benefit of all entitled to come in and take the benefit of the final decree. His claim to be compensated, out of the fund or property recovered, for his personal services and private expenses was rejected as unsupported by reason or authority. "It would present," said Mr. Justice Bradley, speaking for the court, "too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interests of creditors, and that, perhaps, only to a small amount, if they could calculate upon the allowance of a salary for their time and having all their private expenses paid." In respect, however, of the expenses incurred in carrying on the suit and reclaiming the property subject to the trust, the rule, upon a careful review of the authorities, was held to be differ-

ent. After stating it to be a general principle that a trust estate must bear the expenses of its administration, and that where one or more of many parties having a common interest in a trust fund takes, at his own expense, proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement either out of the fund itself or by a proportional contribution from those who accept the benefit of his efforts, the court said that "the same rule is applicable to a creditor's suit where a fund has been realized by the diligence of the plaintiff." It was consequently held that the complainant in that case was properly allowed his reasonable costs, counsel fees, charges and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. Are the principles announced in that case applicable to the one now before us?

We have seen that the purchase, by the Western Railroad Company of the property of the Montgomery and West Point Railroad Company, and the surrender by the latter of its charter, left the unsecured creditors of the vendor company unprovided for, except as the vendee company assumed and agreed to meet the outstanding debts and obligations of the other company. But when the present appellants became purchasers at the sale in the suit instituted by Morris and Lowery, trustees, they asserted their right to hold the property, originally belonging to the Montgomery and West Point Railroad Company, freed from any claim against it by the unsecured creditors of that company. Those creditors resided in several States, and their claims aggregated a large amount. Co-operation among them was impracticable. If some did not move, the interests of all would have suffered. Hence Branch, Sons & Co. and their co-complainants instituted suit for the benefit of themselves and other creditors of the same class. They, and their solicitors, bore the entire burden of the litigation until the lien was finally declared, and the property ordered to be sold to pay all claims filed pursuant to the decree. The Supreme Court of Alabama held—conclusively as between the parties before it—that the Montgomery and West Point Railroad Company, like any other

private corporation chartered to transact business, was a trustee of its capital, property and effects, first, for the payment of its creditors, and afterwards for the benefit of its stockholders; that while it was in operation, according to the design of its charter, its general creditors would have no specific lien, entitling them to sue in equity; yet, having left its debts unpaid, and having distributed its capital, property, and effects among its stockholders, or transferred them to third persons who were not *bona fide* purchasers without notice, and having become disorganized so that it could not be efficiently sued at law, "a court of equity will pursue and lay hold of such property and effects, and apply them to the payment of what it owes to its creditors;" and, consequently, that its creditors had a lien, for the payment of their debts, on its road, appurtenances, and other property, superior to that created by the trust deed or mortgage of September 15, 1870, executed by the Western Railroad Company. *Montgomery & West Point Railroad Co.* v. *Branch*, 59 Ala. 139.

It thus appears that by the suit instituted by Branch, Sons & Co. and others, the property was brought under the direct control of the court to be administered for all entitled to share the fruits of the litigation. Indeed, the suit itself was an equitable levy upon the property, and the lien arising therefrom remained until discharged by order of the court. It is true that the bill states that it was brought for the benefit of all creditors who should become complainants therein. But it was intended to be, and throughout was, conducted as a suit for the benefit, not exclusively of the complainants, but of the class to which they belonged. It was so regarded by all connected with the litigation.

It is clear that within the principles announced in *Trustees* v. *Greenough*, Branch, Sons & Co. and their co-complainants are entitled to be allowed, out of the property thus brought under the control of the court, for all expenses properly incurred in the preparation and conduct of the suit, including such reasonable attorney's fees as were fairly earned in effecting the result indicated by the final decree. And when an allowance to the complainant is proper on account of solicitors' fees, it

may be made directly to the solicitors themselves, without any application by their immediate client.

But, on behalf of appellants, it is insisted that the utmost which the court may do is to charge upon the property such reasonable expenses as complainants themselves incurred, and became directly and personally bound to meet; and, since appellees have received from the creditors, specially engaging their services, all that those creditors agreed to pay, it cannot be said that the compensation demanded in respect of such as were not parties, otherwise than by filing their claims with the register, constitute a part of the expenses incurred by the complainants. This is an aspect of the general question not presented in *Trustees* v. *Greenough*.

It is true that the complainants are not shown to have incurred any personal responsibility for solicitors' fees beyond those stipulated, by special contract, to be paid to the appellees; and it is equally true that there was no express contract, on their part, to pay appellees such additional compensation as the court might allow and charge upon the property. Yet it is proven that when the appellees engaged their professional services to Branch, Sons & Co., and other complainants named in the bill, it was understood by the latter that their solicitors entered upon the preparation of the suit in the belief that they had the right to demand, and would demand, such additional compensation as was reasonable, in respect of unsecured creditors who accepted the fruits of their labors by filing claims; that, but for this understanding, appellees would have stipulated for larger compensation than was agreed to be paid by their particular clients; and that, in this belief and upon that understanding, they conducted the suit. Mr. Watts, in his deposition, says that on the occasion of his contract for a fee with Branch, he "stated to him that the bill which we should file, although it should be in the name of his firm, would be for the benefit of all the creditors of the Montgomery and West Point Railroad Company not secured by mortgage; and that in such cases the lawyer who filed the bill would be entitled to a fee from all the creditors who participated in the benefit of their labors; and that we should charge him so small a fee, with the

expectation that we should be paid a large fee out of the fund brought into court or condemned by our labors; and that such fee would be allowed by order of the Chancery Court, and a lien declared on the fund for the payment of such compensation; and with such understanding the paper [special contract for fee] was signed." Mr. Pettus says: "The bonds and other claims on which the bill was filed were less than a sixth of the unsecured debts of the Montgomery and West Point Railroad Company of the same class, and at the time that Pettus & Dawson were employed to bring the suit, that fact was known and discussed between the parties making the contract, and it was also discussed between said parties that the suit, if successful, would inure to the benefit of all the unsecured creditors who might claim the benefit of the decree, and that everybody who claimed the benefit of the services rendered by the complainants' solicitors would be bound to allow complainants' solicitors compensation out of that part of the fund distributable to them." There is no evidence in contradiction of these statements. Had Branch, Sons & Co., and their co-complainants, expressly stipulated to make such reasonable compensation, in addition to the fees they agreed to pay their solicitors, as the court might allow, in respect of other creditors filing claims, the case, it could not well be doubted, would come within the very letter of the decision in *Trustees* v. *Greenough*. Without at all conceding that an express contract of that character would have added to the power of the court in the premises, it seems to us that the present case is embraced by the reason of the rule announced in *Trustees* v. *Greenough*. When the litigation was commenced, the unsecured bonds of the Montgomery and West Point Railroad Company were without any value in the financial market. That litigation resulted in their becoming worth all, or nearly all, that they called for. The creditors who were entitled to the benefit of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the appellees, so far as the result of litigation may, in any case, be referred to the labors of counsel. When creditors filed their claims they had notice, by the bill, that the suit

was brought, not exclusively for the benefit of the complainants therein, but equally for those of the same class who should come in and contribute to the expenses of the litigation. Those expenses necessarily included reasonable counsel fees, which, upon every ground of justice, should be estimated with reference as well to the claims of the complainants who undertook to protect the rights of all the unsecured creditors, as of the claims of those who accepted the fruits of the labors of complainants and their solicitors. We are of opinion that the appellees are entitled to reasonable compensation for their professional services in establishing a lien, in behalf of the unsecured creditors of the Montgomery and West Point Railroad Company, upon the property described in the suit instituted by Branch, Sons & Co. and others; and that such compensation should be made with reference to the amount of all claims filed in the cause, although the evidence thereof may have been retained in the custody of the respective creditors; excepting from such estimate or calculation not only the claims of the complainants named in the bill, and of other unsecured creditors who may have had special contracts with appellees, or settled with them, but, also, such claims purchased by appellants as were not filed for allowance under the decree. The decree below proceeded upon this basis.

The court below did not err in declaring a lien upon the property in question, to secure such compensation as appellees were entitled to receive; for according to the law of Alabama, by one of whose courts the original decree was rendered, and by which law this question must be determined, an attorney-at-law, or solicitor in chancery, has a lien upon a judgment or decree obtained for a client to the extent the latter has agreed to pay him; or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover, viz., reasonable compensation, for the services rendered. *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Warfield* v. *Campbell*, 38 Ala. 527. That lien could not be defeated by the corporations which owned the property purchasing the claims that were filed by creditors under the decree. The lien of the solicitor rests, by the law of that State, upon the basis that he is to be regarded as

an assignee of the judgment or decree, to the extent of his fees, from the date of its rendition. This right of the solicitors is superior to any which the defendant corporations acquired, subsequent to the decree, by the purchase of the claims of unsecured creditors.

It remains only to consider whether the sum allowed appellees was too great. We think it was. The decree gave them an amount equal to ten per cent. upon the aggregate principal and interest of the bonds and coupons filed in the cause, excluding those in respect of which there was, between appellees and complainants and others, special contracts for compensation. It is shown that appellees had with the complainants contracts for small retainers and five per cent. upon the sums realized by the suit. We perceive no reason for this discrimination against creditors who were not parties except by filing their claims after decree. One-half the sum allowed was, under all the circumstances, sufficient.

For the error last mentioned

The decree is reversed and the cause remanded, with directions to modify the decree so as to award to appellees only the sum of $17,580, *with interest from March* 7, 1881, *with the benefit of the lien upon the property as established by the decree. Each party will pay his costs in this court, and one-half the cost of printing the record.*

STEELE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 22, 1884.—Decided January 19, 1885.

A private sale of old material arising from the breaking up of a vessel of war, made by an officer of the Navy Department to a contractor for repairs of a war vessel and machinery, is a violation of the provisions of § 1541 Rev. Stat.

The allowance of the estimated value of such material in the settlement of

such contractor's accounts is a violation of the provisions of § 3618 Rev. Stat.

A settlement of such accounts at the Navy Department and at the Treasury, in which the contractor was debited with the material at the estimated value, does not preclude the United States from showing that the estimates were far below the real value, and from recovering the difference between the amount allowed and the real value.

Delay in enforcing a claim arising out of an illegal sale of property of the United States, at a value far below its real worth, cannot be set up as a bar to the recovery of its value.

This was an appeal from the Court of Claims. See 19 C. Cl. 182. The facts are stated in the opinion of the court.

Mr. W. D. Davidge and *Mr. R. B. Washington*, for appellants.

Mr. Solicitor-General, for appellee.

Mr. Justice Woods delivered the opinion of the court.

The appellant was the claimant in the Court of Claims. He brought his suit April 30, 1880, to recover from the United States the sum of $3,400 for plumbing done by him on the United States Steamship Quinnebaug under a contract made with I. Hanscom, the Chief of the Bureau of Construction and Repair of the Navy Department, on behalf of the government, in the year 1875. There was no dispute that there was due to him on his contract for work done the sum sued for. The controversy arose on a plea of cross-demand, filed by the United States, which alleged that the officers of the government delivered to the appellant a large amount of old material to be utilized and reworked by him for the plumbing of the Quinnebaug; that a small portion of the material thus delivered he reworked for that purpose, but the greater portion thereof . . . he sold to third parties, realizing therefrom the sum of $20,000.

The Court of Claims found that during the spring and summer of the year 1875, there were delivered to the appellant, by R. W. Steele, who was a naval constructor in the United States Navy, 103,949 pounds of old material resulting from the

breaking up of certain monitors; that before such delivery there had been no survey or inspection of the old material, and that of the amount so delivered the appellant sold and disposed of 98,748 pounds, for which he received money and property to the amount of $8,975.56, and the residue was lost in breaking up, handling, and sorting. These findings fully established the cross-demand of the government for $8,975.56. The court, therefore, in adjusting the controversy, after charging the appellant with a payment on his claim of $3,900 and another item for $300, about neither of which there was any dispute, held him liable for the amount so received by him for the old material, which was sufficient to extinguish his claim and leave a balance of $3,575.56 due the United States. The court therefore rendered judgment against him for that amount, and from that judgment the present appeal is taken.

Upon the facts above stated, it is clear that the judgment of the Court of Claims was right. But the appellant insists that the other facts found by the court show that it was in error, and that its judgment should have been for the appellant for the amount of the claim for which his suit was brought. These facts were as follows: In the latter part of March or early in April, 1875, the appellant had an interview, in the city of Washington, with Isaiah Hanscom, Chief of the Bureau of Construction and Repair in the Navy Department, at which the two came to some verbal understanding that the appellant was to do the necessary plumbing on the United States Steamship Quinnebaug, which was then on the ways in the Philadelphia Navy Yard, and that Hanscom gave the appellant verbal instructions to go on with the work. In the same interview the matter of using on the Quinnebaug old material taken out of other vessels was talked of, and Hanscom spoke of the material as being worth $2,000, but it did not appear what material or what quantity of material was referred to. Afterwards, on April 6, 1875, the appellant wrote a letter to Hanscom, in which he offered to furnish all the material and labor necessary for the plumbing of the Quinnebaug for $14,500, and take in whole or part payment any brass or lead from old vessels that he could use for that purpose.

On the receipt of this letter, Hanscom directed Edward Hartt, who was a naval constructor on duty at the Philadelphia Navy Yard, to draw up specifications for the plumbing to be done on the Quinnebaug, and to solicit proposals therefor. Proposals were accordingly called for and received by the Bureau of Construction and Repair, but the proposal contained in the appellant's letter of April 6th was the lowest bid for the work.

On April 15, 1875, Hanscom sent an order in writing to Naval Constructor R. W. Steele to have all the old lead, brass and composition arising from the breaking up of the monitors, naming them, weighed, boxed up, and sent to Philadelphia, and to report the amount to the Bureau. The officer to whom the order was addressed, interpreting it as authority from the Bureau to deliver to the appellant the old material therein referred to, delivered it to him, and the appellant received the 103,949 pounds of such material heretofore mentioned as the property of the United States. On July 9, 1875, Naval Constructor R. W. Steele wrote to Hanscom that he had delivered the old material to the appellant, that it was estimated to be worth $2,000, which sum would be deducted from the first payment due him for his work. He added: "I beg to say that it was impossible to arrive at a satisfactory estimate of its value when appraised; there was much alloy and dirt mixed with it, and the cost of transportation and labor in separating and preparing it for use is not known, which makes it necessary to correct the value after I obtain full information on the subject, and before his contract is completed and adjusted." Naval Constructor Steele was led to put this estimate upon the value of the old material by the statement made to him by Naval Constructor Hartt, who was superintending the plumbing on the Quinnebaug, that he supposed its value to be $2,000. But it did not appear that Hartt had ever seen any of the 103,949 pounds of old material, but he assumed its value to be $2,000, and so set it down in an account book in his office, and so charged it against the appellant in the settlement of the account of the latter.

On July 30, 1875, Hanscom, as Chief of the Bureau of Construction and Repair, wrote to the appellant declining his proposal to do the plumbing work on the Quinnebaug for $14,500,

and offered to pay him therefor the sum of $12,000, but with the following stipulation: "The old materials the government will furnish you to be reworked, which have accumulated from the breaking up of the light-draft monitors," naming them, "will go towards the materials used in this work; the balance to be paid in two equal payments, in money, on the certificate of the naval constructor superintending the work that the work is satisfactorily completed, according to the specifications which will be furnished." The appellant accepted this proposition by letter, dated August 2, 1875. There was no proof that he did any work on the Quinnebaug until after this correspondence.

Upon these facts the contention of the appellant is that the court should have charged him with the value of the old material at $2,000, and not at $8,975.56. This contention is based on the ground that Naval Constructor R. W. Steele, in his letter to Hanscom, dated July 9, 1875, estimated the old material, delivered to the appellant, to be worth $2,000, and stated that this sum would be deducted from his first payment, and that Naval Constructor Hartt so charged it against him at that sum in the settlement of appellant's account.

We think this an inadequate reason for allowing the appellant to appropriate for $2,000 property of the United States, which it is shown he disposed of for $8,975.56. There had been no inspection or appraisement by any officer of the United States of the old material delivered to the claimant, but merely a loose estimate of its value by Naval Constructor Hartt, who had never seen it, and there was no contract between the appellant and the United States which bound the latter to deliver this old material at the estimate put upon it by Hartt, or to deliver what was not used on the Quinnebaug at all.

The contract between the parties was that made by the offer contained in the letter of Hanscom to the appellant of July 30, 1875, and its acceptance by the appellant in his letter to Hanscom, dated August 2 following. These letters are set out in the appellant's petition as expressing the contract which was the basis of his cause of action. The previous verbal understanding referred to in the findings of the Court of Claims was merged in it.

Opinion of the Court.

It is clear from the terms of the proposition made by Hanscom to the appellant on July 30, 1875, and accepted by the latter on August 2, that it was only such old material as could be reworked in the plumbing of the Quinnebaug that was to be transferred to the appellant, and its value deducted from the contract price of the work. There was no offer on the part of Hanscom to deliver to the appellant old material which could not be used on the Quinnebaug in payment of the stipulated price for his work. Even if such had been the contract it would have been unauthorized, for § 1541 Rev. Stat. provides that "the Secretary of the Navy is authorized and directed to sell, at public sale, such vessels and materials of the United States Navy as, in his judgment cannot be advantageously used, repaired, or fitted out; and he shall, at the opening of each session of Congress, make a full report to Congress of all vessels and materials sold, the parties buying the same, and the amount realized therefrom, together with such other facts as may be necessary to a full understanding of his acts." § 3618 provides that "all proceeds of old material . . . shall be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of government property,' and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law."

These sections confer upon the Secretary of the Navy the only authority by which he can dispose of the materials of the United States navy. When in the judgment of the Secretary they can be advantageously used they must be used; when they cannot be so used they must be sold at public sale and the proceeds covered into the treasury. No officer of the Navy Department had any authority, therefore, to deliver to the appellant the materials of the navy to be sold by him and to allow him to put the proceeds into his own pocket.

If we yield to the contention of the appellant we should be required to hold that an officer of the navy could, without inspection or appraisement, trade off to a contractor in payment of the money due him on his contract, not only materials of every description, but even the vessels of the United States, when in his judgment they could not be advantageously used,

repaired, or fitted out. It appears, therefore, that the appellant was not entitled, by the terms of his contract, to the material delivered to and sold by him, and if his contract had so provided, it would have been without authority of the statute, and therefore void.

The case of the appellant is not aided by the fact of the delivery to him, before the written contract was made, of the old material in question. The delivery was without any authority of the Navy Department, and to put it in the most favorable light for the appellant, the delivery was made to him by mistake. But whether with or without authority of the Department, if it was intended to vest in the appellant any title to the material, it was without authority of law, and cannot be set up as a ground of any right in him.

The case, therefore, comes to this: The appellant claims to hold without accounting therefor, except at less than one-fourth its value, the proceeds of old material belonging to the navy of the United States, which had been delivered to him without the sanction of law, and to which he had no title either by contract or otherwise. The property was the property of the United States, and the appellant must be held accountable for its full value.

The fact that the account of the appellant was settled by the officers of the Navy Department, by charging him with the value of the old material at $2,000, is no bar to the recovery of its real value by the government. The whole transaction was illegal, and appellant is chargeable with knowledge of the fact. It was in effect a private sale of the property of the United States without survey, inspection, or appraisement, at a grossly inadequate price. The fact that the account had been settled by the officers of the Navy Department did not cure the unauthorized acts. Both the disposition of the property and the settlement of the account were without authority of law, and not binding on the government.

Nor can laches in not objecting to the settlement of the appellant's account at an earlier time be imputed to the United States, and set up as a bar to the recovery of the value of the property unlawfully appropriated. This is a case for the appli-

Statement of Facts.

cation of the rule *nullum tempus occurrit regi*. *Lindsey* v. *Miller*, 6 Pet. 666, 669; *Gibson* v. *Chouteau*, 13 Wall. 92.

Judgment affirmed.

ACKLEY SCHOOL DISTRICT *v.* HALL.

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

Argued December 2, 3, 1884.—Decided January 19, 1885.

A municipal bond, issued under the authority of law, for the payment, at all events, to a named person or order, a fixed sum of money, at a designated time therein limited, being indorsed in blank, is a negotiable security within the law merchant.

Its negotiability is not affected by a provision of the statute under which it was issued, that it should be "payable at the pleasure of the district at any time before due."

Consistently with the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States, the holder may sue thereon without reference to the citizenship of any prior holder, and unaffected by the circumstance that the municipality may be entitled to make a defence, based upon equities between the original parties.

An act of the Legislature of Iowa entitled "An Act to authorize independent school districts to borrow money and issue bonds therefor, for the purpose of erecting and completing school houses, legalizing bonds heretofore issued, and making school orders draw six per cent. interest in certain cases," is not in violation of the provision in the Constitution of that State, which declares that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title."

This was a suit to recover principal and interest claimed to be due the defendant in error, on negotiable bonds issued by the plaintiff in error.

By an act of the General Assembly of the State of Iowa, approved April 6, 1868, it was provided that independent school districts should have power and authority to borrow money for the purpose of erecting and completing school-houses, "by

issuing negotiable bonds of the independent district to run any period not exceeding ten years, drawing a rate of interest not exceeding ten per centum, which interest may be paid semi-annually; which indebtedness should be binding and obligatory on the independent school district for the use of which said loan shall have been made." The act prescribed the mode in which the school board should submit to the voters of the district the question of issuing bonds, and declared that "if a majority of the votes cast on that question be in favor of such loan, then said school board shall issue bonds to the amount voted, . . . due not more than ten years after date, and payable at the pleasure of the district at any time before due, which said bonds shall be given in the name of the independent district issuing them, and shall be signed by the president of the board and delivered to the treasurer, taking his receipt therefor, who shall negotiate said bonds at not less than their par value, and countersign the same when negotiated."

With those statutes in force there were issued in the name of the plaintiff in error, certain instruments in the following form:

"No. 1. $500.00.

Independent School District, Ackley, Hardin County, Iowa.

The Independent School district of Ackley, Hardin County, Iowa, promises to pay to Foster Brothers, or order, at the Hardin County Bank, at Eldora, Iowa, on the 1st day of May, 1872, five hundred dollars for value received, with interest at the rate of ten per cent. per annum, said interest payable semi-annually, on the 1st day of May and November in each year thereafter, at the Hardin County Bank, at Eldora, on the presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of school directors by authority of an election of the voters of said school district, held on the 23d day of August, 1869, in conformity with the provisions of chapter 98, acts 12 General Assembly of the State of Iowa.

In testimony whereof the said Independent School District, by the board of directors thereof, have caused the same to be

signed by the president and secretary, this 1st day of November, 1869.

(Signed) W. H. ROBERTS,
President of the Board of Directors.
S. S. LOCKWOOD,
Secretary of the Board of Directors.

Countersigned:
F. EGGERT, *Treasurer School District.*"

To each was attached coupons in the following form:

"Treasurer of Independent School District, Ackley, Hardin County, Iowa, will pay the holder hereof, on the 1st day of November, 1874, at the Hardin County Bank, at Eldora, Iowa, twenty-five dollars, for interest due on school-house bond No. 8.

(Signed) W. H. ROBERTS, *President.*
S. S. LOCKWOOD, *Secretary.*"

The defendant in error became the holder of eight of these obligations, with interest coupons attached, each one being indorsed in blank by Foster Brothers, the original payees. This suit was brought by him as plaintiff below to recover the amount due thereon. He averred himself to be a citizen of New York; but there was no averment in the pleadings as to the citizenship of the payee. The district made defence upon various grounds. The case was tried by the court without the intervention of a jury, and there was a general finding for the plaintiff, upon which a judgment was entered against the district. To that finding and judgment the defendant excepted (but without preserving, by bill of exceptions, the evidence upon which the court acted), and brought this writ of error.

Mr. Galusha Parsons (*Mr. John F. Duncombe* was with him) for plaintiff in error.—The decision of this case will depend upon whether these instruments are "promissory notes, negotiable by the law merchant," within the meaning of the act of March 3, 1875, § 1, 18 Stat. 470, regulating the jurisdic-

tion of Circuit Courts of the United States. As these instruments were issued under authority derived from a State statute, we assume that the court will follow the decisions of the State courts in construing them. The Code of Iowa makes the use of seals no longer necessary, but it continues the distinction between "bonds" and "notes" "negotiable by indorsement or delivery" "according to the custom of merchants;" and it provides that "bonds are assignable by indorsement," "subject to any defence the maker may have against the assignee." It would involve a reconstruction of the records of the Iowa courts, and the language of the legal profession of that State, to describe instruments in this form, issued by school districts or other municipal corporations in that State as promissory notes, and it would require a very considerable revision of the judicial law of the State to subject them to the rules, and to extend to their transfer the incidents, to give to their holders the rights, and to impose upon them the obligations, of the holders of promissory notes negotiable by the law merchant. This statute was before the Supreme Court of Iowa in *McPherson* v. *Foster*, 43 Iowa, 48; *Mosher* v. *Independent School District of Ackley*, 44 Iowa, 122. In the first of them there was an extended review of the authorities. And see *Clark* v. *Des Moines*, 19 Iowa, 199; *Chamberlain* v. *Burlington*, 19 Iowa, 395.

Mr. C. C. Nourse and *Mr. B. F. Kauffman* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated, and continued:

The jurisdiction of the court below is questioned upon the ground that the bonds in suit are not promissory notes negotiable by the law merchant, within the meaning of the first section of the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States; and, consequently, that the court could not take cognizance of the case unless it appeared, affirmatively, that a suit could have been brought thereon by the original payees, Foster Brothers, had they not

parted with the bonds. In this proposition we do not concur. The recital, on their face, that they were issued on the authority of a popular election, held in conformity with a local statute, does not take from them the qualities and incidents of commercial securities. Indeed, the statute evidently contemplated that the bonds issued under its provisions should be negotiable instruments that would do the work of money in financial circles. They are described as "negotiable bonds," to be used for the purpose of borrowing money to be applied in the erection and completion of school-houses for the district. Its treasurer was directed to negotiate them at not less than their par value, and purchasers were assured by the statute that the indebtedness so incurred "shall be binding and obligatory on the independent school district, for the use of which said loan shall have been made." And this special enactment is in accord with the general law of Iowa; for, by the code of that State, "notes in writing, made and signed by any person, promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the custom of merchants;" while the transfer of "bonds, bills, and all instruments in writing, by which the maker promises to pay to another, without words of negotiability, a sum of money," is declared to be subject to any defence or counterclaim which the maker or debtor had against any assignor thereof before notice of assignment; thus, showing that, equally in respect of negotiable promissory notes and negotiable bonds, the rights of the parties are determinable by the law merchant. Iowa Code of 1873, §§ 2082, 2083, 2084.

These instruments, although described in the Iowa statute as bonds, have every characteristic of negotiable promissory notes. They are promises in writing to pay, at all events, a fixed sum of money, at a designated time therein limited, to named persons or their order. Upon being indorsed in blank by the original payees, the title passes by mere delivery, precisely as it would had they been made payable to a named person or bearer. After such indorsement, the obligation to

pay is to the holder. The decisions of this court are numerous to the effect that municipal bonds, in the customary form, payable to bearer, are commercial securities, possessing the same qualities and incidents that belong to what are, strictly, promissory notes negotiable by the law merchant. There is no reason why such bonds, issued under the authority of law, and made payable to a named person, or order, should not, after being indorsed in blank, be treated by the courts as having like qualities and incidents. That they are so regarded by the commercial world cannot be doubted. *Manufacturing Co.* v. *Bradley*, 106 U. S. 180.

But it is contended that the word "negotiable," in the Iowa statute, is qualified by that clause, in the same enactment, which provides that bonds issued under it shall be "payable at the pleasure of the district at any time before due." These words were not incorporated into the bond. But if the holder took, subject to that provision, as we think he did, it is clear that this option of the district to discharge the debt, in advance of its maturity, did not affect the complete negotiability of the bonds; for by their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for non-payment until that day passed. The authorities bearing upon this question are cited in Byles on Bills, Sharswood's Ed., chap. 7; 1 Daniel Negotiable Instruments, § 43, *et seq.*; Chitty on Bills, 525, *et seq.*

In *School District* v. *Stone*, 106 U. S. 183, it was held, in reference to similar bonds issued by another independent school district, in the same county, that their recitals were not sufficiently comprehensive to cut off a defence resting upon the ground that the bonds there in suit were in excess of the amount limited by the State Constitution, and consequently invalid. Applying that decision to the present case, counsel for the district insist that, as these bonds may be open to such a defence as was made in *School District* v. *Stone*, they cannot be deemed negotiable by the law merchant; in other words, that the negotiability of the instrument ceases, whenever the maker is permitted, as against a *bona fide* holder for value, to establish a

defence based upon equities between the original parties. But such is not the test prescribed by the statute defining the jurisdiction of the Circuit Courts of the United States. If a promissory note is expressed in words of negotiability, the right of the holder of the legal title to invoke the jurisdiction of the proper Circuit Court of the United States is not affected by the citizenship of any prior holder, or by the circumstance that the party sued asserts, or is able to make out, a valid defence to the action.

The assignments of error present another question that deserves consideration. The Constitution of Iowa provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." The title of the statute under which those bonds were issued is "An Act to authorize independent school districts to borrow money and issue bonds therefor, for the purpose of erecting and completing school-houses, legalizing bonds heretofore issued, and making school orders draw six per cent. interest in certain cases." The act contains six sections, the fourth providing that "all school orders shall draw six per cent. interest after having been presented to the treasurer of the district, and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer." As there are two kinds of school districts in Iowa, "district township" and "independent district,"—the latter carved out of the former—it is contended that the title to the act in question embraces two subjects; one, relating to matters in which independent school districts alone are concerned; and the other, to matters in which the township district and independent districts are concerned; that whether school orders, which may be issued for many purposes, by districts of either kind, should bear interest or not is wholly foreign to the borrowing of money to build school-houses in independent districts. Iowa Code of 1873, ch. 9, title 12.

We are not referred to any adjudication by the Supreme Court of Iowa which sustains the point here made. On the

contrary, the principles announced in *State* v. *The County Judge*, 2 Iowa, 281, show that the act before us is not liable to the objection that its title embraces more than one subject. The object of the constitutional provision, that court said, was "to prevent the union in the same act of incongruous matter, and of objects having no connection, no relation," and "to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another;" but, that, "it cannot be held with reason that each thought or step towards the accomplishment of an end or object should be embodied in a separate act;" that "the unity of object is to be looked for in the ultimate end, and not in the details or steps leading to the end;" and that "so long as they are of the same nature, and come legitimately under one general denomination or object," the act is constitutional. The doctrines of that case have been approved by the same court in subsequent decisions, and they are decisive against the point here raised. *Morford* v. *Unger*, 8 Iowa, 83; *Davis* v. *Woolnough*, 9 Iowa, 104; *McAunich* v. *The Mississippi & Missouri Railroad Co.*, 20 Iowa, 342; *Farmer's Ins. Co.* v. *Highsmith*, 44 Iowa, 334. The general subject to which this special act relates is the system of common schools. That system is maintained through the instrumentality of district schools of different kinds. Provisions in respect of those instrumentalities—those referring to the erection and completion of school-houses in independent school districts with money raised upon negotiable bonds, and others, to the rate of interest which all school orders shall bear—relate to the same general object, and are only steps towards its accomplishment. See also *Montclair* v. *Ramsdell*, 107 U. S. 153, where this subject was considered.

Other questions have been discussed by the counsel, but as they are not deemed important in the determination of the case they will not be specially noticed.

Judgment affirmed.

CLAWSON *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued January 5, 1885.—Decided January 19, 1885.

A territorial statute which authorizes an appeal by a defendant in a criminal action from a final judgment of conviction ; which provides that an appeal shall stay execution upon filing with the clerk a certificate of a judge that in his opinion there is probable cause for the appeal ; and further provides that after conviction a defendant who has appealed may be admitted to bail as of right when the judgment is for the payment of a fine only, and as matter of discretion in other cases ; does not confer upon a defendant convicted and sentenced to pay a fine and be imprisoned, the right, after appeal and filing of certificate of probable cause, to be admitted to bail except within the discretion of the court.

The appellant, having been found guilty by a jury in the District Court for the Third Judicial District of Utah, of the crimes of polygamy and unlawful cohabitation, charged in separate counts of the same indictment, was sentenced, on the conviction for polygamy, to pay a fine of $500, and to be imprisoned for the term of three years and six months; and, on the conviction for unlawful cohabitation, to pay a fine of $300, and be imprisoned six months. From the whole of the judgment an appeal was taken to the Supreme Court of the Territory, and the judge before whom the trial was had gave a certificate that, in his opinion there was probable cause thereof. The appeal was perfected and the certificate was filed in the proper office.

The defendant, thereupon, applied to the court in which he was sentenced, to be let to bail pending his appeal. The application was denied, the order reciting that "the court being of the opinion that the defendant ought not to be admitted to bail, after conviction and sentence, unless some extraordinary reason therefor is shown, and there being no sufficient reason shown in this case, it is ordered that the motion and application for bail be, and the same is hereby, denied, and the defendant be remanded to the custody of the United States marshal." The accused then sued out an original writ of habeas corpus from

the Supreme Court of the Territory. In his petition therefor he stated that he was then imprisoned and in the actual custody of the United States marshal for the Territory at the penitentiary in the county of Salt Lake. He, also, averred that, upon the denial of bail by the court in which he was tried, "he was remanded to the custody of said United States marshal, who from thenceforth has imprisoned and still imprisons him" under said order of commitment, which "is the sole and only cause and authority" for his "detention and imprisonment;" that "his said imprisonment is illegal" in that "he has been and is able and now offers to give bail pending his appeal in such sum as the court may reasonably determine;" and that, "as a matter of right, and in the sound exercise of a legal discretion, the petitioner is entitled to bail pending the hearing and determination of said appeal."

The Supreme Court of the Territory overruled the application for bail, and remanded the petitioner to the custody of the marshal. From that order the present appeal was prosecuted.

The statutes of Utah regulating bail are printed in the margin.*

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* Laws of Utah, 1878, Title VIII.

SEC. 358. Either party in a criminal action, may appeal to the Supreme Court on questions of law alone, as prescribed in this chapter.

SEC. 360. An appeal may be taken by the defendant:

1. From a final judgment of conviction;

2. From an order denying a motion for a new trial;

3. From an order made after judgment, affecting the substantial rights of the party.

SEC. 362. An appeal from a judgment must be taken within one year after its rendition, and from an order within sixty days after it is made.

SEC. 363. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.

SEC. 366. An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the Supreme Court, that in his opinion there is probably cause for the appeal, but not otherwise.

Argument for Appellant.

Mr. Wayne Mc Veigh and *Mr. F. S. Richards*, for appellant. —The facts present a case novel and grave. They show a departure from an unbroken course of judicial proceeding. They are a substantial denial of a right of appeal. If this construction of the statute is correct, a defendant, appealing, may nevertheless be compelled to serve out his term of punishment, and the right of appeal thus become a delusion. It is submitted that the court below was mistaken in its construction of the act. It is clear there was nothing in the alleged offence which precludes admission to bail. The statute did not make it a felony. Without such statutory declaration it was only a misdemeanor. The American doctrine is that bail shall be allowed generally if it secures the appearance of the defendant. This applies to misdemeanors (for the penalty can be so fixed as to guard against escape), and to bail after conviction pending appeal (for till final conviction the prisoner is not known to be guilty). The grounds for admitting to bail before conviction were, the nature of the offence, and the probability of guilt. After conviction they are, under the statute of Utah, the nature of the offence, the penalty, and the probability of the defendant's appearance. The offence, in Utah, may fairly be regarded as less heinous than the same offence committed elsewhere. We contend that the question for the court to consider in such cases is whether the appearance of the prisoner can be secured, to a reasonable certainty, by bail, and that the nature of the offence, the penalty, the standing of the party, and all the circumstances attending the case and party should be considered. In this case the appellant was on bail from the time of his arrest till the time of his sentence—a period of many months, and it was not alleged that he made any attempt to escape, either before or after conviction; nor can it be pretended that any other person charged with or convicted of a like offence and on bail in Utah ever attempted to escape. The appellant offered to give bail in any sum the court might

Sec. 388. After conviction of an offence not punishable with death, a defendant who has appealed may be admitted to bail: 1. As a matter of right when the appeal is from a judgment imposing a fine only. 2. As a matter of discretion in all other cases.

fix, and there can be no reasonable doubt that his appearance could be thus secured. The condition of things in Utah, and probably other Territories, requires a liberal construction of the law relating to bail. As in offences against the United States the penitentiary is the only prison over which the United States marshal has any jurisdiction, and as the appellant is not and could not under the law be sentenced to labor, he is subjected by detention now to the same punishment and in the same place, as if held under and in execution of the sentence. If the judgment is finally affirmed he will be practically subjected to double punishment, because his case cannot be heard on its merits in this court for several months, and might not be heard for several years, and no part of his imprisonment pending the appeal need be credited on the term for which he was sentenced. Bail has been allowed in Utah, pending an appeal ever since the organization of the Territory, in all but capital cases, following the practice in New York and California. *Ex parte Hoge*, 48 Cal. 3; *People* v. *Folmsbee*, 60 Barb. 480. The Supreme Court of Utah treated this case as an attempt to review the action of the District Court. The real question before it was whether in its own judgment the appellant should be admitted to bail. It assumed that the district judge had exercised a discretion. No such exercise took place. The court held that appellant must remain in custody unless he could show some extraordinary reason for admission to bail. It is true that this construction of the statute finds support in *Ex parte Marks*, 49 Cal. 680, and *Ex parte Smallman*, 54 Cal. 35; but it is erroneous. The Utah statute is borrowed from California and the California statute from New York. As to the construction of the New York act, see *People* v. *Folmsbee*, cited above.

Mr. Solicitor-General for appellee.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts as above stated, and continued:

By the laws of Utah regulating the mode of procedure in criminal cases, it is provided, among other things, that the de-

fendant in a criminal action may appeal to the Supreme Court of the Territory, from any order made after judgment, affecting his substantial rights. Laws of Utah, 1878, Title VIII., ch. 1, § 360. To that class belonged the order made by the court of original jurisdiction refusing bail, and remanding the accused to the custody of the marshal. But no appeal was taken from that order. And as the accused sued out an original writ of habeas corpus from the Supreme Court of the Territory, we cannot, upon the present appeal, consider whether the court of original jurisdiction properly interpreted the local statutes in holding that the accused "ought not to be admitted to bail, after conviction and sentence, unless some extraordinary reason therefor is shown." There is nothing before us for review except the order of the Supreme Court of the Territory, which discloses nothing more than the denial of the application to it for bail, and the remanding of the prisoner to the custody of the marshal. That order, in connection with the petition for habeas corpus—assuming all of the allegations of fact contained in it to be true—only raises the question, whether, under the laws of the Territory, the accused, upon perfecting his appeal and filing the required certificate of probable cause, was entitled, as matter of right, and without further showing, to be let to bail, pending his appeal from the judgment of conviction. Upon the part of the government it is insisted that the court below had, by the statute, a discretion in the premises which, upon appeal, will not be reviewed.

By the laws of the Territory it is provided that "an appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court, or of a justice of the Supreme Court, that in his opinion there is probably cause for appeal, but not otherwise;" also, that if this certificate is filed, "the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal." Laws of Utah, 1878, p. 138. Upon the subject of bail, the same laws provide that "a defendant charged with an offence

punishable with death cannot be admitted to bail when the proof of his guilt is evident or the presumption thereof great;" also, that "if the charge is for any other offence, he may be admitted to bail before conviction as a matter of right;" further, that "after conviction of an offence not punishable with death, a defendant who has appealed may be admitted to bail: 1, as a matter of right when the appeal is from a judgment imposing a fine only; 2, as a matter of discretion in all other cases;" still further, that "in the cases on which the defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus." Ib. pp. 142, 146.

These statutory provisions so clearly indicate the legislative intent that no room is left for interpretation. As the judgment did not impose upon the appellant a fine only, his admission to bail, pending the appeal from that judgment, was not a matter of right, but was distinctly committed, by the statute, to the discretion of the court or judge to whom the application for bail may be made. The exercise of that discretion is not expressly nor by necessary implication forbidden in cases in which the certificate of probable cause is granted; for, by the statute, that certificate only operated to suspend the execution of the judgment of conviction, requiring the officer having the accused in charge to retain him in his own custody to abide the judgment on appeal. We do not mean to say that the granting of such a certificate is not a fact entitled to weight in the determination of an application for bail, but only that the statute does not make it so far conclusive of the question of bail as to prevent the court from considering every circumstance which should fairly and reasonably control or affect its discretion. Whether the Supreme Court of the Territory abused its discretion in the present case is a question not presented by the record before us; for, it does not contain any finding of facts, nor the evidence (if there was any apart from the record of the trial, and of the proceedings upon the first application for bail) upon which the court below acted. Its judgment denying bail cannot, therefore, be reversed, unless, as contended by appellant, the certificate of probable cause

necessarily carried with it the right to bail, and deprived the court of all discretion in the premises. But that construction of the statute is not, we think, admissible.

At the argument, counsel for appellant laid stress upon the fact, averred in the last petition for habeas corpus, that the order committing him to the custody of the marshal had been executed by confining him at the penitentiary. The return of the officer is that the accused is in his custody under and by virtue of the order of commitment. It is not claimed that he is treated as a convict in the penitentiary undergoing the sentence pronounced in pursuance of the judgment appealed from, but only that the officer uses that institution as a place for the confinement of the accused while the latter is in his custody. Whether that action of the officer be legal is a question that does not now arise; for, the application to the Supreme Court of the Territory for habeas corpus only raised the question of the right of the accused to be discharged, on bail, from all custody whatever; and the present appeal is from the order, in that court, refusing such discharge, and remanding him to the custody of the marshal.

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

Affirmed.

Mr. Justice Miller and Mr. Justice Field dissented.

BICKNELL *v.* COMSTOCK.

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

Submitted January 8, 1885.—Decided January 19, 1885.

The mutilation (without the consent and against the protest of the grantee) of a patent for public land, by the Commissioner of the Land Office, after its execution and transmission to the grantee, and the like mutilation of the record thereof, do not affect the validity of the patent.

Opinion of the Court.

A State statute of limitations as to real actions begins to run in favor of a claimant under a patent from the United States, on the issue of the patent and its transmission to the grantee.

The lapse of time provided by a statute of limitations as to real actions vests a perfect title in the holder.

This was an action to recover the consideration paid for a tract of land in Iowa, and the value of the improvements thereon, brought by defendant in error, as plaintiff below, against the plaintiff in error as defendant. The complaint alleged a conveyance by Bicknell to one Bennett, the subsequent transfer to the defendant by sundry mesne conveyances; valuable improvements on the premises made by Bennett and his grantees; and a failure of title in Bicknell when the deed was made, by reason of a superior title in the State of Iowa under a land grant. Judgment below for plaintiff, to reverse which this writ of error was brought.

Mr. Edward F. Bullard for plaintiff in error.

Mr. A. B. Olmstead for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

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

The action is for a breach of covenants of warranty in a conveyance of land located in Iowa. It is a manifest attempt to obtain the judgment of this court on one of the complicated phases of the disputed titles growing out of the grants of lands on the Des Moines River to aid in improving the navigation of that river, and in constructing railroads through these lands, with a strong probability of the absence and ignorance of this suit, on the part of all the persons really interested in the questions here raised.

The plaintiff below, Comstock, is not the original grantee in the deed on whose covenants he sues. He does not allege that he has been evicted under any judicial proceedings from possession of the land, but, on the contrary, it is one of the agreed facts on which the case was heard by the court without a jury.

that defendant Bicknell, and those claiming under his deed, including, of course, the plaintiff, have been in the actual possession of the land in question ever since May 23, 1862, a period of more than twenty-two years.

We shall be able, however, to decide this case without answering the twenty-four errors assigned, by considering the thirteenth assignment alone, namely, that, under the facts in this case, the court should have found that a perfect title was vested in Bicknell to the lot in question.

One of the facts admitted in the case stated is this: "It is admitted that on the first day of May, 1869, a patent in due form was executed by the President of the United States, conveying to said Bicknell said lots 3 and 4, which patent was duly recorded in the General Land Office on the same day at Washington, D. C., and thereupon the original was transmitted to the United States land office at Fort Dodge, Iowa, for said Bicknell."

In June, 1878, the Commissioner of the General Land Office ordered a return of this patent to his office, and thereupon "tore off the seals and erased the President's name from said patent, and mutilated the record thereof in the General Land Office, all without the consent and against the protest of the grantees of said Bicknell."

That this action was utterly nugatory and left the patent of 1869 to Bicknell in as full force as if no such attempt to destroy or nullify it had been made, is a necessary inference from the principles established by the court in the case of *United States* v. *Schurz*, 102 U. S. 378. That principle is that when the patent has been executed by the President and recorded in the General Land Office, all power of the Executive Department over it has ceased.

It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States if it had not been divested before, so that Bicknell, or his grantees, being in possession under claim and color of title, the statute of limitation began to run in their favor.

The agreed case further finds, that "it is also admitted that the defendant Bicknell and his grantees have been in actual

possession of the premises in question ever since May 23, 1862, and during that period made permanent improvements upon said lot 3 of the value of more than $6,000."

As all title was out of the United States prior to this deed, in which this suit is brought, and vested in some one else capable of suing under the various acts cited to defeat Bicknell's title, or passed out of the United States by the patent to Bicknell in 1869, at the latest, the case makes a continued uninterrupted possession under Bicknell's title, adverse to all the world, of fifteen years.

Under the statute of Iowa ten years of such possession is a perfect bar to any action to recover the land, and this applies to suits in chancery as well as actions at law. (See Code of Iowa, section 2529, subdivision 5.)

The defence, therefore, of the plaintiff in this action to any suit brought against him for the land covered by Bicknell's deed is perfect, and he is in the undisturbed possession of the land held under Bicknell's claim for over twenty-two years.

This court has more than once held that the lapse of time provided by the statutes makes a perfect title.

In *Leffingwell* v. *Warren*, 2 Black, 599, it is said that "the lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder."

And this doctrine is repeated in *Croxall* v. *Shererd*, 5 Wall. 289, and in *Dickerson* v. *Colgrove*, 100 U. S. 578, 583.

The court was asked on the trial to rule that under the facts found in this case a perfect title was vested in Bicknell to the lot in question. And though this may not be literally true in regard to Bicknell, we think it is true in regard to the title of Bicknell under which the property is now held by plaintiff.

For this reason

The judgment of the Circuit Court is reversed, with directions to enter a judgment for defendant Bicknell on the agreed facts.

UNITED STATES *v.* MUELLER.

MUELLER *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Submitted December 22, 1884.—Decided January 19, 1885.

Under contracts to furnish stone to the United States for a building, and to saw it, and cut and dress it, all as "required," the contractor may recover damages for enforced suspensions of, and delays in, the work, by the United States, arising from doubts as to the desirability of completing the building with the stone, and on the site, which involved the examination of the foundation and the stone by several commissions.

A contract to furnish "all of the dimension stone that may be required in the construction" of a building does not include dimension stone used in "the approaches or steps leading up into the building."

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

Mr. Enoch Totten for Mueller.

Mr. Solicitor-General for United States.

Mr. Justice Blatchford delivered the opinion of the court.

Before July 23, 1872, the United States advertised for proposals for furnishing and delivering at the site of the new United States Government building to be erected at Chicago, Illinois, "all of the dimension stone required in its construction." John M. Mueller submitted a proposal, dated July 23, 1872, "to furnish dimension stone in accordance with the attached advertisement," at specified prices. This proposal was accepted by a notice to him which said: "You are hereby notified that your proposal to furnish all the dimension stone that may be needed for the exterior of the new custom-house building to be erected in the city of Chicago," for specified prices, "the stone to be delivered at the site of the building, and in such quantities and at such times as the Department, or its duly authorized agent, may direct, is accepted."

On the 2d of September, 1872, a written contract, in pursuance of such advertisement and proposal, was made between the United States and Mueller, which described Mueller as the

person "to whom was awarded a contract for certain dimension stone required in the construction of the new custom-house, court-house, and post-office building, at Chicago, Illinois, on his bid received under advertisement, and dated July 23, A.D. 1872." By the contract, which was made on behalf of the United States by the supervising architect of the Treasury Department, Mueller agreed to furnish from his quarry, "and deliver at the site of the aforesaid buildings, all of the dimension stone that may be required in the construction of said building," and to furnish and deliver 100,000 cubic feet of the stone on or before the 1st of January, 1873, "and the remainder at such times, and in such quantities, as may be required" by the supervising architect, and the United States agreed to pay to Mueller certain specified prices. The stone was known as "Buena Vista free stone."

On the 9th of December, 1871, Mueller entered into another contract with the United States, on his bid made under an advertisement, by which he agreed to furnish the cutting of the Buena Vista free stone to be used in the basement story, sill and lintel course of said building, in accordance with a specification attached, by which he was to deliver the stone, cut and ready for setting, "promptly and as required by the superintendent, so that the progress of the work will not be interrupted." By the contract, all the stone for the area wall was to be cut, lewised and ready for setting on or before the 1st of March, 1873, and the pier-stones and sill and lintel course as soon thereafter as required by the superintendent.

On the 18th of July, 1873, Mueller entered into another contract with the United States, by which he agreed "to furnish such number of mechanics and laborers as may be required from time to time" by the superintendent, and all of the tools and materials necessary to cut, dress, and, if necessary, box, all of the stone required for the construction of said building, "and to cut such stone in such manner and at such place as may be required" by the superintendent, and to furnish, free of cost to the Government, all shops, sheds and machinery necessary to cut, dress and box said stone; and it was agreed, that all materials required for the cutting or boxing of said stone should be

supplied only upon the requision of the superintendent, and that not less 250 stone-cutters, with the necessary complement of mechanics and laborers, should be employed "at any time during the progress of the work;" Mueller to be paid for the labor full market rates "of the labor" actually performed, increased by 15 per centum, and for the materials the lowest trade prices, increased by 15 per centum thereof.

On the 4th of August, 1873, Mueller entered into another contract with the United States, on a bid of his, by which he was to furnish all the tools, machinery, shops and sheds, &c., required to saw, and to saw such of the stone supplied under his contract of September 2, 1872, as might be found necessary by the superintendent, the sawing to be done at such times and in such quantities as the superintendent might require, and Mueller to be paid a specified price for all stone sawn.

Mueller brought a suit, on these contracts, against the United States, in the Court of Claims, to recover sundry items, and, among them, pay for certain stones furnished, for which he had not been fully paid; also damages for suspensions and delays, enforced and caused by the United States, of work under the contracts, which kept Mueller and his men, machinery, plant and capital idle; also damages because dimension stone was required for the construction of "the steps and approaches leading up into said building," but he was not allowed to furnish it.

The Court of Claims allowed to him $20,000 as damages for suspensions of the work, enforced by the United States, and $2,758.25 additional pay for the stones referred to, and rejected all the other items sued for, and rendered a judgment in his favor for $22,758.25. Among the items rejected was the claim for damages in respect to the stone for the "steps and approaches." The United States have appealed because of the allowance of the $20,000; and Mueller has appealed as to the item for "steps and approaches."

The finding of facts by the Court of Claims as to the $20,000 item is this: "On the 13th of May, 1875, claimant was directed to stop shipment of stone until further orders, and on

the 15th he was directed to stop cutting. On the 25th of May he was notified formally, in accordance with the language of the contract, 'that the party of the first part does not require that any more stock should be delivered at the present time. Whenever more is required you will be notified.' On the 16th of October, 1875, he was notified to resume cutting. In the summer and fall of 1877, when the work was nearing completion, he was directed to discharge workmen from time to time, so that the number was reduced below the minimum fixed in his contract. The work of sending forward stone was also resumed about the middle of October and continued until about the 1st of December. The second suspension lasted until about the middle of February. These suspensions arose from a well-founded doubt as to the desirability of completing the Chicago custom-house with the Buena Vista stone, and on the site. Several commissions made lengthy and exhaustive examinations of the foundation and stone, pending which the United States stopped the work. The damages resulting to the claimant therefrom were $20,000."

The court was of opinion, that, as the delay was caused by a contemplated change of purpose in regard to the stone and the site, the enforced suspension and delay were unjustifiable, and not covered by the stipulations in the contracts that the stone and the work should be furnished as "required." 19 C. Cl. 591. We are of opinion that the court was correct in its view. *United States* v. *Smith*, 94 U. S. 214.

The finding of facts as to the "steps and approaches" was as follows: "The approaches or steps leading up into the building required, according to the plans for said building, a large quantity of cut dimension stone, to wit, 17,473.10 cubic feet, and, although the claimant was able and willing to furnish the same under his agreement, the officers of the United States refused to permit him to furnish the same, but it does not appear that he made any proposition to furnish it. The defendants determined that granite would be more suitable than sandstone for these approaches, and the amount required was furnished by other parties. If the claimant had been allowed to furnish sandstone, he would have made a

profit of $6,115.58." The court was of opinion that there was no violation of the contract. 19 C. Cl. 592.

The expression "steps and approaches leading up into said building," used in the petition, and the expression "approaches or steps leading up into the building," used in the finding of facts, are, perhaps, somewhat vague. But we must infer that the expression used in the finding means structures wholly outside of the building, not a part of it, but constituting a means of ascent on the way into the building. In this view, the stone used in the approaches or steps was not stone used in the construction of the building, within the meaning of the first contract and the original advertisement. The approaches may have been of cut dimension stone, and necessary for use in connection with the building after it was constructed; but, in the absence of anything more definite in the finding, it cannot be said that they were in the building, or a part of it.

Judgment affirmed.

CONSOLIDATED SAFETY-VALVE COMPANY *v.* CROSBY STEAM GAUGE & VALVE COMPANY.

SAME *v.* SAME.

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

Argued December 10, 11, 1884.—Decided January 19, 1885.

Letters patent No. 58,294, granted to George W. Richardson, September 25, 1866, for an improvement in steam safety-valves, are valid.

Under the claim of that patent, namely, "A safety-valve, with the circular or annular flange or lip *c c*, constructed in the manner, or substantially in the manner, shown, so as to operate as and for the purpose herein described," the patentee is entitled to cover a valve in which are combined an initial area, an additional area, a huddling chamber beneath the additional area, and a strictured orifice leading from the huddling chamber to the open air, the orifice being proportioned to the strength of the spring, as directed.

Richardson was the first person who made a safety-valve which, while it automatically relieved the pressure of steam in the boiler, did not, in effecting

Syllabus.

that result, reduce the pressure to such an extent as to make the use of the relieving apparatus practically impossible, because of the expenditure of time and fuel necessary to bring up the steam again to the proper working standard.

His valve was the first which had the strictured orifice to retard the escape of the steam, and enable the valve to open with increasing power against the spring, and close suddenly, with small loss of pressure in the boiler.

The direction given in the patent, that the flange or lip is to be separated from the valve-seat by about one sixty-fourth of an inch for an ordinary spring, with less space for a strong spring, and more space for a weak spring, to regulate the escape of steam, as required, is a sufficient description, as matter of law, and it is not shown to be insufficient, as a matter of fact.

Letters patent No. 85,963, granted to said Richardson, January 19, 1869, for an improvement in safety-valves for steam boilers or generators, are valid.

Under the claim of that patent, namely, "The combination of the surface beyond the seat of the safety-valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described," the patentee is entitled to cover the combination with the surface of the huddling chamber, and the strictured orifice, of a screw-ring to be moved up or down to obstruct such orifice more or less in the manner described.

The patents of Richardson are infringed by a valve which produces the same effects in operation, by the means described in Richardson's claims, although the valve proper is an annulus, and the extended surface is a disc inside of the annulus, the Richardson valve proper being a disc, and the extended surface an annulus surrounding the disc; and although the valve proper has two ground joints, and only the steam which passes through one of them goes through the stricture, while, in the Richardson valve, all the steam which passes into the air goes through the stricture; and although the huddling chamber is at the centre instead of the circumference, and is in the seat of the valve, under the head, instead of in the head, and the stricture is at the circumference of the seat of the valve, instead of being at the circumference of the head.

The fact that the prior patented valves were not used, and the speedy and extensive adoption of Richardson's valve, support the conclusion as to the novelty of the latter.

Suits in equity having been begun, in 1879, for the infringement of the two patents, and the Circuit Court having dismissed the bills, this court in reversing the decrees, after the first patent had expired, but not the second, awarded accounts of profits and damages as to both patents, and a perpetual injunction as to the second patent.

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

Mr. Thomas William Clarke and *Mr. Benjamin F. Butler* for appellant.

Mr. Joshua H. Millett and *Mr. Benjamin F. Thurston* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

On the 27th of May, 1879, the Consolidated Safety-Valve Company, a Connecticut corporation, brought a suit in equity, in the Circuit Court of the United States for the District of Massachusetts, against the Crosby Steam Gauge and Valve Company a Massachusetts corporation, for the infringement of letters patent No. 58,294, granted to George W. Richardson, September 25, 1866, for an improvement in steam safety-valves. The specification of the patent is as follows:

"Be it known, that I, George W. Richardson, of the city of Troy, in the county of Rensselaer, in the State of New York, have invented a new and useful improvement on a safety-valve for steam generators, and I do hereby declare that the following is a full, clear and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part of this specification, in which Fig. 1 is an end view of my improved safety-valve and its seat, as seen from the bottom; Fig. 2 is an end view of the valve alone, as seen from the bottom; Fig. 3 is vertical section at *x x*, Fig 1, of the valve and seat in position; Fig. 4 is a vertical section at *y y*, Fig. 2, of the valve alone. Similar colors and letters of reference indicate corresponding parts in the several figures. *A A* is the head of the safety-valve; *B B B B* are wings to guide the valve into its seat *E E*; *c c* is a circular or annular flange or lip, extending over, slightly below, and fitting loosely around, the outer edge of the valve-seat *E E*; *D D* is a circular or annular chamber, into which the steam immediately passes when the valve lifts from its seat at the ground joint *F F*; *E E* is the valve seat; *F F* is the ground joint of the valve and seat; *P* is the countersink or centre upon which the point of the stud extending from the scale lever rests, in the usual manner. The nature of my invention consists in increasing the area of the head of the common safety-valve outside of its ground joint, and terminating it in such a way as to form an increased resisting surface, against which the steam escaping

from the generator shall act with additional force after it has lifted the valve from its seat at the ground joint, and so, by overcoming the rapidly increasing resistance of the spring or scales, insure the lifting of the valve still higher, thus affording so certain and free a passage for the steam to escape as effectually to prevent the bursting of the boiler or generator, even when the steam is shut off and the damper left open.

Fig. 1.

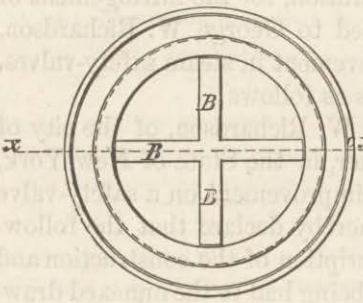


Fig. 2.

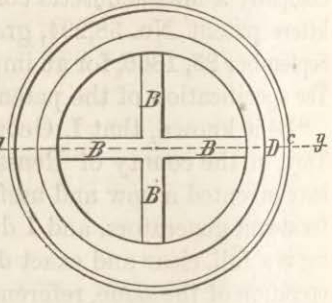


Fig. 3.

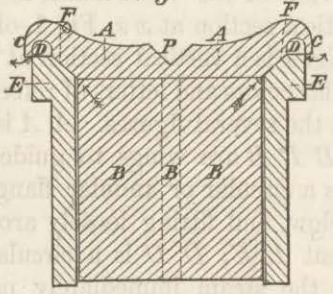
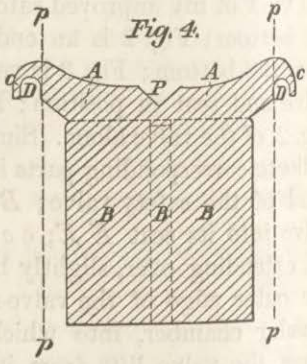


Fig. 4.



"To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation. To the head of the common safety-valve, indicated by all that portion of Fig. 2 lying within the second circle from the common centre, I add what is indicated by all that portion lying outside of the said circle, in about the proportion shown in the figure. A transverse vertical section of this added por-

tion is indicated, in Fig. 4, by those portions of the figure lying outside of the dotted lines *p p*, *p p*, while all that portion lying within the dotted lines *p p*, *p p*, indicates a transverse vertical section of the common safety-valve alone. This increased area may be made by adding to a safety-valve already in use, or by casting the whole entire. I terminate this addition to the head of the valve with a circular or annular flange or lip, *c c*, which projects beyond the valve-seat *E E*, Fig. 3, and extends slightly below its outer edge, fitting loosely around it, and forming the circular or annular chamber *D D*, whose transverse section, shown in the figure, may be of any desirable form or size. This flange or lip *c c*, fitting loosely around the valve-seat *E E*, is separated from it by about $\frac{1}{64}$ of an inch, for an ordinary spring or balance. For a strong spring or balance this space should be diminished, and for a weak spring or balance it should be increased, to regulate the escape of the steam, as required. Instead of having the flange or lip *c c* project beyond and extend below and around the outer edge of the valve-seat, as shown in Fig. 3, a similar result may be obtained by having the valve-seat itself project beyond the outer edge of the valve-head, and terminating it with a circular or annular flange or lip, extending slightly above, and fitting loosely around, the outer edge of the flange or lip *c c* of the valve-head; but I consider the construction shown in Fig. 3 preferable. With my improved safety-valve, constructed as now described, and attached to the generator in the usual way, the steam, escaping in the direction indicated by the arrows in Fig. 3, first lifts the valve from its seat at the ground joint *F F*, and then, passing into the annular chamber *D D*, acts against the increased surface of the valve-head, and by this means, together with its reaction produced by being thrown downwards upon the valve-seat *E E*, it overcomes the rapidly increasing resistance of the spring or balance, lifts the valve still higher, and escapes freely into the open air, until the pressure in the generator is reduced to the degree desired, when the valve will be immediately closed by the tension of the spring or balance. The escape of the steam by means of this safety-valve is so certain and free, that the pressure of the steam in the generator or boiler will

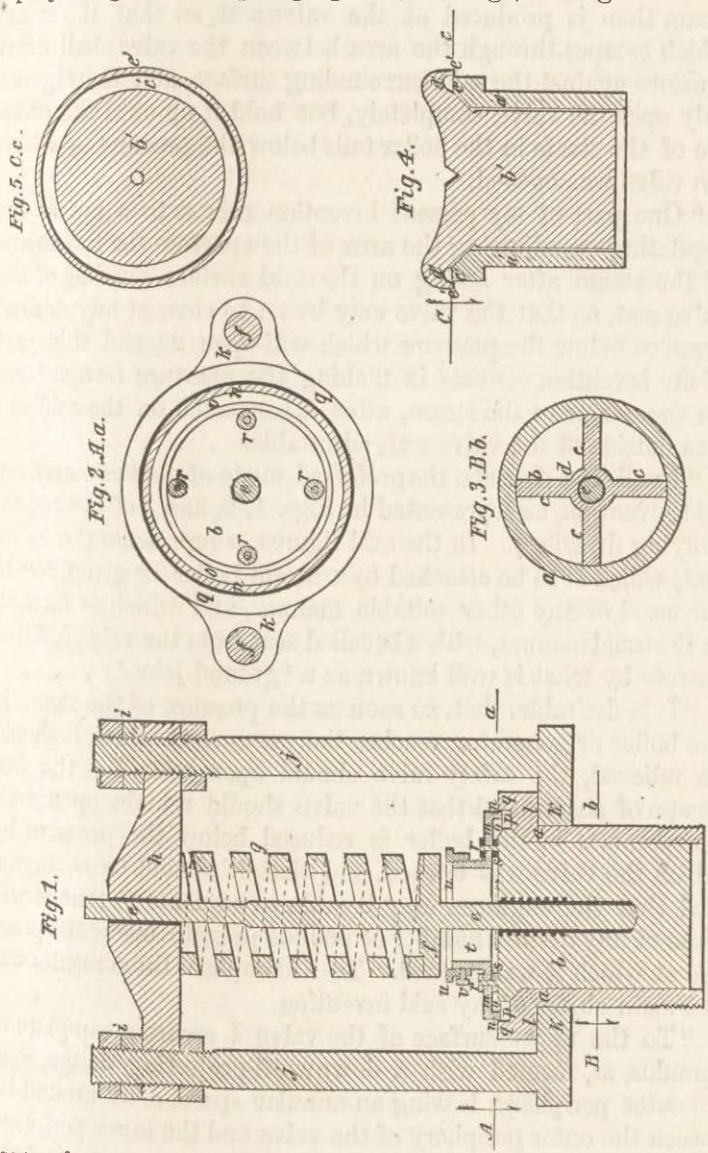
not increase beyond the point or degree at which the valve is set to blow off."

The claim of the patent is this: "What I claim as my improvement, and desire to secure by letters patent, is a safety-valve with the circular or annular flange or lip *c c*, constructed in the manner, or substantially in the manner, shown, so as to operate as and for the purpose herein described."

On the 2d of June, 1879, the same plaintiff brought a suit in equity, in the same court, against the same defendant, for the infringement of letters patent No. 85,963, granted to the same George W. Richardson, January 19, 1869, for an improvement in safety-valves for steam boilers or generators. So much of the specification of the patent as is involved in this suit is as follows:

"Be it known, that I, George William Richardson, of Troy, in the State of New York, have invented certain new and useful improvements in safety-valves for steam boilers or generators; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings making part of this specification, in which Figure 1 is a vertical section of the safety-valve and its connections, taken in the plane of the axis of the valve-stem; Fig. 2, a horizontal section taken in the plane of the line *A a* of Fig. 1, and Fig. 3 another horizontal section at the line *B b* of Fig. 1. Fig. 4 is a vertical section taken in the plane of the axis of the valve, representing a modification of my said invention; and Fig. 5, a horizontal section thereof, taken in the plane of the line *C c* of Fig. 4. My said invention relates to improvements in the invention described in letters patent granted to me, and bearing date the 25th day of September, 1866, which said patented invention relates to a means for providing a more free escape for the steam than could be obtained by safety-valves as constructed prior thereto, and to insure the keeping of the valve open until the pressure of the steam in the boiler or generator falls below the pressure which was required to open it, the said means so patented consisting in forming the valve with a surface outside of the ground joint, for the escaping steam to act against, the said surface being surrounded by

a projecting or overlapping lip, rim, or flange, leaving a narrow



escape for the steam when the valve is opened, but which, although of greater diameter than the valve-seat, by reason of

the said lap, presents a less area of opening for the escape of steam than is produced at the valve-seat, so that the steam which escapes through the area between the valve shall exert pressure against the said surrounding surface, and thereby not only open the valve completely, but hold it up until the pressure of the steam in the boiler falls below the pressure by which the valve was opened.

"One part of my present invention relates to a means for regulating or adjusting the area of the aperture for the escape of the steam after acting on the said surface outside of the valve-seat, so that the valve may be set to close at any desired pressure below the pressure which will open it; and this part of my invention consists in making the aperture or apertures for the escape of the steam, after it has acted on the said surface outside of the valve-seat, adjustable. . . .

"I will first describe the preferred mode of application of my said invention, as represented in Figs. 1, 2, and 3 of the accompanying drawings. In the said figures, *a* represents the valve-seat, which is to be attached to a steam boiler or generator in the usual or any other suitable manner, and which is formed, in the usual manner, with a bevelled seat from the valve *b*, fitted thereto by what is well known as a 'ground joint.' . . .

"It is desirable, that, so soon as the pressure of the steam in the boiler or generator reaches the pressure at which it should be relieved, the safety-valve should open wide for the free escape of steam, and that the valve should remain open until the pressure in the boiler is reduced below the pressure by which the valve was opened, and that it should be so organized that the engineer may be able to adjust it so that it will close at any desired number of pounds pressure below the pressure at which it was opened. To accomplish these results was the main object of my said invention.

"To the upper surface of the valve I secure a cap-plate or annulus, *m*, formed with a downward-projecting flange, *n*, at its outer periphery, leaving an annular space, *o*, all around between the outer periphery of the valve and the inner periphery of the flange *n* of the said cap. And the upper surface of the valve-seat *a* is extended all around, a little beyond the outer

periphery of the flange *n* of the cap, leaving an annular surface, *p*, surrounded by an upward-projecting rim, *q*, the plane of the upper edge of which, when the valve is closed, extends a short distance above the plane of the lower edge of the flange *n* of the cap. The said cap-plate *m* is connected with the top of the valve by studs *r r*, or cast with it, in such manner as to leave an open space, *s*, between the two, for the passage of steam to the central aperture *t* in the cap, through which steam can escape when the valve is lifted from its seat. This central aperture is surrounded by a projecting cylindrical flange, threaded on the outside, to which is fitted a threaded ring, *u*, that can be turned up or down to any desired elevation, and there secured by a set-screw, *v*. The disk-like projection *f*, on the valve rod or stem *e*, extends over the said central aperture *t* in the cap-plate *m*, and at such an elevation that the upper edge of the adjustable ring can be set in contact with it, or let down so far below it as to leave sufficient space for the free escape of steam.

"From the foregoing it will be seen, that, when the pressure of steam in the boiler or generator becomes sufficient to lift the valve from its seat, it acts against the surface of the annular space *o* between the bevel of the valve-seat and the downward-projecting flange *n* of the cap, to assist in lifting and holding up the valve, particularly when the valve is borne down by the tension of a spring, which presents an increasing resistance as the valve is lifted. If the projecting rim *q* were in the same plane with the lower edge of the flange *n*, the diameter of these parts being greater than that of the valve-seat, on the lifting of the valve and cap, the area of the opening between the flange *n* of the cap and the projecting rim *q* would be greater than the area of the opening between the valve and its seat, just in proportion as the diameter of the one is greater than the other, and the steam escaping from the valve would pass unchecked between the flange *n* and rim *q*, and would not exert any force against the surface of the annular space *o*; but, as the rim *q* extends above the lower edge of the flange *n* of the cap-plate, it follows that the aperture between the valve and its seat, by the lifting of the valve, is

always greater than the aperture between the flange *n* and the rim *q*, and hence the escaping steam, by its elastic force, will act against the surface of the annular space *o*, to assist in lifting and holding up the valve until the pressure in the boiler or generator falls below the pressure by which the valve was first opened. The difference between the pressure against which the valve will close and the pressure by which it will be opened will depend upon the distance between the outer periphery of the flange *n* of the cap-plate and the inner periphery of the projecting rim *q*. To render this adjustable, the area of the aperture for the escape of steam beyond the valve-seat must be adjustable. This is effected by the raising or lowering of the ring *u*. If it be set to its lowest position, the steam escaping from the valve will be free to escape between the top of the valve and the cap, through the central aperture, and thence between the upper edge of the ring *u* and the disk *f*, without materially aiding to lift or hold up the valve; but, by setting the ring *u* nearer to the under surface of the disk *f*, and thereby reducing the space for the escape of steam, it will be caused to act, by its elastic force, against the annular space *o* of the cap-plate, and thus assist in lifting the valve and holding it up.

"I have described and represented this as the simplest mode of adjusting the area of the aperture for the escape of the steam after it passes the valve-seat; but it will be obvious, that the same result may be attained by equivalent means, such, for instance, as making the ring *q* in adjustable segments, so that its diameter can be increased or diminished; but this would be more complicated than the mode first and fully described; and it will also be obvious, that the devices for holding up the valve may be inverted, as represented in Figs. 4 and 5 of the accompanying drawings, in which *a'* is the valve-seat and *b'* the valve, with its bevelled ground joint, the valve-seat *a'* having a flat annular surface *c'*, beyond the bevel, and the valve an annular surface *d'*, with a downward-projecting flange *e'*, the lower edge of which, when the valve is closed, extends a little below the plane of the surface *c'* of the valve-seat, and a narrow annular space being left for the escape of steam between the inner

periphery of the said flange and the outer periphery of the valve-seat *a'*, as set forth in my patent of September 25, 1866."

The claim of the patent is as follows:

"What I claim as new, and desire to secure by letters patent, is, the combination of the surface beyond the seat of the safety-valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described."

The answers in the two suits set up want of novelty, and cite, as anticipating patents, three English patents—one to Charles Ritchie, No. 12,078, August 3, 1848; one to James Webster, No. 1,955, July 12, 1857; and one to William Hartley, No. 2,205, August 19, 1857; also, an English publication made in 1858, called "The Artizan." Infringement is denied, and it is averred that the valves which the defendant makes and sells are the inventions of George H. Crosby, and are described in two patents granted to him and owned by the defendant, one No. 159,157, dated January 26, 1875; and the other, No. 160,167, dated February 23, 1875.

The same proofs were taken in the two suits, and they were heard together in the Circuit Court. In each suit that court made a decree dismissing the bill, 7 Fed. Rep. 768, and from each decree the plaintiff has appealed.

When Richardson applied for his patent of 1866 his claim read thus: "What I claim as my improvement, and desire to secure by letters patent, is, increasing the area of the head of the common safety-valve, outside of the ground joint *F F*, and terminating this addition with the circular or annular flange or lip *c c*, constructed in the manner, or substantially in the manner shown, so as to operate as and for the purpose herein described." This claim was rejected as defective, because not for a device, and it was amended to read as granted.

In the application for the patent of 1869 there were two claims. The second related to means for preventing the guides and stem of the valve from binding, and was rejected as not new, and stricken out, though the descriptive matter on which it was founded was retained. The first claim, as applied for,

was this: "What I claim as new, and desire to secure by letters patent, is, combining with the surface beyond the bevelled, or equivalent, seat of a safety-valve, the means herein described, or the equivalent thereof, for regulating or adjusting the area of the passage for the escape of steam beyond the bevel, or equivalent, seat, substantially as and for the purpose described." This claim was amended, on suggestions made by the Patent Office, to read as granted.

The view taken by the Circuit Court, in dismissing the bills, was, that some valves had been made before 1866, which embodied the same general principle as Richardson's, and were of some value, operating through the expansive power of steam exerted upon an additional chamber outside of the ground joint; and that what Richardson did was to so regulate the action of the chamber outside of the ground joint, by a crack or opening between the lip of the valve and its main body, that the steam would be confined or huddled, when it sought to escape from the chamber, and so the valve would be held up just long enough, and could fall rapidly before too much steam was lost. But, the cases went off on the question of infringement, and the Circuit Court found, that while the defendant's valve employed an additional surface to lift the valve as soon as it began to blow, and the pressure was regulated in part by a stricture, it differed from the plaintiff's, in that the additional area was not outside of the ground joint, but inside, and was not acted on independently of the valve itself, but was a part of it, and the escaping steam did not act at all by impact, but wholly by expansion. The conclusion was, that as Richardson was not the first to apply the idea of an additional area or of a stricture, he could not enjoin a valve which resembled his only in adopting such general ideas, and that his claims did not cover a valve having the mode of operation of the defendant's.

Edward H. Ashcroft, as assignee of William Naylor, obtained reissued letters patent of the United States, No. 3,727, dated November 9, 1869, on the surrender of letters patent No. 58,962, issued to said Naylor, October 16, 1866, for an improvement in safety-valves. Ashcroft brought a suit in equity, in the Circuit Court of the United States for the District of Mas-

sachusetts, against the Boston and Lowell Railroad Company, for the infringement of reissue No. 3,727. The infringement consisted in the use of valves constructed according to the patent of 1866 to Richardson. The court dismissed the bill, 5 Off. Gaz. 725, and 1 Holmes, 366, and 1 Bann. & A. 215, and on an appeal to this court, by the plaintiff, the decree was affirmed. 97 U. S. 189. In view of an English patent, No. 1,038, granted to Charles Beyer, April 25, 1863, it was held by this court, that Naylor was not the first person who devised means for using the recoil action of steam to assist in lifting the valve, or who invented the combination, in a spring safety-valve, of an overhanging downward curved lip, with an annular recess surrounding the valve-seat, into which steam is deflected as it issues between the valve and its seat. In speaking of the invention of Richardson, as described in his patent of 1866, this court said: "His invention, as he describes it, consists in increasing the area of the head of the common safety-valve outside of its ground joint, and terminating it in such a way as to form an increased resisting surface, against which the steam escaping from the generator shall act with additional force, after lifting the valve from its seat at the ground joint, and so, by overcoming the rapidly increasing resistance of the spring or scales, will insure the lifting of the valve still higher, thus affording so certain and free a passage for the steam to escape as effectually to prevent the bursting of the boiler or generator, even when the steam is shut off and the damper left open. Safety-valves previously in use were not suited to accomplish what was desired, which was to open for the purpose of relieving the boiler, and then to close again at a pressure as nearly as possible equal to that at which the valve opened. Sufficient appears, to show that Richardson so far accomplished that purpose as to invent a valve which would open at the given pressure to which it was adjusted, and relieve the boiler, and then close again when the pressure was reduced about two and one-half pounds to the inch, even when the pressure in the generator was one hundred pounds to the same extent of surface, which made it, in practice, a useful spring safety-valve, as proved by the fact that it went almost immediately into gen-

eral use. . . . When the valve opens the steam expands and flows into the annular space around the ground joint. Its free escape, which might otherwise be too free, is prevented by a stricture or narrow space formed by the outer edge of the lip and the valve-seat. By these means, the steam escaping from the valve is made to act, by its expansive force, upon an additional area outside of the device, as ordinarily constructed, to assist in raising the valve." On these views, it was held by this court, that, although important functions, not very dissimilar in the effect produced, were performed by the two valves there in controversy, the means used and the mode of operation were substantially different in material respects.

In the present case, the defendant has introduced in evidence the before-named English patents to Ritchie, Webster and Hartley, and the English patent to William Naylor, No. 1,830, granted July 1, 1863; and also letters patent of the United States, No. 10,243, granted to Henry Waterman, November 15, 1853, and the reissue of the same, No. 2,675, granted to him July 9, 1867. In view of all these patents, and of the state of the art, it appears that Richardson was the first person who described and introduced into use a safety-valve which, while it automatically relieved the pressure of steam in the boiler, did not, in effecting that result, reduce the pressure to such an extent as to make the use of the relieving apparatus practically impossible, because of the expenditure of time and fuel necessary to bring up the steam again to the proper working standard. His valve, while it automatically gives relief before the pressure becomes dangerously great, according to the point at which the valve is set to blow off, operates so as to automatically arrest with promptness the reduction of pressure when the boiler is relieved. His patent of 1866 gave a moderate range of pressure, as the result of the proportions there specified, and his patent of 1869 furnished a means of regulating that range of pressure, by a screw ring, within those narrow limits which are essential in the use of so subtle an agent as steam.

In regard to all of the above patents, adduced against Richardson's patent of 1866, it may be generally said, that they

never were, in their day, and before the date of that patent, or of Richardson's invention, known or recognized as producing any such result as his apparatus of that patent produces, as above defined. Likenesses in them, in physical structure, to the apparatus of Richardson, in important particulars, may be pointed out, but it is only as the anatomy of a corpse resembles that of the living being. The prior structures never effected the kind of result attained by Richardson's apparatus, because they lacked the thing which gave success. They did not have the retarding stricture which gave the lifting opportunity to the huddled steam, combined with the quick falling of the valve after relief had come. Taught by Richardson, and by the use of his apparatus, it is not difficult for skilled mechanics to take the prior structures and so arrange and use them as to produce more or less of the beneficial results first made known by Richardson; but, prior to 1866, though these old patents and their descriptions were accessible, no valve was made producing any such results. Richardson's patent of 1866 states that the addition to the head of the valve terminates in an annular lip, which fits loosely around the valve-seat, and is separated from it by about $\frac{1}{64}$th of an inch for an ordinary spring, and a less space for a strong spring, and a greater space for a weak spring, forming an annular chamber, and regulating the escape of the steam; that the steam, when the valve is lifted, passes beyond the valve-seat, and into the annular chamber, and acts against the increased surface of the valve-head, and thus overcomes the increasing resistance of the spring due to its compression, and lifts the valve higher, and the steam escapes freely into the open air, until the pressure is sufficiently reduced, when the spring immediately closes the valve. It is not shown that, before 1866, any known valve produced this result. On the contrary, Richardson testifies, that, for about twenty years before 1866, he was acquainted with safety-valves in practical use, by working in the locomotive repair shops of railroad companies, part of the time as foreman, and as a locomotive engineer, and that he never, before his invention, knew, in practical use or on sale, of any spring-loaded safety-valve, capable of opening to relieve the boiler when the working

pressure was exceeded, and of automatically closing with a small loss of working pressure. He also says that he was in England, for about four months, in 1873, bringing his valve to the notice of officials in the shops of some of the largest railroad companies (his valve being one especially useful on locomotive engines on railroads); that, while he was in England, he found no man who professed to be acquainted with, or to have heard of, a safety-valve which would automatically open and relieve the boiler at a predetermined working pressure, and automatically close when such working pressure had been slightly reduced, or who admitted that such a valve could be made until he had seen Richardson's valve work; that the master mechanics at the shops named did not believe he could make a valve close within 25 pounds of the blowing-off point; that he showed them the working of his valve with no excess beyond working pressure, and with but from 3 to 5 pounds reduction from a pressure of 130 pounds per square inch in the boiler; that he did not hear, in England, of any of the Ritchie, Webster or Hartley valves, but heard the Naylor valve blow; and that, when it blew, the steam rose several pounds above the point where it commenced to blow, and it did not close promptly, tightly or suddenly. There is no evidence to contradict, or vary the effect of, this testimony.

Thomas Adams, of Manchester, England, who has spent a lifetime in the manufacture and practical working of safety-valves, testifies, that the Ritchie and Webster valves have never been in use practically in England, and the Hartley only in two or three cases, when it was a failure; that he himself has made and applied, in England, about 15,000 of Richardson's valves; that, if loaded at 120 pounds per square inch, his valve returns to its seat with a very small loss of pressure; that the Beyer valve, loaded at 120 pounds, reduces the pressure 30 pounds, before returning to its seat; and that Naylor's has been superseded by Richardson's.

It appears to have been easy enough to make a safety-valve which would relieve the boiler, but the problem was to make one which, while it opened with increasing power in the steam against the increasing resistance of a spring, would close sud-

denly and not gradually, by the pressure of the same spring against the steam. This was a problem of the reconciliation of antagonisms, which so often recurs in mechanics, and without which practically successful results are not attained. What was needed was a narrow stricture, to hold back the escaping steam, and secure its expansive force inside of the lip, and thus aid the direct pressure of the steam from the boiler, in lifting the valve against the increasing tension of the spring, with the result, that, after only a small, but a sufficient, reduction in the boiler pressure, the compressed spring would, by its very compression, obtain the mastery and close the valve quickly. This problem was solved by Richardson and never before. His patent of 1869 describes the arrangement and operation of the whole apparatus, with the adjustable ring, thus: When the pressure of the steam lifts the valve, the steam acts against the surface of an annular space between the bevel of the valve-seat and the downward projecting flange of the cap-plate, to assist in holding up the valve against the increasing resistance of the spring. The aperture between the valve and its seat is always greater than that between the flange and the upward projecting rim, and thus the steam in the annular space assists in holding up the valve till the boiler pressure falls below that at which the valve opened. The difference between the closing pressure and the opening pressure depends on the distance between the flange and the rim. There is a central aperture in the cap, through which the steam escapes when the valve is lifted, which is surrounded by a projecting cylindrical flange, threaded on the outside, to which is fitted a threaded ring, which can be turned up or down, and secured by a set screw. By this means, the area of the aperture for the escape of steam beyond the valve-seat is adjustable, the space being largest when the ring is down and smallest when the ring is up.

Ritchie's patent, in speaking of his valve, says: "This valve is weighted by a helical spring *i* (shown at Figure 2) of sufficient power according to the required pressure of the steam; and, when it is intended to be used as a reserve safety-valve, I place the spring around that part of the stem below the valve, that is to say, within the boiler, as shown at Figure 2. The

advantage of this form of construction of valve over the ordinary valve is as follows: As soon as the pressure of the steam raises the valve from its seat, the flange *h*, being exposed to the pressure of the steam, presents an increased surface, which compensates for the increasing resistance of the helical spring *i*, until the valve has been raised to a height equal to the area of the steam-way, when it allows the steam or vapor to escape freely." In an article in "The Artizan," published in England, in July, 1858, signed by Ritchie, and referring to his patent of 1848, it is said of his valve: "The top area being made double that of the under side or steam-way, such a valve would quickly reduce the pressure in the boiler to half that at which the valve lifted; and so, also, of other proportions. Hence it is chiefly suited for a reserve valve." This shows the existence of the very evil which Richardson remedied. Ritchie's patent and publication say nothing about any stricture.

The evidence in the present case shows satisfactorily, that valves made in conformity with the measurements of the drawing of Ritchie's patent do, in practice, reduce the pressure in the boiler to such an extent, after that pressure is properly relieved, and before they close, as to involve great loss of time and consumption of fuel before the initial pressure is restored. The experimental valves produced by the defendant as structures made according to Ritchie's patent vary from the dimensions of his drawing, and the variations are those which result from the instructions given by Richardson in his patents. Ritchie gives no information how to make a valve work at a predetermined pressure, or how to make it work with a small range of difference between the opening and closing pressures, or how to proportion the strength of the spring and the size of the stricture to each other. The same thing is true of the Webster and the Hartley patents.

The Webster patent shows a huddling chamber and a stricture. But the evidence shows that valves made with the proportions shown in the drawings of Webster work with so large a loss of boiler pressure, before closing, as to be practically and economically worthless. Webster's patent describes a means of making the area for the escape of steam adjustable, consist-

ing in adjusting up and down, on a smooth valve-stem, a sliding collar or flange, and fixing it in place by a set-screw. But it does not show the screw-ring of Richardson, with its minute delicacy of adjustment and action.

Nothing further need be said as to the Hartley valve or the Beyer valve.

The original patent to Waterman was issued in 1853. His attention had been turned to the subject of safety-valves for locomotive engines. He invented what is described in that patent, but he testifies that, before 1866, he never saw a safety-valve capable of keeping the pressure at a point not above working pressure, and of relieving the boiler with but a small loss of pressure; that his valve would let the steam down about 15 pounds, and was not practical for an ordinary locomotive; and that the Richardson valve, when introduced, went at once into general use. The Waterman valve had a supplemental surface, on which the steam acted to aid in the raising of the valve; and this was shown in the drawing of Waterman's original patent, but the specification did not describe it. Waterman's original patent did not show the use of a spring, and prior to its reissue his valve had not been made with a spring. After Richardson obtained his patent of 1866, and Waterman knew of Richardson's valve, they combined the interests in their two patents, and the reisue of Waterman's was obtained, with the co-operation of Richardson, he signing as a witness the specification of the reissue. That specification, granted in 1867, describes an overhanging part of the valve as increasing its area outside of, and beyond, the ground joint, and a concentric rim or ledge, which directs the steam upward against such overhanging part of the valve, so that the valve is assisted in rising. The specification was drawn in view of Richardson's patent and valve, and for the purpose of making a claim, which was then made, and which was not in Waterman's original patent, to a combination of the concentric rim or ledge with the overhanging part of the valve. The specification states, that the valve and its seat are so constructed that the escaping steam will act on an increased area of the valve after it has risen from its seat, and strike the overhanging or

projecting annular surface above, and outside of, and beyond, the ground joint. It also states, that a proper modification of the overhanging or projecting annular surface will modify the force of the steam; that, if such surface be large, the valve will be opened suddenly and discharge so much steam that the pressure in the boiler will be considerably reduced before the valve closes; that such surface may be made so small that but little more than the surplus steam will escape; that the success or efficiency of the valve will depend on a proper proportion between the overhanging annular surface and the concentric rim or ledge, because, if a free discharge of steam between them is allowed, the valve will not be assisted in rising, and, if the escape of steam is too small, the valve will rise too easily, and remain open too long, and the steam will be so much reduced in pressure as seriously to impair the economical and efficient action of the apparatus; and directions are given as to the sizes of the overhanging part, and of the ledge or rim, and of the opening, for a valve of a specified diameter, acting with a specified pressure of steam. Nothing of all this was found in the specification of the original Waterman patent. It, therefore, has no effect, as against Richardson's patent of 1866, to destroy the validity of that patent.

If anything which Richardson did in respect to reissuing the Waterman patent, could, in any event, affect the rights of the present plaintiff under either patent sued on, as to which we express no opinion, it is sufficient to say, that the present defendant claims, in its answers, no benefit from any action of Richardson's in respect to the Waterman patent, as operating in its favor or inuring to its benefit, as an equitable defence in these suits.

Richardson is, therefore, entitled to cover, by the claim of his patent of 1866, under the language, "a safety-valve with the circular or annular flange or lip *c c*, constructed in the manner, or substantially in the manner, shown, so as to operate as and for the purpose herein described," a valve in which are combined an initial area, an additional area, a huddling chamber beneath the additional area, and a strictured orifice leading from the huddling chamber to the open air, the orifice being

proportioned to the strength of the spring, as directed. The direction given in the patent is, that the flange or lip is to be separated from the valve-seat by about $\frac{1}{64}$th of an inch for an ordinary spring, with less space for a strong spring, and more space for a weak spring, to regulate the escape of the steam, as required. As matter of law, this description is sufficient, within the rule laid down in *Wood* v. *Underhill*, 5 How. 1, and it is not shown to be insufficient, as a matter of fact.

Richardson is also entitled to cover, by the claim of his patent of 1869, under the language, "the combination of the surface beyond the seat of the safety-valve, with the means herein described, for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described," the combination with the surface of the huddling chamber, and the strictured orifice, of a screw ring, to be moved up or down to obstruct such orifice more or less, in the manner described.

The Richardson patents have a disc valve, an annular huddling chamber, an annular stricture at the outer extremity of the radii from the centre of the valve, an additional area which is radially beyond the disc valve, and a cylindrical steam-way. But, before 1866, an annular form of safety-valve was well known. Such a valve necessarily requires an annular steam-way. In the defendant's valve, complainant's Exhibit A, the same effects, in operation, are produced as in the Richardson valve, by the means described in Richardson's claims. In both structures, the valve is held to its seat by a spring, so compressed as to keep the valve there until the pressure inside of the boiler is sufficient to move the valve against the pressure of the spring, so that the steam escapes through the ground joint into a chamber covered by an extension of the valve, in which chamber the steam acts expansively against the extended surface, and increases the pressure in opposition to the increasing pressure of the spring, and assists in opening the valve wider; this chamber, in the defendant's valve, has, at its termination, substantially the same construction as Richardson's valve, namely, a stricture, which causes the steam to act, by expansive

force, against the extended surface of the valve; and in both valves, after the pressure of the steam has been somewhat reduced in the boiler, the closing movement is quickened, as the valve nears its seat, in consequence of the reduced pressure of the steam on the extended surface, and the valve comes suddenly to its seat. In the Richardson valve, the valve proper is a disc, and the extended surface is an annulus surrounding the disc, while, in the defendant's valve, the valve proper is an annulus, and the extended surface is a disc inside of the annulus. But this is a mere interchange of form between the valve proper and the extended surface, within the skill of an ordinary mechanic.

There is one structural difference between the two valves, which is now to be mentioned. In the Richardson valve, all the steam which escapes into the open air escapes from the huddling chamber, through a stricture which is smaller than the aperture at the ground joint. In the defendant's valve, the valve proper has two ground joints, one at the inner periphery of the annulus, and the other at its outer periphery, and only a part of the steam, namely, that which passes through one of the ground joints passes into the huddling chamber and then through the stricture, the other part of the steam passing directly from the boiler into the air, through the other ground joint. But all of that part of the steam which passes into the huddling chamber and under the extended surface, passes through the constriction at the extremity of such chamber, in both valves, the difference being only one of degree, but with the same mode of operation.

In the Richardson patent of 1869, the stricture is regulated as to size by an adjustable screw-ring. In the defendant's valve, there is a screw-ring or sleeve, which closes the escape orifices from the central chamber, more or less.

In the defendant's valve, the huddling chamber is at the centre instead of the circumference, and is in the seat of the valve under the head, instead of in the head, and the stricture, instead of being at the circumference of the head, is at the circumference of the seat of the valve. But this is only the use of means equivalent to those shown by Richardson, while the

mode of operation of the parts of the mechanism is the same, in their relation to each other, and the result is the same.

Richardson's invention brought to success what prior inventors had essayed and partly accomplished. He used some things which had been used before, but he added just that which was necessary to make the whole a practically valuable and economical apparatus. The fact that the known valves were not used, and the speedy and extensive adoption of Richardson's valve, are facts in harmony with the evidence that his valve contains just what the prior valves lack, and go to support the conclusion at which we have arrived on the question of novelty. When the ideas necessary to success are made known, and a structure embodying those ideas is given to the world, it is easy for the skilful mechanic to vary the form by mechanism which is equivalent, and is, therefore, in a case of this kind, an infringement.

It follows, from these views, that

The decrees of the Circuit Court must be reversed, and each case be remanded to that court, with a direction to enter a decree sustaining the validity of the patent sued on, and decreeing infringement, and awarding an account of profits and damages, as prayed for, and to take such further proceedings as may be proper and not inconsistent with this opinion, and with the further direction, as to the suit brought on the patent of 1869, *to grant a perpetual injunction, according to the prayer of the bill.*

BRYAN & Others *v.* KENNETT & Others.

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

Argued December 12, 1884.—Decided January 5, 1885.

The term "property," in the treaty by which the United States acquired Louisiana, comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed.

Statement of Facts.

The incomplete title acquired from the Spanish government, prior to the treaty of St. Ildefonso between Spain and France, to lands in the territory now embraced within the State of Missouri, was such a property interest as could be transferred by mortgage or reached by judicial process.

Congress intended by the act of February 14, 1874, 18 Stat. 16, entitled "An Act to confirm certain titles in the State of Missouri," to recognize the claim of Austin arising from the Spanish concession, survey, and grant recited in its preamble, and to assure those who were in possession, by contract or by operation of law, and, therefore, assignees of Austin, that they would not be disturbed by any assertion of claim upon the part of the United States.

Questions involved in the determination of a suit in equity are not open to re-examination, in any collateral proceeding between the same parties or their privies, if the court rendering the decree had jurisdiction of the subject-matter and of the parties.

This action, in form ejectment, involved the title to an undivided half of a tract of land in the county of Washington, State of Missouri, containing six hundred and forty acres, part of a larger tract, containing seven thousand one hundred and fifty-three arpents, or six thousand and eighty-five acres, known as the Mine à Breton survey, or as United States survey, numbered 430, made in the name of Moses Austin, and dated August 14 and 15, 1817. In conformity with the instructions of the court, the jury returned a verdict for the defendants.

The plaintiffs in error, who were plaintiffs below, introduced in evidence a certified copy of the foregoing survey; also a certified copy of a recorded deed of February 15, 1820, by Moses Austin and wife, whereby the grantors bargained, sold, and conveyed to James Bryan, Levi Pettibone, and Rufus Pettibone, as tenants in common—one undivided half to Bryan and an undivided fourth each to the other grantees—"the whole of that certain tract of land heretofore granted to the said Moses Austin by the Spanish government, and confirmed to him by the government of the United States, containing 7,160 arpents, and being one league square, situated at and near the Mine à Breton, in the county of Washington and Territory aforesaid [Missouri,] being the only concession from the Spanish government to the said Moses Austin," &c.; excepting from such conveyance, several parcels, aggregating about

2,500 arpents, and which the grantor had previously conveyed to other persons.

The deed also provided that the grantor would not warrant and defend the premises against a judgment for about $14,000, which the Bank of St. Louis had obtained in the Superior Court of the Territory against him, for which debt that bank held, in addition, a mortgage on part of the premises conveyed; nor against three judgments in favor of Gamble's estate for about $1,029; nor against a judgment in favor of Alexander McNair, for about $450.

They also read in evidence an act of Congress, approved February 14, 1874, 18 Stat. 16, as follows:

"CHAP. 29. An act to confirm certain land titles in the State of Missouri.

"Whereas the Baron of Carondelet, governor-general of the Territory of Louisiana, did, on the fifteenth day of March, anno Domini seventeen hundred and ninety-seven, instruct Zenon Trudeau, lieutenant-governor of said Territory, to place Moses Austin in possession of a league square of land at Mine à Breton, in said Territory; and

"Whereas the said Moses Austin did, in the year anno Domini seventeen hundred and ninety-eight, take possession of the said land by moving upon it with his family, and did improve the same by building dwelling-house, blacksmith shop, furnace, and other improvements; and

"Whereas the said lieutenant-governor did, on the fourteenth day of January, seventeen hundred and ninety-nine, order Antone Lulard, surveyor in said Territory, to survey the said land and put the said Austin legally in possession of the same, which survey, numbered fifty-two, containing seven thousand one hundred and fifty-three arpents and three and two-thirds feet, was executed by said Antone Lulard, and a certificate of the same filed by him in November, anno Domini eighteen hundred; and

"Whereas Don John Ventura Morales, then governor at New Orleans, did, in the year of our Lord eighteen hundred

and two, in the name of the King of Spain, grant to the said Moses Austin the land so surveyed and located: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States hereby release whatever title they have to said lands now numbered four hundred and thirty on the plat in the surveyor-general's office, and in townships thirty-seven and thirty-eight, range two east, in the county of Washington and State of Missouri, containing seven thousand one hundred and fifty-three and thirty-two one hundredths arpents (six thousand eighty-five and twenty-nine one hundreths acres), to the heirs, legal representatives, or assigns of said Moses Austin, according to their respective interests therein: Provided, however, that this act shall not affect nor impair the title which any settler or other person may have acquired adverse to the title of said Moses Austin to any portion of said land."

They also proved that James Bryan, one of the grantees in the deed of February 15, 1820, intermarried in 1813 with Emily M. Austin, a daughter of Moses Austin. There were five children of that marriage, one of whom, Stephen, was born July 16, 1814, and died in the succeeding month. Three others, the present plaintiffs, were born, respectively, December 14, 1815, September 25, 1817, and January 12, 1821; while the remaining one, Elizabeth, was born in 1822 and died in 1833. Moses Austin died in 1821 and James Bryan in 1822. The widow of the latter intermarried in 1824 with James F. Perry, of which marriage there were five children, two of whom died in infancy during the lifetime of their parents, two others died without having been married, while the remaining one died in 1875, leaving several children. The surviving children of these two marriages, and their descendants, are the only living descendants of Moses Austin.

Upon the foregoing evidence the plaintiffs rested their case.

The defendants offered in evidence a duly certified copy of the order of Baron de Carondelet, dated March 15, 1797, to Zenon Trudeau. This paper not being found in the files of

the court could not be made a part of the bill of exceptions; but its import is shown by the preamble of the foregoing act of Congress.

They also read in evidence the following documents:

1. A copy, certified under the hand and seal of the register of lands for the State of Missouri, of "the plat of survey No. 52, containing 7,153 arps. 32⅔ p's, in the right of Moses Austin, as the same appears of record in first part of registre d'arpentage, page 85, Soulard's surveys, together with field-notes of the same;" and a copy of the record of the grant to Austin, under date of July 5, 1802, by "Don John Bonaventure Morales, treasurer of armies, intendant interim of the royal finances of the provinces of Louisiana and Western Florida, superintendent, sub-delegate, judge of arrivals, of lands, and King's domain," whereby was granted to Austin "complete property, use, and domain of the aforesaid 7,153 arpents 32⅔ feet of land in superficie, according to the results of figures and measures contained in the plat of survey drawn by said Soulard," &c. This was accompanied by a copy of the testimony taken in 1808 in support of Austin's claim, from which it appeared that he took possession of the land embraced in that grant as early as 1798 and made improvements thereon. 18 Amer. State Papers (3 Public lands), 682. 2. The claim of Austin, as set out by him upon the United States record of land titles.

The defendants introduced a large amount of other documentary evidence, which, in the view taken by the court of the case, it is unnecessary to give in detail. Its object was to show the execution of a mortgage, under the date of March 11, 1818, by Austin to the Bank of St. Louis, on the land in controversy, for the sum of $15,000; a judgment in the Superior Court of the Territory of Missouri, in favor of the bank against Austin for $14,001.85, rendered October 1, 1819 and a judgment in the same court, in favor of McNair, for $493,94; executions upon those judgments issuing in 1819, which were levied upon all the right, title, claim, interest, and property of Austin in the land embraced in the Mine à Breton survey (except three lots of described boundaries), and under which sales

were had March 21, 1820; a deed by the sheriff, making the sale to Charles R. Ross, who purchased as agent of the Bank of St. Louis, and to which no seal or scroll was affixed; duly recorded deeds from the bank to Charles R. Ross in trust; from Ross to Simpson, Price, Hammond, and Easton; from Simpson, Hammond, and Easton to Price; from Ross, agent, to Price; from Price to Smith and others in trust; from the latter, under date of June 29, 1822, to Louis Devotion; the death of Devotion, and the appointment and qualification of Savage and Walsh as his administrators; the resignation of Walsh, and the sale by Savage, as administrator, because of the insufficiency of personalty to meet debts of his intestate, and in conformity with the orders of the County Court of St. Louis County, having jurisdiction in the premises, of Austin's interest in the land embraced in the Mine à Breton survey; its purchase by John Deane; the confirmation of such sale; and the subsequent conveyance to Deane by the administrator of Devotion on May 28, 1835.

On the first day of April, 1836, Deane, having received possession under his purchase, exhibited his bill in equity in the Circuit Court of Washington County, Missouri, against James F. Perry and Emily, his wife; Stephen Perry and Eliza Perry; the present plaintiffs in error; and a child, whose name was alleged to be unknown, but who was averred to have been born of the intermarriage of James F. and Emily Perry. The bill alleged that the defendants were out of the jurisdiction of the court, and residents of the State of Texas; and that all of them, except James F. Perry and wife, were under the age of twenty-one years. It gave a detailed history of the title asserted by Deane under the before-mentioned proceedings, alleging, among other other things, that the sheriff who made the deed for the land sold in 1820 under the foregoing executions, inadvertently and by mistake omitted to affix a seal or scroll thereto; that the deed from Austin to James Bryan was without consideration, and was made with the intent, upon the part of Austin and Bryan, to hinder and delay the creditors of the grantor; and that Bryan took the conveyance with knowledge of and subject to the judgments and mortgages held against

Statement of Facts.

Austin by the Bank of St. Louis and McNair. The prayer of the bill was, that the defendants in that suit, in whose behalf an interest in the land was asserted, be compelled by a decree of court to answer to the complainant for all the right, title and interest each of them might have in the undivided moiety of the said tract of land, or "that the right, title and interest of James Bryan, at the time of his death, and of said James F. Perry and Emily, his wife, in her right, and of the said William Bryan, Moses Bryan, Guy Bryan, Stephen Perry, Eliza Perry, and the child, whose name is unknown, of the said Emily Perry, in the said undivided moiety of the said tract of land conveyed by said Moses Austin, by his deed, executed the fifteenth of February, 1820, to said James Bryan as aforesaid, be vested in your orator, and for such other and further relief as to the court shall seem just," &c.

The bill was verified by the oath of the complainant, and he also made affidavit that the defendants (naming them), and the child, whose name was unknown, of the said Emily Perry, defendants in the bill, were non-residents of the State of Missouri.

On the 26th of July, 1836, an order was made by the court reciting that the order of publication, previously made by the clerk in vacation, had been duly published, and a guardian *ad litem*, John Brickey, was appointed in behalf of the infant defendants. On the next day, an order was made reciting that the infant defendants—naming them—come "by their guardian, John Brickey, and file their answer; and the said James F. Perry, and Emily, his wife, having been notified to appear at this term, according to law, and answer the bill of the said complainant, or the same would be taken as confessed, and having failed to file any exceptions, plea, demurrer or answer to the bill, it is ordered that the same be taken as confessed against the said James F. Perry and his wife." It was further ordered and adjudged that the right, title and interest of Perry and wife in the undivided moiety of the land conveyed by Austin's deed of February 15, 1820, to James Bryan, "be vested in the said John Deane, the complainant, unless the said James F. Perry and wife appear at the next term of this court and file their answer to said bill."

Statement of Facts.

On the 30th day of November, 1836, the following decree was passed:

"And now at this day comes the said John Deane, the complainant, by his solicitor, and the said William Bryan, Moses Bryan, Guy Bryan, Stephen Perry, Eliza Perry, and a child, whose name is unknown, of the said Emily Bryan, defendants, by their guardian, John Brickey, and by agreement of the parties aforesaid, it is consented that the bill be taken in lieu of allegations, and thereupon, neither party requiring a jury, all and singular the premises are submitted to the court, who doth find that the matters aforesaid, in form aforesaid in the bill alleged, are true; and the said James F. Perry and Emily, his wife, having failed to appear at this term of the court and file their answer to the bill of complaint, it is ordered and adjudged and decreed that the decree heretofore entered in this cause against them be, and the same is hereby, made final.

"And it is further ordered, adjudged, and decreed that the right, title, and interest of the said William Bryan, Moses Bryan, Guy Bryan, Stephen Perry, Eliza Perry, and a child, whose name is unknown, of the said Emily Bryan, defendants, in and to the undivided moiety of that certain tract of land situate in the county of Washington, in this State, heretofore granted to Moses Austin by the Spanish Government, and confirmed to him by the Government of the United States, containing seven thousand one hundred and sixty arpents, and being one league square, situate at and near the Mine à Breton in the county of Washington, excepting such parcels thereof as the said Moses Austin had prior to the fifteenth day of February, in the year one thousand eight hundred and twenty, sold and conveyed, and which parcels so excepted are, fourteen hundred and thirty-two arpents to John Rice Jones, forty-five arpents to the county of Washington, two hundred and sixteen arpents to a Mr. Perry, two hundred and forty-three arpents to a Mr. Ruggles, fifty-eight arpents to a Mr. McGready, four arpents to John Brickey, senior, three hundred and twenty-four arpents to Mr. Ficklin, forty-five arpents to Mr. McCormick, one hundred and sixteen arpents to Mr. Brocky, and are described in the deeds and contracts to said purchasers for the same,

being the moiety conveyed as charged in the bill of complaint by Moses Austin to James Bryan, by his deed dated the fifteenth day of February, in the year one thousand eight hundred and twenty, be vested in the said John Deane the complainant.

"And it is further ordered, adjudged and decreed that the said defendants recover of the said complainant, John Deane, the costs and charges in this behalf expended.

"And it is further ordered, adjudged and decreed that the said William Bryan, Moses Bryan, Guy Bryan, Stephen Perry, Eliza Perry, and a child, whose name is unknown, of the said Emily Bryan, respectively, be allowed each the time of six months after he or she respectively comes of age to appear and show cause against this decree entered as aforesaid against them."

The present action was defended upon the following grounds: 1. That the defendants and those under whom they claim had been in the open, continuous adverse possession of the premises in controversy for more than thirty years prior to the commencement of the action. 2. That the equitable title to the premises emanated from the government of the United States on the 10th of April 1803; that the premises have not been in possession of the plaintiffs, or of any one under whom they claim, for a period of time exceeding thirty years prior to February 27, 1874, nor have plaintiffs, during that period, paid taxes thereon, but they have been paid by defendants and those under whom they claim; that on the 10th day of June, 1814, all title, both legal and equitable, to said premises passed from the United States, and that no action to recover the same has been instituted, as provided by law, prior to the institution of the present suit. 3. That the decree in the equity suit instituted on the 1st day of April, 1836, by John Deane, who then had actual possession of the premises, and under whom the defendants claim, estops the plaintiffs from maintaining their action and from claiming under the deed from Moses Austin to James Bryan, Levi Pettibone, and Rufus Pettibone any interest or estate in the premises adverse to said defendants.

Without any reference to the defence based upon adverse

possession, the jury were instructed to find, and did find, a verdict for the defendants. A general exception was taken by the plaintiffs to the "instructions" given by the court. Judgment was rendered on the verdict. The plaintiffs sued out this writ of error.

Mr. Henry H. Denison for plaintiffs in error.—I. Austin had no title in the league square, Mine à Breton, which could be subjected to levy and execution. This court has held that the act of March 26, 1804, annulled all grants included in the treaties made subsequent to the treaty of St. Ildefonso. *Foster* v. *Neilson*, 2 Pet. 253, affirmed in *Garcia* v. *Lee*, 12 Pet. 511; *United States* v. *Reynes*, 9 How. 127; *United States* v. *D'Auterine*, 10 How. 609; *United States* v. *Philadelphia and New Orleans*, 11 How. 609; *De Montault* v. *United States*, 12 How. 47; *United States* v. *Lynde*, 11 Wall. 632. Those who come in under a void grant can acquire nothing. *Polk's Lessee* v. *Wendell*, 5 Wheat. 293; *United States* v. *Arredondo*, 6 Pet. 691, 731; *Sampeyreac* v. *United States*, 7 Pet. 222, 241.—II. If the act of April 12, 1814, embraced the Morales grant, it could only confirm the equitable title. The legal title still remained in the government. *Papin* v. *Hines*, 23 Missouri, 274.—III. But the Austin claim was not confirmed by that act. *Burgess* v. *Gray*, 16 How. 48.—IV. It was essential to the validity of an execution issuing out of the Superior Court that it should be under a seal purporting to be the seal of the Superior Court for the Circuit. On this point the counsel quoted sundry laws of Missouri.—V. The executions under which the sale of the Mine à Breton survey was made were without seals, and void. A levy of a void execution is void, especially when made on lands which the judgment debtor held by a void concession. Until an inchoate title be confirmed it has no standing in a court of equity. *Burgess* v. *Gray*, 15 Missouri, 220; *Insurance Co.* v. *Hadlock*, 6 Wall. 556. VI. The sheriff's sale was further void as an attempt by the bank by means of a levy and execution to deprive a mortgagor of his equity of redemption and of his rights under the mortgage contract. *McNair* v. *O'Fallon*, 8 Missouri, 188. A judgment brought collaterally before the

court, may be shown to be void upon its face. *Webster* v. *Reid*, 11 How. 437; *Albee* v. *Ward*, 8 Mass. 79; *Miller* v. *Handy*, 40 Ill. 448.—VII. The sheriff's deed to Ross was void for want of seal. *Moreau* v. *Detchemendy*, 18 Missouri, 522. A court of equity cannot relieve against this defective execution. *Bright* v. *Boyd*, 1 Story, 478. See also *Moreau* v. *Branham*, 27 Missouri, 351; *Grimsley* v. *Riley*, 5 Missouri, 280; *Walker* v. *Keile*, 8 Missouri, 301; *Harley* v. *Ramsey*, 49 Missouri, 309.—VIII. The sheriff's deed is also void for want of seal to the clerk's certificate. *Allen* v. *Moss*, 27 Missouri, 354; *Alden* v. *King*, 35 Missouri, 216; *Adams* v. *Buchanan*, 49 Missouri, 64; *Ryan* v. *Carr*, 46 Missouri, 483; *Hammond* v. *Coleman*, 4 Missouri, App. 307.—IX. The deed of Price to Ross is inoperative and void. The doctrine is well settled, in relation to solemn instruments under seal, that the principal will only be bound where he is both in form and substance the contracting party. It must be his deed. If it be the deed of the agent only, it will neither pass the title of the principal, nor bind him as a covenantor. *Townsend* v. *Corning*, 23 Wend. 435. See also *Wood* v. *Goodridge*, 6 Cush. 117; *Thurman* v. *Cameron*, 24 Wend. 87. The addition to his name of the words "Attorney of Henry L. Sheldon" was a mere *descriptio personæ*. The fact that in truth he was the attorney or *procurador* of Sheldon cannot, by the most liberal interpretation, impart to the instrument executed by Chase the character of a conveyance by Sheldon. Chase might as well have described himself as of any other profession or occupation belonging to him as that of attorney of Sheldon. *Echols* v. *Cheney*, 28 Cal. 157. See also *Harper* v. *Hampton*, 1 H. & J. 622, 709; *Elwell* v. *Shaw*, 16 Mass. 42; *Barger* v. *Miller*, 4 Wash. C. C. 280; *Bobb* v. *Barnum*, 59 Missouri, 394. Not being under the corporate seal of the bank it is void.—X. It follows that Price, holding under a void deed, and having no title, could convey none. *Hiney* v. *Thomas*, 36 Missouri, 377; *Elliott* v. *Peirsol*, 1 McLean, 11.—XI. The notice on non-resident minors in *Deane* v. *Bryan* was insufficient.—XII. Brickey's consent as guardian that the allegations of the bill might be taken as confessed against non-resident minor defendants was made without

power. *Litchfield* v. *Buswell*, 5 How. Pr. 341; *Revely* v. *Skinner*, 33 Missouri, 98.—XIII. No decree can be taken against a minor on his own admissions or those of his guardian ad litem.

Mr. George D. Reynolds for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. He recited the facts, as above stated, and continued:

The objection that the record does not show a sufficient exception, upon the part of plaintiffs, to the instructions given to the jury, cannot be sustained. The series of propositions announced by the court, although styled instructions, embodies nothing more than the reasons that induced it to direct a verdict for the defendants. These propositions submitted no fact for the determination of the jury; for, they were accompanied by a peremptory instruction to return a verdict for the defendants. As the bill of exceptions contains all the evidence, and, in addition, sets forth the exceptions reserved by the plaintiffs, in the progress of the trial, to the admission of testimony, it is competent for this court to determine whether the exceptions were well taken, and, also, whether there was error in directing a verdict for the defendants. If, upon all the evidence, excluding such as was incompetent, plaintiffs were entitled to go to the jury—and such is the contention here—there was error of law in instructing them to find for the defendants. We proceed, therefore, to consider such of the questions argued by counsel as are deemed necessary to the determination of the case.

By an act of Congress, approved April 12, 1814, ch. 52, 3 Stat. 121, provision is made for the confirmation of the claims of every person or persons, or the legal representatives of any person or persons, claiming lands in the State of Louisiana, or the Territory of Missouri, by virtue of any incomplete French or Spanish grant or concession, or any warrant or order of survey, which was granted prior to the 25th of December, 1803, for lands lying within that part of the State of Louisiana which composed the late Territory of Orleans, or which was

granted for lands lying within the Territory of Missouri before the 10th day of March, 1804. In behalf of the plaintiffs it is contended that the Spanish grant of 1802, recited in the preamble of the act of February 14, 1874, was void, because made subsequent to the treaty of St. Ildefonso, concluded October 1, 1800, between Spain and France; Act of March 26, 1804, 2 Stat. 287, ch. 38, § 14; *Foster* v. *Neilson*, 2 Pet. 253, 304; that, if the grant to Austin was an incomplete grant, and, therefore, embraced by the act of 1814, that act operated only to confirm to him the equitable title to the land, the legal title remaining in the United States until the passage of the act of February 14, 1874; that the equitable title passed only under the restrictions and in the manner prescribed by the act of 1814; that, so far from Austin acquiring the legal title, the board of commissioners, organized under the act of Congress, found that his title was not a grant made and completed prior to the treaty of St. Ildefonso, 17 American State Papers (2 Public Lands), 678; 18 Ib. (3 Public Lands), 671; *Burgess* v. *Gray*, 16 How. 48; that, for these reasons, Austin did not, at the date of the before-mentioned judgments, have any title which could be mortgaged or which was subject to levy and sale under execution; and, consequently, that all the proceedings which had for their object to acquire or reach his interest in the Mine à Breton survey are inoperative to defeat their rights under the act of February 14, 1874, by which, for the first time, the United States parted with the legal title.

It is not necessary, in this case, that we should define the precise nature and extent of the interest acquired by Austin in this land, prior to or apart from the grant of 1802 by Morales, then governor at New Orleans. The order of the governor-general of the Territory of Louisiana, in 1797, that he be placed in possession; his taking possession of the land and improving it in 1798; the orders of the lieutenant-governor of the Territory, in 1799, that the land be surveyed and Austin put legally in possession, followed by the execution of that order, and the recording of the certificate of survey—all prior to the treaty of St. Ildefonso—certainly operated to give Austin a property

interest in the land, capable (even if the grant of 1802 was void) of being made a complete grant, with the consent of the United States. In *Soulard* v. *United States*, 4 Pet. 511, it was said by Chief Justice Marshall, that, in the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property; that the term "property," as applied to lands, comprehends every species of title, inchoate or complete, and embraces rights which lie in contract, executory as well as executed; and that, in this respect, the relation of the inhabitants to their government was not changed; the new government taking the place of that which had passed away. In *Strother* v. *Lucas*, 12 Pet. 410, 434–5, which involved the title to real estate in St. Louis, the court said that "the State in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it, 2 Pet. 301; by which this government put itself in place of the former sovereigns and became invested with all their rights, subject to their concomitant obligations to the inhabitants;" that "this court has defined property to be any right, legal or equitable, inceptive, inchoate or perfect, which, before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign 'with a trust,' and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district; according to the principles of justice and rules of equity;" and that "the term 'grant,' in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order, or permission to survey, possess or settle, whether evidenced by writing or parol or presumed from possession." So in *Hornsby* v. *United States*, 10 Wall. 224, 242, it was said that by the term "property," as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. See also *Carpenter* v. *Rannels*, 19 Wall. 138, 141; *Morton* v. *Nebraska*, 21 Wall. 660.

And in *Landes* v. *Perkins*, 12 Missouri, 238, the court said: "It is a matter of history, of which this court will take judicial notice, that, at the time of the cession of Louisiana to the United States, in that portion of the territory of which this State is composed, nineteen-twentieths of the titles to lands were like that involved in this case prior to its confirmation. There were very few complete grants. Most of the inhabitants were too poor to defray the expenses attending the completion of their titles, but they had faith in their government and rested as quietly under their inchoate titles as though they had been perfect. As early as October, 1804, we find the legislature speaking of freeholders and authorizing executions against lands and tenements. There being so few complete titles, the legislatures, in subjecting lands and tenements generally to execution, must have contemplated a seizure and sale of those incomplete titles which existed under the Spanish Government. At the date of the act above referred to, no titles had been confirmed by the United States. An instance is not recollected in which a question has been made as to the liability of such titles as Clamorgan's under the Spanish government to sale under execution. It is believed that such titles have been made the subject of judicial sales without question ever since the change of government."

That such was the law of Missouri is recognized by this court in *Landes* v. *Brant*, 10 How. 348, 370–1, where, among other things, referring to a title derived from the Spanish government, and confirmation of which was obtained from a board of commissioners, acting under the authority of the United States, it was said: "The imperfect title as then filed was subject to seizure and sale by execution; the ultimate perfect title demanded and granted was a confirmation and sanction by the political power of the imperfect title, and gave it complete legal validity."

We are of opinion, therefore, that, even upon the assumption that the Spanish grant of 1802 was void, the interest which Austin acquired by the concession of 1797, the order of survey, and the recorded survey of 1799, in connection with his actual possession, taken under competent authority, was a property

right which, at least as between private parties, could be transferred by mortgage or be reached by judicial process.

But it is contended that the defendants cannot claim title under the before-mentioned proceedings in the courts of the Territory and State of Missouri, and thereby defeat the rights of the plaintiffs under Austin's deed of 1820, because: 1. It was not competent for the bank to have Austin's interest sold under execution on a judgment, while it held a mortgage on part of the premises sold, and thus cut off his right of redemption; 2. The sheriff's deed to Ross was void for want of a seal or scroll affixed thereto. 1 Terri. Stats. Missouri, 120, § 45; *Moreau* v. *Detchemendy*, 18 Missouri, 522; *Allen* v. *Moss*, 27 Missouri, 354; *Moreau* v. *Detchemendy*, 41 Missouri, 431; *Grimsley* v. *Riley*, 5 Missouri, 280; *Harley* v. *Ramsey*, 49 Missouri, 309; 3. The deed from the bank was not under its corporate seal; and these matters all appearing upon the face of the record in the suit of *Deane* v. *Bryan*, instituted in 1836, no title passed by the decree therein, even if the court rendering it had jurisdiction. These propositions were necessarily involved in the determination of that suit, and, so far as they impeach the correctness of that adjudication, are not open to re-examination, in any collateral proceeding between the same parties or their privies, provided the court which rendered the decree had jurisdiction of the subject-matter and of the parties.

Its jurisdiction to pass any final decree affecting the rights of non-resident minors is assailed only upon grounds to be now stated.

1. It is contended that there was no authority, under the laws of Missouri, to proceed against the non-resident minors by publication. Counsel for the plaintiffs refers to the act of March 17, 1835, regulating the practice at law in the courts of Missouri, and calls attention to the fact that, while it provides for actual service of process upon infants, no provision is made for service upon non-resident defendants by publication. And referring to the act of March 7, 1835, regulating the practice in chancery, he insists that, while a mode is therein prescribed for the service of process upon resident and non-resident de-

fendants, no provision is made for service on non-resident minors. It is not questioned that, under the laws of Missouri, adult non-resident defendants in equity suits concerning real estate, may be proceeded against by publication in such cases as that instituted by Deane in 1836; but it is contended that non-resident infants could not be brought before the court in that mode. In this view we do not concur. It appears from the Missouri statutes, that the court which determined Deane's suit was a court of record, having exclusive original jurisdiction, in the county in which it was held as a court of equity, "in all cases where adequate relief cannot be had by the ordinary course of proceedings at law," with authority "to proceed therein according to the rules, usage and practice of courts of equity, and to enforce their decrees by execution, or in any manner proper for a court of chancery;" also, that "suits in equity concerning real estate, or whereby the same may be affected, shall be brought in the county within which such real estate, or a greater part thereof, is situate," and, in any county, "if all the defendants are non-residents;" and further, that "in all cases where the court may decree the conveyance of real estate, or the delivery of personal property, they may, by decree, pass the title of such property without any act to be done on the part of the defendants, when in their judgment it shall be proper; and may issue a writ of possession, if necessary, to put the party entitled into possession of such real or personal property, or may proceed by attachment or sequestration." Rev. Stat. Mo. 1835 (2d Edit. 1840), Title "Courts," p. 155; Ib. Title "Practice in Chancery," art. 1, §§ 1 and 2; art. 6, § 7.

By the same statute, provision is made for proceeding against defendants who are non-residents of the State, by publication, where the complainant, or any one for him, files with his bill an affidavit, stating their non-residence. Upon such affidavit being filed, the court, or the clerk, in vacation, was authorized to make an order, directed to such non-residents, notifying them of the commencement of the suit, stating the substance of the allegations and prayer of the bill, and requiring them to appear on a day to be therein named (allowing sufficient time

for publication) and answer the same, or the bill will be taken as confessed. Rev. Stat. Mo. 1835, Title "Practice in Chancery," art. 1, § 7. Similar proceedings were prescribed as to persons interested in the subject-matter of the bill, whose names appeared, from the verified allegations of the bill, to be unknown to the complainant. Ib. §§ 10, 11. While our attention has not been called to any statute of Missouri in force when Deane's suit was instituted, which, in terms, authorized publication against non-resident minors, there was no exception in their favor from the provision which permits that mode of bringing non-resident defendants before the court. They could be proceeded against by publication whenever the statute permitted such process against adults. 1 Daniell Ch. Prac. 164, 659, ch. 15, § 2. The provision authorizing courts of equity to proceed according to the rules, usage and practice of courts of chancery, had reference to the rules and practice which obtained in the English courts of chancery. *Ruby* v. *Strother*, 11 Missouri, 417; *Hendricks* v. *McLean*, 18 Ib. 32; *Creath* v. *Smith*, 20 Ib. 113. In conformity with that practice, the court, in the case of *Deane* v. *Bryan*, appointed a guardian *ad litem* to defend the suit for the non-resident infant defendants. 1 Daniell Ch. Prac. 160 to 163. And the record shows that he made defence.

2. But it is claimed that the decree was based upon the admissions by the guardian *ad litem* of the truth of the allegations of the bill, and was, for that reason, void. Without stopping to comment upon the authorities which counsel cite in support of this position, some of which hold that decrees *pro confesso* against infants are erroneous, not that they are subject on that ground to collateral attack as void, it is sufficient to say that the decree under examination was not of the character stated. The contention to the contrary rests entirely upon the recital in the decree, that, "by agreement of the parties . . . it is consented that the bill be taken in lieu of allegations." The meaning of those words is shown by reference to the before-mentioned act regulating the practice in chancery, by which it is provided, that, "within such time as the court shall require, before the hearing of a cause at issue, each party

shall set down distinctly the allegations made by him and denied by the other party, or which, by the course of proceedings in chancery, he is required to support by his testimony, and issues shall be made thereon accordingly, Rev. Stat. Mo. 1835, Title "Practice in Chancery," art. 3, § 1; that the testimony shall be confined to the issue thus made, Ib. § 2; and that "the trial of all issues and matters of fact shall be by jury, or, if neither party require a jury, by the court, and the allegations shall be disposed of by a general or special verdict before a final decree shall be made, except such as shall be expressly decided by the court to be immaterial or irrelevant to the merits of the cause." Ib. § 5. The consent given was, not that the court might take the allegations of the bill to be true, but only that the "bill be taken in lieu of allegations," thereby dispensing with the requirement of the statute that the complainant should formally "set down" the material allegations of his bill. The effect of the consent was to place the complainant under the necessity, imposed by statute as well as by the established rules in equity practice, of proving every allegation of fact necessary to authorize a decree against the non-resident infants. Nothing was confessed by the guardian *ad litem*, but, a jury being waived, the court found the matters alleged in the bill to be true, and decreed accordingly. That the evidence upon which the court acted does not appear in the record, is, perhaps, because the suit was heard upon oral testimony in connection with the official documents and records referred to in the bill. Ib. § 7.

We have, then, a final decree of a court of superior general jurisdiction, rendered in a suit that involved the title to a tract of land, embracing the premises in controversy, and situate in the county in which the court was held; in which suit the present plaintiffs, as non-resident minors, were parties defendant, having been brought, in the mode prescribed by the local law, before the court, by publication, and having made defence by guardian *ad litem* duly appointed, and by which decree it was adjudged that the right, title, and interest of the present plaintiffs and others, in the said tract, be vested in the complainant Deane, under whom the present defendants hold pos-

session. The decree, as we have seen, passed the title without any conveyance from the non-resident defendants, for, by its terms whatever title they held was vested in the complainant Deane. According to the settled principles of law, the plaintiffs are thereby estopped from asserting, in this collateral proceeding, any interest in the premises in controversy adverse to that of the defendants. It is not subject to collateral attack, because there is nothing on the face of the record which shows any want of jurisdiction in the court that rendered it. It was and is conclusive as to all the parties to that suit, and their privies, until reversed or modified on appeal, or unless, in proper time, it had been impeached, in some direct proceeding, and set aside or annulled.

One other question remains to be considered. Upon the supposition that Austin took nothing by the grant of 1802, and at most had but an equitable interest in the land, capable of being enlarged into a complete title in the mode prescribed by the acts of Congress, the plaintiffs claim that the rights of the United States were unaffected by any proceedings between private persons involving Austin's title; and, consequently, that the legal title passed to them under that clause of the act of February 14, 1874, which releases whatever title the United States may have, "to the heirs, legal representatives, or assigns of said Moses Austin." In other words, that the decree in 1836 does not preclude them from accepting from the government the legal title to the premises in controversy. We have seen that the property interest of Austin, whatever it was, passed, before the act of 1874, under valid judicial proceedings, to others than the present plaintiffs. If Congress intended to pass the title of the government to the heirs simply, there was no necessity to include his "legal representatives or assigns." But there could have been no such intention; for it was common knowledge, as it was the settled law, that such inchoate interest or title as Austin acquired from the Spanish government, prior to October 1, 1800, could, as between private persons, be transferred or reached by judicial process. We concur with the court below in holding that Congress intended, by the act of 1874, to recognize the claim of Austin arising from the

concession, survey and grant recited in its preamble, and to release to the assignee of such claim the remaining title (if any such there was) of the United States. And those who purchased, under the proceedings referred to, were assignees within the meaning of the act. There was no purpose to disturb their title or possession. On the contrary, the sole object of this legislation, so far as it may be ascertained from the debates in Congress, was to assure those who thus acquired possession, whether by contract or by operation of law, that they would not be disturbed by any assertion of claim upon the part of the United States. It originated with the representatives in Congress from Missouri, whose avowed purpose was to protect the interests of their immediate constituents. The necessity of this act arose from a then recent opinion of the Commissioner of the General Land Office, that the legal title to the land within the Austin claim was still in the United States. In order to quiet the fears of those "who have been in possession for half a century, claiming the land adversely against everybody, as well as the United States," the act of 1874 was passed. It had no other object. Cong. Rec., Vol. 2, Pt. 1, 43d Cong., 1st Sess. 1874, pp. 716, 910.

There is no error in the record, and

The judgment is affirmed.

NORTHERN LIBERTY MARKET COMPANY *v.* KELLY.

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

Submitted January 5, 1885.—Decided January 19, 1885.

A market-house company, incorporated for twenty years, with power to purchase, hold and convey any real or personal estate necessary to enable it to carry on its business, built a market house on land owned by it in fee simple, and sold by public auction leases for ninety-nine years, renewable forever, of stalls therein at a specified rent. The highest bidder for one of the stalls gave the corporation several promissory notes in part payment for the option of that stall, received such a lease, and took and kept possession of the stall; and afterwards gave it a note for a less sum, in compromise of

Statement of Facts.

the original notes, and upon express agreement, that if this note should not be paid at maturity, the corporation might surrender it to the maker, and thereupon the cause of action on those notes should revive: *Held*, That the new note was upon a sufficient legal consideration; and that the corporation, holding and suing upon all the notes, could recover upon this note only.

This was a writ of error to reverse a judgment for the defendant in an action brought on April 4, 1884, by a corporation formed for the purpose of erecting a market-house in the city of Washington and carrying on a marketing business there, upon twenty promissory notes made by him to the plaintiff, dated January 1, 1875, for $171.05 each, two payable in fifty-two months, two in fifty-eight months, two in sixty-four months, and two at the end of each succeeding six months, the last two being payable in one hundred and six months after date, and all bearing interest at the yearly rate of eight per cent.; also upon a promissory note made by the defendant, dated August 5, 1881, for $1881.60, payable in ninety days after date; and upon a promissory note, dated March 11, 1881, for $394.08, made by one William S. Cross, and guaranteed by the defendant, and payable in sixty days after date; each of the last two notes bearing interest at the yearly rate of six per cent.

The judgment was rendered upon a case stated by the parties, in substance as follows: The plaintiff is and since May 18, 1874, has been a corporation, duly incorporated under the general incorporation act in force in the District of Columbia, Rev. Stat. D. C. §§ 553–593, by which it became a corporation for twenty years, and capable of suing and being sued, and of taking, holding and conveying any real and personal estate necessary to enable it to carry on its business. On January 1, 1875, being the owner in fee of a parcel of land in the city of Washington, and having built a market-house thereon, it offered for sale by public auction leases for ninety-nine years, renewable forever, of the stalls in the market-house, at a specified rent, the highest bidder being entitled to his option of the stalls. At the sale the defendant was the highest bidder for a stall, and made and delivered to the plaintiff, in part payment

of the purchase money for the option of that stall, the twenty notes for $171.05 each, and afterwards received from the plaintiff such a lease of that stall, and took and has since retained possession of the stall under the lease. On August 5, 1881, the defendant, with full knowledge of the foregoing facts, including the fact that by the terms of incorporation the plaintiff's corporate existence was limited to twenty years, made and delivered to the plaintiff the note for $1881.60, in compromise of the twenty original notes, and upon express agreement that, if this note should not be promptly paid at maturity, the plaintiff might surrender it to the defendant, and thereupon the plaintiff's cause of action upon the original notes should revive. The note for $394.08 was made by Cross and guaranteed by the defendant under like circumstances, and in consideration of the surrender of two other notes similar in amount and consideration to the twenty notes before mentioned. All the notes in suit remain unpaid, otherwise than by the giving of the note for $1881.60, and all are still held by the plaintiff.

Mr. R. T. Merrick and *Mr. J. J. Darlington* for plaintiff in error.

Mr. James G. Payne for defendant in error.—The corporate existence of the company being limited to twenty years, the company was without power to make a lease for ninety-nine years with renewals. There was an entire failure of the consideration for which the original notes were given, the undertaking of the plaintiff being absolutely void. *Thomas* v. *Railroad Co.*, 101 U. S. 71. This disposes of the claim on the original notes. As to the note alleged to have been given in compromise, it was given and accepted upon the express agreement that if not promptly paid at maturity the plaintiff might surrender it to the defendant, and its cause of action upon the original notes should thereupon immediately revive. The plaintiff sues upon the original cause of action. This disposes of that claim. If it be claimed that the new note was a renewal of the original debt, we answer that as a renewal it would be open to the same objection of want of

legal consideration. *Merrifield* v. *Baker*, 9 Allen, 29, 34; *Pearce* v. *Railroad Co.*, 21 How. 441. The same considerations apply to the notes upon which the defendant is sued as guarantor.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The plaintiff insists that the original notes were valid, because a corporation, empowered to hold and convey real estate for the objects of its incorporation, may convey an estate in fee or any less estate in lands which it has purchased, and may therefore make a valid lease of them for any term of years, though extending beyond the limit of its corporate existence. But it is unnecessary to express a definitive opinion upon that point, because it is agreed in the case stated that the defendant gave, in compromise of the original twenty notes for $171.05 each, the new note for $1881.60. If the plaintiff had exceeded its corporate powers in making the original contract, yet it had authority to compromise and settle all claims by or against it under that contract. *Morville* v. *American Tract Society*, 123 Mass. 129. The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the new note. *Cook* v. *Wright*, 1 B. & S. 559; *Tuttle* v. *Tuttle*, 12 Met. 551; *Riggs* v. *Hawley*, 116 Mass. 596. By the terms of the agreement of compromise, the plaintiff's cause of action on the original notes was not to revive, in case of the new note not being paid at maturity, except upon the surrender of this note to the defendant. The plaintiff, not having surrendered it, but holding and suing upon it as well as upon the original notes, has not performed the condition on which the revival of the right of action on the original notes depended.

It follows, that the plaintiff cannot recover in this action on the original notes for $171.05 each, but is entitled to recover on the new note for $1881.60, and also, for like reasons, on the note for $394.08, made by Cross and guaranteed by the defendant.

Judgment reversed, and case remanded with directions to enter judgment for the plaintiff on the twenty-first and twenty-second counts.

TUCKER & Another *v.* MASSER & Others.

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

Submitted January 9, 1885.—Decided January 26, 1885.

A patent for a placer mining claim, composed of distinct mining locations, some of which were made after 1870, and together embracing over one hundred and sixty acres, is valid. *Smelting Co.* v. *Kemp*, 104 U. S. 636, was carefully considered, and is again affirmed.

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

Mr. L. C. Rockwell and *Mr. Charles J. Rowell* for plaintiffs in error.

No appearance and no brief for defendants in error.

Mr. Justice Field delivered the opinion of the court.

This is an action of ejectment for the possession of three lots in what is known as Stevens' and Leiter's subdivision of the City of Leadville, in Lake County, Colorado. The complaint is in the usual form under the practice established in that State, where the action is brought to obtain possession of land alleged to be part of the public domain, but of which the plaintiff claims to have a better right of possession than his adversary. It alleges that on the 10th of March, 1879, the plaintiff was and still "is the owner, by prior actual possession on the public domain, and by superiority of possessory title, and entitled to the immediate possession" of the described premises, and that they are of the value of $5,000; that on the 20th of that month the defendants wrongfully and unlawfully entered upon the premises, and wrongfully and unlawfully withheld them from the plaintiff to his damage of $1,000; that the rents and profits of the premises, from the date of the ouster, have been $200 a month, and aggregate $3,000. The plaintiff, therefore, asks judgment for the possession of the premises and for the damages, rents and profits. The answer of the defendants denies the general allegations of the com-

plaint, and avers that they are the owners of the premises and entitled to their possession.

On the trial the plaintiff offered proof tending to show prior occupation of the premises, the erection of some buildings thereon, his forcible dispossession by the defendants, and the damages he had sustained.

The defendants introduced in evidence a patent of the United States to William H. Stevens and Levi Z. Leiter, bearing date November 5, 1878, which covered the premises in controversy, and traced title from the patentees through sundry mesne conveyances. The patent was for a placer mining claim, and the plaintiff was allowed, against the objections of the defendant, to introduce, for the purpose of impeaching the patent, the proceedings before the Land Department of the government upon which it was issued. And the court decided that as it appeared upon such proceedings that the patent was issued upon four mining locations made after 1870 united in one claim, embracing two hundred and ninety acres or thereabouts, the patent was invalid and passed no title to the patentees, holding, in effect, that several distinct mining locations could not after that year be thus united in one claim for which a single patent could be issued. The plaintiff accordingly recovered.

The validity of a patent for a placer mining claim, composed of distinct mining locations, some of which were made after 1870, and together embracing over one hundred and sixty acres, was sustained in the case before us at October Term, 1881, of *Smelting Co.* v. *Kemp*, 104 U. S. 636. All the questions presented in the case at bar were there fully considered after two arguments of counsel, and we have seen no reason to question the soundness of the conclusions we then reached.

Upon the authority of that case,

The judgment below is reversed, and the cause remanded for a new trial.

CARDWELL *v.* AMERICAN BRIDGE COMPANY.

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

Submitted January 6, 1885.—Decided January 19, 1885.

The doctrine that, in the absence of legislation by Congress, a State may authorize a navigable stream within its limits to be obstructed by a bridge or highway, reasserted, and the former cases to that effect referred to.

The provision in the act admitting California, "that all the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants of said State, as to the citizens of the United States, without any tax, impost, or duty therefor," does not deprive the State of the power possessed by other States, in the absence of legislation by Congress, to authorize the erection of bridges over navigable waters within the State.

That provision aims to prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of tolls for their navigation.

Bill in equity, for the removal of a bridge erected by the defendant in error over the American River in California, below the lands of the plaintiff in error situate on that river.

The American River is a branch of the Sacramento River in California. It is entirely within the State, and navigable for small steamboats and barges from its mouth to the town of Folsom, a distance of thirty miles. By its junction with the Sacramento River, vessels starting upon it can proceed to the bay of San Francisco, and thence to adjoining States and foreign countries. It is therefore a navigable water of the United States, and, as such, is under the control of the general government in the exercise of its power to regulate foreign and inter-state commerce, so far as may be necessary to insure its free navigation.

The defendant was a corporation organized under the laws of California, and, pursuant to the authority conferred by an act of its legislature, had constructed a bridge over the American River, of twenty feet in width and three hundred feet in length, which was used as a roadway across the stream. Its floor was about fourteen feet above extreme low water, and about five feet above extreme high water; and the bridge was

without a draw or opening for the passage of vessels. Steamboats and other craft were therefore obstructed by it in the navigation of the river.

The complainant alleged that he was the owner of a large tract of land, bordering on the river, below Folsom, and raised many tons of grain each year; that he was also the owner of a steamboat and other vessels by which he could ship his grain down the river but for the obstruction caused by the bridge; that there were also large quarries of granite on his land sufficient to supply the markets of Sacramento and San Francisco for years, and also large deposits of cobble-stone which had a value for paving, and, but for the obstruction, he could ship the granite and cobble-stone by his vessels and sell them at a profit, whereas the expense of sending them by rail or other means open to him were such as to deprive him of all profit on them. He, therefore, filed his bill against the company, and prayed that it might be enjoined from maintaining the bridge across the river until a draw should have been placed in it sufficient to allow steamboats, vessels and watercraft, capable of navigating the stream, to pass and repass, freely and safely. A demurrer to the bill was sustained and the bill dismissed, and the case was brought here on appeal.

Mr. J. J. Scrivener, and *Mr. John L. Boone* for appellant.— The act admitting California, 9 Stat. 452, provided in § 3 that "all the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants of said State, as to the citizens of the United States, without any tax, duty, or impost therefor." This provision withdrew the subject matter of navigable rivers from the jurisdiction of the State, and distinguishes this case from the line of cases as to the power of States over them. In effect it leaves them subject to the exclusive will of Congress under article 1, section 8, of the Constitution. The court below took this view in language which we quote and adopt as part of our brief. The question is, has Congress done this with reference to the navigable waters of California? If Congress has so acted, that legislation is found in the act admitting California into the Union, which act provides, "that

all the navigable waters within the State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." 9 Stat. 452, 453. How can the American River be a "common highway," or how can it be "free" to "the citizens of the United States," or "the inhabitants of the State," with a low bridge across it, without a draw, and so constructed as to preclude all navigation by steamers or vessels? To be a common highway, or to be free to all to use as such, involves a capacity to be practically used as a highway, and such capacity is wanting where there is an impassable barrier or obstruction. "Now, an obstructed navigation cannot be said to be free." *Wheeling Bridge Case*, 13 How. 518, 565. This provision is a law of Congress, and it is valid, not as a compact between the United States and the State of California, but as a law of Congress, passed by virtue of the constitutional power of Congress to regulate commerce among the States and with foreign nations, and to establish post roads. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 224, 225, 229, 230; *Wheeling Bridge Case*, above cited, 566; *Woodruff* v. *North Bloomfield Mining Co.*, 1 West Coast Rep. 183, 212. What does this provision of the statute mean? Can there be any reason to suppose that Congress intended anything else than to make or continue the navigable waters of the State, by virtue of its power to regulate commerce, practical free highways, and to take away the power of the State to destroy or wholly obstruct their navigability? Had nothing been said upon the subject in the act of admission, but subsequently, after the admission of California into the Union "on an equal footing with the original States in all respects whatever," Congress had passed a separate, independent act, with no other provision in it, providing "that all the navigable waters within the State of California shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor," would anybody suppose that Congress, by the passage of such an act, under the circumstances indicated, could have any other purpose than to take

control of the navigable waters of the State for the purpose of preventing any interference with, or obstruction to, their navigability, or "so far as might be necessary to insure their free navigation?" See also *Hatch* v. *Wallamet Iron Bridge Co.*, 7 Sawyer, 127; *Wallamet Bridge Co.* v. *Hatch*, 19 Fed. Rep. 347. These principles bring this case within the uniform and unqualified line of decisions for a period of sixty years from *Gibbons* v. *Ogden*, 9 Wheat. 1, to *Miller* v. *Mayor of New York*, 109 U. S. 385.

Mr. J. B. Haggin, and *Mr. A. T. Britton* for appellee.

Mr. Justice Field delivered the opinion of the court. He recited the facts as above stated, and continued:

The questions thus presented are neither new nor difficult of solution. Except in one particular, they have been considered and determined in many cases, of which the most important are *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 564; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, and *Miller* v. *Mayor of New York*, 109 U. S. 385. In these cases the control of Congress over navigable waters within the States so as to preserve their free navigation under the commercial clause of the Constitution, the power of the States within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the States to regulate within their limits matters of internal police, which embraces among other things the construction, repair and maintenance of roads and bridges, and the establishment of ferries; that the States are more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as

an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams.

In *Wilson* v. *Blackbird Creek Marsh Co.*, a dam had been constructed across a small navigable river in the State of Delaware, by authority of its legislature; and this court held that the obstruction which it caused to the navigation of the stream was an affair between the government of the State and its citizens, in the absence of any law of Congress on the subject.

In the case of *Gilman* v. *Philadelphia*, a bridge across the Schuylkill River connecting East and West Philadelphia, had been constructed by authority of the legislature of Pennsylvania. It was without a draw, and prevented the passage of vessels to wharves above it, although the river was tide water and navigable to them, and commerce had been carried on to them for years in all kinds of vessels. The owner of the wharves filed a bill to prevent the erection of the bridge, alleging that it would be an unlawful obstruction to the navigation of the river and an illegal interference with his rights, and claimed that he was entitled to be protected by an injunction against the progress of the work, and to a decree for its abatement should it be proceeded with to completion. But the court held that the State had not exceeded the bounds of her authority in permitting its construction, and until the power of the Constitution was made effective by appropriate legislation, the power of the State was plenary, and its exercise, in good faith, could not be made the subject of review here. The court observed that it was not to be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, were means of commercial transportation, as well as navigable waters; that the commerce which passed over a bridge might be much greater than would be transported on the water obstructed; and that it was for the municipal power to weigh the considerations that applied to the subject, and to decide

which should be preferred, and how far either should be made subservient to the other.

These cases illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management, until Congress intervenes and supersedes their action.

The complainant, however, contends that Congress has intervened and expressed its will on this subject by a clause in the act of September 9, 1850, 9 Stat. 452, admitting California as a State into the Union, which declares "that all the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." 9 Stat. 453. This declaration is similar to that contained in the ordinance of 1787, for the government of the territory of the United States northwest of the Ohio River, so far as the latter relates to the navigable waters flowing into the Mississippi and the St. Lawrence. And in *Escanaba Co.* v. *Chicago* we held, with respect to the State of Illinois, that the clause was superseded by her admission into the Union, for she then became entitled to, and possessed of all the rights of domain and sovereignty which belonged to the original States. The language of the resolution admitting her declared, that it was on "an equal footing with the original States in all respects whatever;" so that, after her admission, she possessed the same power over rivers within her limits that Delaware exercised over Blackbird Creek and Pennsylvania over Schuylkill River.

The act enabling the people of Wisconsin Territory to form a Constitution and State government, and for admission into the Union, contains a similar clause. And yet, in *Pound* v. *Turck*, which was before this court at October Term, 1877, it was held, that a statute of that State which authorized the

erection of a dam across a navigable river within her limits, was not unconstitutional, in the absence of other legislation by Congress bearing on the case. The court does not seem to have considered the question as affected by the clause in the enabling act. That clause is not, it is true, commented on in the opinion, but the section containing it is referred to, and the declaration, that navigable streams within the State are to be common highways, must have been in the mind of the court. It held, however, that the case was governed by the decisions in the Delaware and Pennsylvania cases, observing that there were in the State of Wisconsin, and other States, many small streams navigable for short distances from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value, in water carriage, was as outlets to saw-logs and lumber, coal and salt, and that, in order to develop their greatest utility in that regard, it was often essential that dams, booms and piers should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges; but that to the legislature of the State the authority is most properly confided to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned. And the court added that the exercise of this limited power may all the more safely be confided to the local legislatures as the right of Congress is recognized to interfere and control the matter whenever deemed necessary.

The clause, therefore, in the act admitting California, quoted above, upon which the complainant relies, must be considered, according to these decisions, as in no way impairing the power which the State could exercise over the subject if the clause had no existence. But independently of this consideration, we do not think the clause itself requires the construction which the court below placed upon it, and which counsel urges so earnestly for our consideration. That court held that the clause contains two provisions, one that the navigable waters shall be a common highway to the inhabitants of the State as well as to citizens of the United States; and the other, that

they shall be forever free from any tax, impost, or duty therefor; that these provisions are separate and distinct, and that one is not an adjunct or amplification of the other. Possibly some support is given to that view by language used in the opinion in *Escanaba Co.* v. *Chicago.* In that case all the bridges over the Chicago River had draws for the passage of vessels, and we there held that a bridge constructed with a draw could not be regarded within the ordinance of 1787 as an obstruction to the navigation of the stream. We were not required to express any further opinion as to the meaning of the ordinance. But upon the mature and careful consideration, which we have given in this case to the language of the clause in the act admitting California, we are of opinion that, if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public. The act admitting California declares that she is "admitted into the Union on an equal footing with the original States *in all respects whatever.*" She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits.

Decree affirmed.

VOSS *v.* FISHER.

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

Argued January 15, 1885.—Decided January 26, 1885.

The doctrine that the use of one of the elements of a combination does not infringe a patent for a combination reasserted.

Patent No. 89,646 granted May 4, 1869, to C. J. Fisher, for an improved neck-pad for horses was not infringed by the device used by the appellant for the same purpose.

This was a suit in equity brought by Charles J. Fisher, the appellee, against Willibald Voss, the appellant, to restrain the infringement by the latter of letters patent granted to Fisher, dated May 4, 1869, "for an improved neck-pad for horses."

The answer denied infringement and denied that Fisher was the first inventor of the patented improvement.

Upon final hearing on the pleadings and evidence the Circuit Court rendered a decree in favor of the complainant, and the defendant appealed.

Mr. E. A. West and *Mr. L. L. Bond* for appellant.

Mr. Edward Taggart for appellee.

Mr. Justice Woods delivered the opinion of the court. He recited the facts, as above stated, and continued:

Neck-pads for horses, to which the letters-patent relate, were made of various kinds and used long before application for the patent was filed. They were attached to the horse-collar at its upper end immediately below the point where the two arms of the collar are buckled together. They rested on the neck of the horse, and their object was to prevent the galling of the horse's neck by the upper part of the collar. The improvement in neck-pads covered by the letters patent of the appellee was described as follows in the specification:

Opinion of the Court.

"This invention relates to a new device for protecting the necks of horses between the upper ends of the collar to prevent galling. For this purpose pieces of leather, cloth, or other material have heretofore been used, but without the desired success. Pads could not be made, as their inner faces could not be kept clear from wrinkles or protuberances, which are more injurious than the omission of a protecting device.

"My invention consists in producing a pad which may be attached to the collar, and which is perfectly smooth on the under side, the leather used on the under side being crimped in order to obtain the desired shape. . . . [The pad] is so shaped that it fits a horse's neck between the arms of the collar, it being thick on top and tapering toward the ends. . . . The under side of the pad is formed by a sheet of leather, . . . which is crimped in order to have its ends turned up without producing wrinkles; the stuffing in the pad is of hay, or any other suitable material. On the outer side of the pad, near the ends of the same, are straps . . . which are fitted around the collar . . . to prevent longitudinal displacement of the pad." The claim was as follows: "The neck-pad having an inner lining of crimped leather, and provided with straps . . . to allow its being fastened to the collar as herein shown and described for the purpose specified."

The thing made and sold by the appellant, which was charged to be an infringement of the appellee's patent, was a single piece of crimped leather having a piece of sheet metal so shaped as to fit it riveted to its upper side, in order to stiffen it and preserve its crimped form, and provided with straps to fasten it to the collar.

The specification of appellant's patent describes a stuffed pad. The drawing by which it is illustrated shows a stuffed pad, and the certified model of the invention from the Patent Office, exhibited at the hearing, is a stuffed pad.

It is clear, that if the patent is to be construed as a combination consisting of a stuffed pad, having an inner lining of crimped leather and straps to fasten the pad to the collar, the appellant does not infringe, for he does not use one of the elements of the combination, namely, the stuffed pad, nor its equiv-

alent. *Prouty* v. *Ruggles*, 16 Pet. 336; *Gould* v. *Rees*, 15 Wall. 187; *Rowell* v. *Lindsay*, *ante*, 97, and cases therein cited.

But counsel for appellee insists that the patent was not intended to cover a combination, but merely the forming of the under side of the pad by the use of a smooth sheet of leather crimped in order to have its ends turned up without producing wrinkles.

As already stated, the appellant does not use the crimped leather as the inner lining of a stuffed pad. He uses the crimped leather stiffened by a metal plate as a substitute for a stuffed pad with a crimped leather lining.

There is, therefore, no infringement, unless the patent of the appellee should be construed to cover simply a piece of leather crimped to the proper shape, and having its under side smooth and free from wrinkles, to be used to keep the upper part of the collar from galling the neck of the horse. If the patent is so construed it must be held void, for the evidence in the record is conclusive to show that such a device was made, sold, and used by many persons years before the date of the appellee's patent.

The result of these views is that

The decree of the Circuit Court must be reversed, and the cause remanded to that court, with directions to dismiss the bill.

CAILLOT & Another *v.* DEETKEN.

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

Submitted January 12, 1885.—Decided January 26, 1885.

This court can acquire no jurisdiction under a writ of error where the return to it is made by filing the transcript of the record here after the expiration of the term of this court next succeeding the filing of the writ in the Circuit Court.

The facts are stated in the opinion of the court.

Syllabus.

Mr. J. J. Scrivner for plaintiffs in error.

Mr. John A. Wright, *Mr. John F. Hanna* and *Mr. James M. Johnston* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

It has been repeatedly decided by this court that where no return has been made to a writ of error by filing the transcript of the record here, either before or during the term of the court next succeeding the filing of the writ in the Circuit Court, this court has acquired no jurisdiction of the case, and the writ having then expired, can acquire none under that writ, and it must, therefore, be dismissed. *Villabolos* v. *United States*, 6 How. 81; *Castro* v. *United States*, 3 Wall. 46; *Mussina* v. *Cavasos*, 6 Wall. 355, 358; *Murdock* v. *Memphis*, 20 Wall. 590, 624.

In the case before us the writ of error was filed in the Circuit Court in which the record was March 16, 1882, and the transcript that was returned with it was filed in this court November 28, 1884. Two full terms of the court had passed, therefore, between the filing of the writ of error in the Circuit Court and its return with the transcript into this court.

It must, therefore, be

Dismissed for want of jurisdiction.

CHEONG AH MOY *v.* UNITED STATES.

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

Submitted January 9, 1885.—Decided January 26, 1885.

The court declines to decide a question arising in a case which no longer exists, in regard to rights which it cannot enforce.

The facts are stated in the opinion of the court.

Mr. H. S. Brown and *Mr. Thomas D. Riordan* for plaintiff in error.

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

Mr. Justice Miller delivered the opinion of the court.

The plaintiff in error here is a Chinese woman who, arriving at San Francisco from China, was not permitted to land in that city, by reason of the acts of Congress of May 6, 1882, and the amendatory act of 1884, and, being forcibly kept on board the vessel, sued out a writ of habeas corpus to obtain her release.

On a hearing in the Circuit Court of the United States, it was ordered that she be returned on board the vessel in which she came, or some other vessel of the same line, to be carried back to China; and she was placed in the custody of the marshal who was directed to execute the order.

On undertaking to do this, it was found that the vessel had sailed, and the marshal placed his prisoner in jail for safe keeping, until another vessel should be at hand to remove her.

Her counsel, upon this state of facts, applied to the Circuit Court for permission to give bail on behalf of the woman and have her released from custody. The judges of the Circuit Court were opposed in opinion on the question of granting this motion, and, having overruled it, have certified the division to this court.

In the mean time it is made to appear to us, by the return of the marshal, and by affidavits, that on the 2d day of October, three days after the order was made overruling the motion, and ten days before the writ of error herein was served by filing it in the clerk's office of the Circuit Court, the marshal had executed the original order of the court by placing the prisoner on board the steamship New York, one of the Pacific Mail Steamships, about to start for China, and that she departed on said vessel on the 7th day of October. It thus appears that the order of deportation had been fully executed, and the petitioner in the writ of habeas corpus placed without the

jurisdiction of the court, and of the United States, six days before the writ of error was filed in the Circuit Court, and several days before it was issued.

The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail, it could be of no value to her, as the order by which she was remanded has been executed, and she is no longer in the custody of the marshal or in prison.

This court does not sit here to decide questions arising in cases which no longer exist, in regard to rights which it cannot enforce.

The writ of error is dismissed.

PRICE & Others *v.* PENNSYLVANIA RAILROAD COMPANY.

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

Argued January 15, 1885.—Decided January 26, 1885.

A person travelling on a railroad in charge of mails, under the provision of § 4000 Rev. Stat., does not thereby acquire the rights of a passenger, in case he is injured on the railroad through negligence of the company's servants.

A statute of Pennsylvania, passed April 15, 1851, Purdon, Tit. Negligence 2, 1093, makes the provision, now become common, for a recovery by the widow or children of a person whose death was caused by the negligence of another, of damages for the loss of the deceased.

A statute passed April 4, 1868, Purdon, Tit. Negligence 5, 1094, provides that "where any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depot and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of

action or recovery in all such cases against the company shall be such only as would exist if such person were an employé: *Provided*, That this section shall not apply to passengers."

The plaintiff in error sued the defendant in error for the loss of her husband by a death which the jury, by the following special verdict, found to be caused by the negligence of the company's servant or servants:

"We find for the plaintiff in the sum of ($5,000) five thousand dollars, subject to the opinion of the court on the question of law reserved, to wit: We find that A. J. Price at the time of his death was route agent of the United States Post Office Department, duly appointed and commissioned, his route being on the Western Pennsylvania Railroad from Allegheny City to Blairsville, in the State of Pennsylvania; that his duties as such agent required him to be on the mail car on the mail train of said road to receive and deliver mail matter; that for the purpose of his business and that of the postal department, and in accordance with the laws of the United States and the regulations of the Post Office Department, and acceptance thereof by the railroad company, one end of the baggage car on the mail train was divided off and fitted up for the use of the Department in carrying the mails, and that the duties of the said route agent required him to be in said room in the car during the running of the train; that said Price was daily on said train, making a round trip from Allegheny City to Blairsville and return; that on the 23d day of July, 1877, while at his post in his room on said car, Mr. Price was killed in a collision of the mail train coming west with another train of the defendant company going east.

"That said collision was caused by the negligence or misconduct of the conductor and engineer in charge of the train going east in neglecting or disobeying orders, and in failing to take necessary precaution to avoid a collision.

"We find that the Pennsylvania Railroad Company, by resolution dated April 16, 1868, accepted the provisions of the act of Assembly, approved 4th April, 1868, P. L. p. 59, and that [at the] time of the collision the Pa. R. R. Co. was operating the Western Pennsylvania Railroad under lease.

"If, under this finding of facts, and under the acts of Congress and acts of Assembly offered in evidence, and the postal regulations in evidence, the court should be of the opinion that the plaintiffs, as widow and children of deceased, are entitled to recover, then judgment to be entered on the verdict in favor of the plaintiffs.

"If the court should be of the opinion that the law is with the defendant, then judgment to be entered in favor of the defendant *non obstante veredicto*."

Upon this verdict the judge of the trial court held that the deceased was a person engaged in and about the train, within the meaning of the act of 1868, but that he was also within the *proviso* as a passenger, and gave judgment for plaintiff on the verdict. The judgment was reversed by the Supreme Court of Pennsylvania on the ground that the deceased was not a passenger within the meaning of the proviso, and a judgment was rendered for defendant (see 96 Penn. St. 256), to which this writ of error was prosecuted.

Mr. Charles A. Ray, *Mr. Edward A. Newman*, and *Mr. Thomas M. Bayne* for plaintiffs in error submitted on their brief.—When the act of 1865, 13 Stat. 504, was passed, authorizing the appointment of postal clerks to travel in charge of mails, it was well settled that such persons while discharging their duties were entitled to the rights of passengers. In England and New York it was so settled as to mail agents. *Callett* v. *London & Northwestern Railway*, 16 Q. B. 984; *Nolton* v. *Western Railroad*, 15 N. Y. 444. It was so settled as to the analogous case of a drover transporting stock. *Pennsylvania Railroad* v. *Henderson*, 51 Penn. St. 315. Being so settled the act of the legislature of Pennsylvania of 1868 should be so construed as not to deprive a Federal officer of this right, and thus impose upon him an additional hazard while discharging his duties. It is analogous to an attempt to tax his salary, which cannot be done. *Dobbins* v. *Erie County*, 16 Pet. 435. The proper construction is that the words, "*Provided* that this section shall not apply to passengers," is directed at existing facts and conditions. The elements necessary to fix the status

of a person with a railroad as a passenger were already settled. The statute declares that it shall not be construed so as to include such persons.

Mr. John Dalzell argued for defendant in error.

Mr. Justice Miller delivered the opinion of the court. He recited the facts as above stated, and continued:

The plaintiff argues here, and insisted throughout the progress of the case in the State courts, that by reason of certain laws of the United States as applied to the facts found in the verdict of the jury, the decedent was a passenger, and the Supreme Court erred in holding otherwise.

These laws are thus cited in the brief of plaintiff's counsel:

"Act March 3, 1865, § 8, 13 Stat. 506, provides that 'For the purpose of assorting and distributing letters and other matter in railway post offices, the Postmaster General may, from time to time, appoint clerks who shall be paid out of the appropriation for mail transportation.'

"§ 4000 Rev. Stat. requires that 'Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.'"

We do not think these provisions either aid or govern the construction of the proviso in the Pennsylvania statute.

The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that charac-

ter, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right*, as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States.

We are, therefore, of opinion that no question of federal authority was involved in the judgment of the Supreme Court of Pennsylvania, and the writ of error is accordingly

Dismissed.

DAKOTA COUNTY *v.* GLIDDEN.

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

Submitted January 5, 1885.—Decided January 26, 1885.

While payment of the sum recovered below in submission to the judgment is no bar to the right of reversal of the judgment when brought here by writ of error, a compromise and settlement of the demand in suit, whereby a new agreement is substituted in place of the old one, extinguishes the cause of action, and leaves nothing for the exercise of the jurisdiction of this court.

Evidence of facts outside of the record, affecting the proceeding of the court in a case on error or appeal, will be received and considered, when deemed necessary by the court, for the purpose of determining its action.

This was a motion to dismiss. The suit was on county bonds issued in aid of a railroad. Judgment below for the plaintiff. The defendant brought a writ of error to reverse it. Subsequently to the judgment, the county settled with the plaintiff and other bondholders, by giving them new bonds bearing a less rate of interest, and the old bonds, which were the cause of action in this suit, were surrendered and destroyed. These facts were brought before this court by affidavits and transcripts from the county records, accompanied by a motion to dismiss the writ of error.

Mr. R. P. Ranney and *Mr. J. M. Woolworth*, in support of the motion.

Opinion of the Court.

Mr. A. J. Poppleton and *Mr. J. M. Thurston* opposing.—I. The original bonds sued on were absolutely void. This is a settled question in this court. They were in all respects like the bonds passed upon in *Dixon County* v. *Field*, 111 U. S. 83. —II. The compromise bonds were issued without authority and were void for lack of power. If it be claimed that the Supreme Court of Nebraska has recognized their validity, it is answered that this conflicts with *Dixon County* v. *Field*, cited above, and that in questions involving the validity of negotiable instruments, this court is not bound by the decisions of State courts. *Pine Grove* v. *Talcott*, 19 Wall. 666; *Olcott* v. *Supervisors*, 16 Wall. 678; *Gelpcke* v. *Dubuque*, 1 Wall. 175.—III. The question of the validity of this compromise cannot be legitimately raised. It does not in any manner appear in the record, and ought not to be considered by the court.—IV. The circumstances and motives accompanying this proceeding, taken in connection with the resolute resistance of the adjoining County of Dixon, cannot be investigated in this court. This constitutes a strong reason for relegating the question of the validity of the alleged compromise to an appropriate tribunal.

Mr. Justice Miller delivered the opinion of the court.

This case comes before us on a motion to dismiss the writ of error.

The ground of this motion is that since the judgment was rendered, which plaintiff in error now seeks to reverse, the matter in controversy has been the subject of compromise between the parties to the litigation, which is in full force and binding on plaintiff and defendant, and which leaves nothing of the controversy presented by the present record to be decided.

The evidence of this compromise is not found in the record of the case in the Circuit Court, nor in any proceedings in that court, and it is argued against the motion to dismiss that it cannot, for that reason, be considered in this court.

It consists of duly certified transcripts of proceedings of the Board of Commissioners of Dakota County, who are the authorized representatives of that county in all its financial mat-

ters, of receipts of the parties or their attorneys, and of affidavits of persons engaged in the transaction.

These are undisputed on the other side, either by contradictory testimony, or by the brief of counsel who appear to oppose this motion. They leave no doubt of the fact, if it is competent for this court to consider them, that shortly after the judgment against the county in favor of Glidden was rendered, the parties entered into negotiations to settle the controversy, which, after due deliberation and several formal meetings of the board of commissioners, resulted in such settlement.

The judgment in the case was rendered on certain coupons for interest due on bonds issued by said county to aid in constructing railroads. These bonds bore interest at the rate of ten per cent. per annum, and became due in the year 1896. By the new agreement the county took up the bonds and the coupons on which judgment was rendered, and issued new bonds bearing six per cent. interest, the principal payable in the year 1902. These new bonds were delivered to plaintiff and accepted by him in satisfaction of his judgment and of his old bonds, and these latter were delivered by him to the county authorities and destroyed by burning.

There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money, or had in any other way satisfied that judgment without changing the rights of the parties in any other respect, its right to prosecute this writ of error would have remained unaffected.

But what was done was a very different thing from that.

Opinion of the Court.

A new agreement, on sufficient consideration, was made, by which the judgment itself, the coupons on which it was recovered, and the bonds of which these coupons were a part, were all surrendered and destroyed, and other bonds and other coupons were accepted in their place, payable at a more distant date and with a lower rate of interest, with the effect of extinguishing the judgment now sought to be reversed, so that the plaintiff in that judgment could not issue execution on it, though there is no supersedeas bond, to secure its payment.

It is a valid compromise and settlement of a much larger claim, but it includes this judgment necessarily. It *extinguishes* the cause of action in this case. If valid, it is a bar to any prosecution of the suit in the Circuit Court, though we should reverse this judgment on the record as it stands for errors which may be found in it. To examine these errors and reverse the judgment is a fruitless proceeding, because when the plaintiff has secured his object the relation of the parties is unchanged, and must stand or fall on the terms of the compromise.

It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction.

But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal.

The death of one of the parties after a writ of error or appeal requires a new proceeding to supply his place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record, and acted on. A release of errors may be filed as a bar to the writ. A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced, as an agreement to submit the case on printed argument alone, within the time allowed by the rule of this court.

This court has dismissed several suits on grounds much more liable to the objection raised than the present case, as in the

case of *Cleveland* v. *Chamberlain*, 1 Black, 419, where the plaintiff in error, having bought out the defendant's interest in the matter in controversy, and having control of both sides of the litigation in the suit, still sought for other purposes to have the case decided by this court. On evidence of this by affidavits the court dismissed the writ. Similar cases in regard to suits establishing patent rights or holding them void by the inferior courts, as in *Lord* v. *Veazie*, 8 How. 251, 254, *Wood Paper Co.* v. *Heft*, 8 Wall. 333, 336, have been dismissed, because the parties to the suit having settled the matter, so that there was no longer a real controversy, one or both of them was seeking a judgment of this court for improper purposes, in regard to a question which exists no longer between those parties.

It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the court must be that, not found in the transcript of the original case, because it occurred since that record was made up.

To refuse to receive appropriate evidence of such facts for that reason is to deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal the means of inflicting gross injustice.

The cases and precedents we have mentioned are sufficient to show that the proposition of plaintiff in error is untenable.

In the case of the *Board of Liquidation* v. *Louisville & Nashville Railroad Co.*, 109 U. S. 221, 223, a question arose on the presentation of an order made by the authorities of the city of New Orleans to dismiss a suit in this court in which that city was plaintiff in error. The order was based on a compromise between those authorities and the railroad company, which the board of liquidation intervening here alleged to be without authority and fraudulent. The court here did not disregard the compromise or the order of the city to dismiss the case, but, considering that the question of authority in the mayor and council of the city to make the compromise, and of the alleged fraud in making it, required the power of a court of original jurisdiction to investigate and decide thereon, continued the case in this court until that was done in the proper court. But when this was ascertained in favor of the

action of the mayor and council, the suit was dismissed here on the basis of that compromise order.

In the case before us we see no reason to impeach the transaction by which the new bonds were substituted for the old, and for the judgment we are asked to reverse, and

The writ of error is dismissed.

ANDERSON COUNTY COMMISSIONERS *v.* BEAL.

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

Submitted January 9, 1885.—Decided January 26, 1885.

Bonds issued by Anderson County, in Kansas, under legislative authority, and in payment of its subscription to the stock of a railroad company, after the majority of the voters of the county had, at an election, voted in favor of subscribing for the stock and issuing the bonds, recited, on their face, the wrong statute, but also stated that they were issued "in pursuance to the vote of the electors of Anderson County, September 13, 1869." The statute in force required that at least 30 days' notice of the election should be given, and made it the duty of the Board of County Commissioners to subscribe for the stock and issue the bonds, after such assent of the majority of the voters had been given. In a suit against the board on coupons due on the bonds, brought by a *bona fide* holder of them, it appeared, by record evidence, that the board made an order for the election 33 days before it was to be held, and had canvassed the returns and certified that there was a majority of voters in favor of the proposition, and had made such vote the basis of their action in subscribing for the stock and issuing the bonds to the company; and the court directed the jury to find a verdict for the plaintiff; *Held:*

(1.) The statement in the bonds, as to the vote, was equivalent to a statement that the vote was one lawful and regular in form, and such as the law then in force required, as to prior notice;

(2.) As respected the plaintiff, evidence by the defendant to show less than 30 days' notice of the election could not avail;

(3.) The case was within the decision in *Town of Coloma* v. *Eaves*, 92 U. S. 484.

(4.) The rights of the plaintiff were not affected by any dealing by the board with the stock subscribed for;

(5.) The issue or use of the bonds not having been enjoined, for two years and

Statement of Facts.

a half, between the day of election and the time the company parted with the bonds for value, and the county having, for 10 years, paid the interest annually on the bonds, it was estopped, as against the plaintiff, from defending on the ground of a want of proper notice of the election.

(6.) As the bill of exceptions contained all the evidence, and the defendant did not ask to go to the jury on any question of fact, and the questions were wholly questions of law, and a verdict for the defendant would have been set aside, it was proper to direct a verdict for the plaintiff.

This was an action at law, brought in the Circuit Court of the United States for the District of Kansas, by Thomas P. Beal, against the Board of County Commissioners of the County of Anderson, in the State of Kansas, to recover the amount of 90 coupons for $70 each due January 1, 1881, and the same amount due January 1, 1882. The coupons were cut from bonds alike except as to their numbers, of the following form:

"No. ——. County of Anderson. 1,000.
United States of America, State of Kansas.

Know all men by these presents, that the county of Anderson acknowledges to owe and promises to pay to Leavenworth, Lawrence & Galveston Railroad Co., or bearer, one thousand dollars, lawful money of the United States of America, on the first day of January, in the year of our Lord one thousand nine hundred, at the Farmers' Loan and Trust Co. Bank, in the city of New York, with interest at the rate of seven per centum per annum, payable annually on the first day of January in each year, on the surrender of the annexed coupons as they severally become due.

This bond is executed and issued under the provisions of, and in conformity to, An Act of the Legislature of the State of Kansas, approved February 26, 1866, entitled, An Act to amend an Act entitled An Act to authorize counties and cities to issue bonds to railroad companies, approved February 10, 1865, and in pursuance to the vote of the electors of Anderson County, of September 13, 1869.

In testimony whereof, The Board of County Commissioners of the said county of Anderson have caused these presents to be signed by the chairman of said Board and by the clerk of

the county, and to be sealed with the seal of said county, and to be registered by the treasurer of said county.

Dated January 1, 1870.

[SEAL.] H. CAVENDER, *Chairman.*
A. SIMONS, *Treasurer.* J. H. WILLIAMS, *Clerk.*"

The coupons read thus:

"No. —— $70.

The county of Anderson, State of Kansas, will pay to the Leavenworth, Lawrence & Galveston Railroad Company, or bearer, at the Farmers' Loan & Trust Co.'s Bank, in the city of New York, on the first day of January, A. D. 188–, seventy dollars, interest due on their bond.

J. H. WILLIAMS,
County Clerk."

The petition averred, as to each bond, that it erroneously recited that it was issued under the provisions of the act of February 20, 1866, whereas it was issued "under the provisions of, and in conformity to, the laws of the State of Kansas then in force, and in pursuance to the vote of the electors of Anderson County, of September 13, 1869, at an election regularly and duly ordered and held for that purpose;" that the bond was issued in payment of a subscription theretofore made by the county to the capital stock of the Leavenworth, Lawrence and Galveston Railroad Company; that on March 27, 1872, the bond was duly registered in the office of the auditor of the State; that, as each coupon falling due prior to January 1, 1881, matured, the same was paid by the officers of the county with the proceeds of a tax levied and collected each year by said county from its tax-payers for that purpose; and that, after said registration, and before the coupons became due, they became, for value, the property of the plaintiff.

The answer admitted, that, pursuant to an order passed by the Board of County Commissioners of the county, on the 11th of August, 1869, ordering a special election therefor, the said board submitted to the qualified voters of the county the ques-

tion of issuing bonds to said company, a copy of the order being annexed to the answer. It averred, that the bonds were issued without any consideration therefor, and without authority of law, and a vote was taken in the county on the 13th of September, 1869, pursuant to said submission, without the legal notice of thirty days having been given, at which election a majority of the persons voting voted in the affirmative; that up to the 1st of January, 1870, and for some time thereafter, the company's track was not completed, equipped or in full operation to the town of Garnett; that on the 5th of November, 1869, the company, through its president, Mr. Joy, corruptly induced Cavender and Lowry, who were a majority of the board, to agree to subscribe for 2,000 shares, of $100 each, of the capital stock of the company, and to sell and transfer the stock, for $1, to Joy, and to issue to Joy, in trust for the company, to be delivered by him to the company, when the road should be completed to Garnett, $200,000 of the bonds of the county; that for that purpose the commissioners made an order, on that day, of which a copy is annexed to the answer, and carried out said agreement; and that the plaintiff had knowledge of such corrupt agreement and of said facts before he acquired any of said bonds or coupons. There was a reply denying all the allegations of the answer.

The case was tried by a jury, which found a verdict for the plaintiff, for $14,321.34, for which amount, with costs, judgment was rendered. The defendant brought a writ of error.

There was a bill of exceptions setting forth all the evidence. The order of August 11, 1869, made by the board, was as follows:

"Ordered by the Board, that a special election be held in the several voting precincts in the county of Anderson, on Monday, September 13, 1869, whereat shall be submitted to the qualified voters, electors of said county, for adoption or rejection, the following proposition, to wit: Shall the county of Anderson subscribe $200,000 to the capital stock of the Leavenworth, Lawrence & Galveston Railroad Company, and issue the bonds of the county in payment thereof; said bonds pay-

able thirty years after their date, bearing interest at the rate of 7 per cent. per annum, payable annually; said bonds to bear date of January 1, 1870, and to be issued and delivered to said railroad company on the 1st day of January, A. D. 1870, and before that time, if said railroad shall on or before that time complete its line of railway to the town of Garnett, in said county; and, if said line of railway shall not be completed thus far by that time, then said bonds to be issued and delivered when said line of railway is completed to the town of Garnett, in said county, provided the county of Anderson be released from all propositions or votes taken to subscribe stock and issue bonds to said railroad company. Electors desiring to vote on the above proposition shall have their tickets written or printed as above, and shall add thereto, for or against the subscription of stock to the Leavenworth, Lawrence and Galveston R. R. Co., as the electors may desire to vote.

H. CAVENDER, *Chairman.*
Attest: REUBEN LOWRY, *Member.*
J. H. WILLIAMS, *Clerk.*"

Among the proceedings of the board were these:

"COUNTY CLERK'S OFFICE, GARNETT,
ANDERSON COUNTY, KA'S, *September* 17, 1869.

Board of County Commissioners met pursuant to law for the purpose of canvassing returns of the election, held in said county on the 13th day of September, 1869, for the purpose of voting upon a proposition to vote stock to certain railroad companies.

Present: H. Cavender, chairman; J. B. Lowry, members present; and we find the vote as follows:"

Then followed a statement showing that there were 551 votes in favor of the proposition, and 372 against it, and the following certificate:

"We hereby certify that the proposition to subscribe stock to the Leavenworth, Lawrence & Galveston Railroad Company

received five hundred and fifty-one votes, and that there were three hundred and seventy-two votes against said proposition.

H. CAVENDER, *Chairman.*

Attest: J. B. LOWRY, *Member.*

J. H. WILLIAMS, *Clerk.*"

The order of November 5, 1869, made by the board, contained the following:

"*Resolved*, That the Board of County Commissioners of Anderson County, Kansas, for and in behalf of Anderson County, in accordance with the vote heretofore had and taken of the electors of said county to that effect, hereby subscribe for two thousand shares of the capital stock of the Leavenworth, Lawrence and Galveston Railroad Company, of one hundred dollars each, making in amount two hundred thousand dollars.

Resolved, That the stock above subscribed for by this Board in behalf of Anderson County is hereby sold and transferred, for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, to James F. Joy, president of said railroad company, and the chairman of this Board is authorized to sign a transfer of said stock to said James F. Joy, and to assign the certificate for said stock issued to Anderson County by said railroad company, and to authorize, in such assignment, the necessary transfer of said stock on the books of said company."

Among the proceedings of the board were these:

"COUNTY CLERK'S OFFICE, GARNETT,
July 8, 1870.

Board of County Commissioners met pursuant to adjournment; full quorum present; minutes of preceding meeting read and approved.

Whereas, on the 5th day of November, A. D. 1869, the Board of County Commissioners of Anderson County, State of Kansas, did formally issue to the Leavenworth, Lawrence & Galveston Railroad Company the bonds of Anderson County to the

sum of $200,000, according to provisions of the vote of the electors of said county, and did place the said bonds in the hands of James F. Joy, to be delivered to said railroad company when the said railroad should be completed to the town of Garnett, said bonds to bear interest at the rate of 7 per cent. per annum from the 1st day of January, 1870, but in case said railroad should not be completed to Garnett by the 1st day of January aforesaid, the interest accruing upon said bonds from said first day of January, 1870, to the time said road should be completed to said town of Garnett should be cancelled;

And whereas, on the 8th day of July, 1870, M. R. Baldwin, sup't of said L., L. & G. R. R. Co., did certify to this Board that said railroad was completed, equipped, and operated to the town of Garnett on the 1st day of March, 1870;

Therefore, this Board do authorize the same James F. Joy to deliver said bonds to said railroad company upon returning the coupons of said bonds, and the amount of interest accrued upon said bonds, between the 1st day of January and March, 1870, to the treasurer of Anderson County.

Minutes read and approved. On motion, Board adjourned to meet on Tuesday, July 19, 1870, at 9 A. M.

GEO. W. ILER,
Chairman of the Board of County Commissioners,
Attest: *Anderson County, Kansas.*
[SEAL.] J. H. WILLIAMS, *Clerk.*"

"COUNTY CLERK'S OFFICE,
ANDERSON COUNTY, KANSAS, *Sept.* 5, 1870.

Being the first Monday of September, 1870, Board of County Commissioners met pursuant to law. Present, Geo. W. Iler, chairman, J. B. Lowry, and J. W. Vaughn. Met for the purpose of levying taxes for the year 1870, at which time the following taxes were levied, to be collected for the year 1870, to wit: That there be levied on all the taxable property of said county the sum of four mills per dollar on all taxable property of said county, for road purposes. It is hereby ordered, that there be levied on the taxable property of Anderson County the sum of $7\frac{1}{2}$ mills per each dollar, to pay ten months' inter-

est on the bonds of said county issued to the Leavenworth, Lawrence & Galveston Railroad Company, for the year 1870, the two months' interest from January 1, 1870, to March 1, 1870, having been agreed upon between said railroad company and the Board of County Commissioners, to be cancelled.

Iler and Vaughn, for the levy.

J. B. Lowry enters his protest as follows:

The undersigned, commissioner of Anderson County, protests against the action of the majority of said Board in the matter of the levying of taxes for the payment of the interest on the L., L. & G. R. R. bonds for the following reasons, to wit:

Said bonds are not legally in the hands of said railroad company, if in the hands of said railroad company at all.

J. B. Lowry,
Member of the Board of County
Attest: *Commissioners of Anderson County.*
[seal.] J. H. Williams, *Clerk.*"

After the plaintiff had offered in evidence the coupons sued upon, and one of the bonds (the bond having on it a certificate of the auditor of the State, dated March 27, 1872, that it had been regularly issued, and had been duly registered in his office, under the act of March 2, 1872, and a guaranty by the company of the payment of it, and of its coupons), and the order of August 11, 1869, and the proceedings of September 17, 1869, and July 8, 1870, and September 5, 1870, and a copy of the registration of the bonds in the office of the auditor of the State, he rested his case. Thereupon the defendant demurred to the evidence, and asked the court to declare the law to be, that, upon the pleadings and proofs, the plaintiff was not entitled to recover, but the court refused so to do, and the defendant excepted.

The defendant then introduced the two resolutions of November 5, 1869, above set forth; and also gave evidence for the purpose of showing that previous notice of the holding of the election was published in a newspaper at Garnett only twenty-four days before the day of the election, and not thirty days. There was also evidence given in reply, by the plaintiff, to show

that the county paid the interest on the bonds every year, down to that which fell due January 1, 1881; that in March, 1872, when the bonds were registered in the office of the auditor of the State, they belonged to the company; and that it afterwards sold them for full value to various parties.

At the close of the evidence, the court instructed the jury to find a verdict for the plaintiff, and the defendant excepted to such instruction.

Mr. A. Bergen for plaintiff in error.—The bonds in suit recite that they were issued in conformity with the act of the Kansas legislature of February 26, 1866. This is equivalent to a declaration that the requirements of that act as to preliminary proceedings necessary to the validity of the issue have been complied with. *McClure* v. *Oxford*, 94 U. S. 429, 432; *Lewis* v. *Commissioners*, 105 U. S. 739, 749. The act of 1866 was repealed when these bonds were issued, and another act passed in 1869 was in force. The former required twenty days' notice of the meeting called to authorize the issue; the latter required thirty days' notice. This is a good defence, which may be availed of against a purchaser for value. *Buchanan* v. *Litchfield*, 102 U. S. 278, 292. *Commissioners of Johnson County* v. *January*, 94 U. S. 202, is not in conflict with this. The registration of these bonds was made before the act of 1872 took effect, and is nugatory. *Bissell* v. *Spring Valley Township*, 110 U. S. 162. The plaintiff has not shown that the thirty days' notice of the meeting required by the act of 1869 was given. It was incumbent on him to do this affirmatively. The act of 1866 required notice in a newspaper: that of 1868 (which repealed the act of 1866) notice by posting and notice in a newspaper; that of 1869 required notice but did not indicate how it should be made. It should be given as required by the act of 1868, thirty days in advance, by posting, and by publication. The evidence shows twenty days' notice by publication, but witnesses did not know of posting. Lastly, these questions are *res judicata*.

Mr. Wallace Pratt and *Mr. Jefferson Brumbach* for defendant in error.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court. He recited the facts, as above stated, and continued:

It is not disputed that the recital, in the bond, that it was issued under the act of February 26, 1866, Sess. Laws of Kansas, 1866, ch. 24, p. 72, was an error. That act authorized county subscriptions to the stock of railroad companies, when authorized by a majority of the votes cast at a county election, if twenty days' notice of the election had first been given "in some newspaper published and having general circulation in the county, or, in case there be no paper published in the county, then by written or printed notices posted up in each election precinct, twenty days previous to the day of such election;" and it authorized bonds of the county to be issued in payment for the stock. But it was repealed by the enactments of sections 1 and 2 of chapter 119 of the General Statutes of Kansas, of 1868 (pp. 1123, 1127), and for it were substituted sections 51, 52 and 53 of chapter 23 of such General Statutes of 1868, entitled "An Act concerning private corporations," pp. 203, 204. Those sections authorized subscriptions by counties to the stock of railway companies created by Kansas, if the subscription was first assented to by a majority of the qualified voters of the county, at an election of which notice should be given "at least sixty days before the holding of the same." By the act of February 27, 1869, Sess. Laws of Kansas, 1869, ch. 29, p. 108, sections 51, 52 and 53 of chapter 23 of the General Statutes of 1868, were repealed, and the following sections were substituted:

"SEC. 51. The board of county commissioners of any county, the city council of any city, or the trustees of any incorporated town, may subscribe for and take stock, for such county, city or town in, or loan the credit thereof to, any railway company duly organized under this or any other law of the State or Territory of Kansas, upon such conditions as may be prescribed by the aforesaid county, city or town authorities; *Provided, however*, that a majority of the qualified voters of such county, city or town, voting upon such question of subscribing and taking such stock, shall, at a regular or special election to be held therein, first assent to such subscription and the terms

and conditions prescribed as aforesaid, upon which the same shall be made; *and provided, further*, that when such assent shall have been given, to such subscription as aforesaid, it shall be the duty of the said county, city or town authorities, as the case may be, to make such subscription.

"SEC. 52. A special election may be ordered by the county commissioners of any county, the city council of any city, or the corporate authorities of any town, at any time, for the purpose of ascertaining the sense of the voters of such county, city or town, as contemplated in the preceding section. Notice of such election shall be given at least thirty days before the holding of the same, and the question or questions to be submitted thereat shall be set forth in such notice.

"SEC. 53. Upon the making of such subscription, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the same liabilities imposed by this act, or by the charter of the company in which such stock is taken, except as the same shall be varied and limited by the terms and conditions upon which the said subscriptions shall have been authorized and made. And it shall be the duty of the board of county commissioners or city council or trustees of the town, making such subscription as aforesaid, to pay for the same and the stock thereby agreed to be taken by such county, city or town, by issuing to the company entitled thereto, the bonds of such county, city or town at par, payable at a time to be fixed, not exceeding thirty years from the date thereof, bearing interest at the rate of seven per cent. per annum, and with interest coupons attached."

It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds, and when it was certified to them that the road was completed to Garnett they authorized the bonds to be delivered to the company, and the bonds were delivered in payment for the subscription and for

the stock agreed to be taken. The only question made is as to the notice of the election.

It is contended that the recital in the bond, that it is issued under the provisions of the act of 1866, is a recital that only twenty days' notice of the election was given. But the meaning of the act of 1866 was, that at least twenty days' notice should be given, and even if the recital amounted to a statement that the notice prescribed by that act had been given, it would not necessarily mean that exactly twenty days' notice, or only twenty days' notice, had been given.

In the case of *McClure* v. *Township of Oxford*, 94 U. S. 429, cited by the defendant, the bonds were issued under an act which took effect only eighteen days before the election was held, and, as the act required thirty days' notice of the election, it was held that the face of the bond, with the act recited in it, showed that the statute had not been complied with. Wherever the want of legislative authority appears by the face of the bond, taken in connection with the act which the bond mentions, every taker of the bond has notice of the want of power. But no such case is here presented.

The bond recites the wrong act, but if that part of the recital be rejected, there remains the statement, that the bond "is executed and issued" "in pursuance to the vote of the electors of Anderson County, of September 13, 1869." The act of 1869 provides, that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county. The provision of section 51 is, "that when such assent shall have been given," it shall be the duty of the county commissioners to make the subscription. What is the meaning of the words "such assent"? They mean the assent of the prescribed majority, as the result of an election held in pursuance of such notice as the act prescribes. The county commissioners were the persons authorized by the act to ascertain and determine whether "such assent" had been given; and necessarily so, because, on the ascertainment by them of the fact of "such assent," they were

charged with "the duty"—that is the language—of making the subscription, and the duty of issuing the bonds. They were equally charged with the duty of ascertaining the fact of the assent.

The record evidence of their proceedings shows, that their order for the election was made thirty-three days before the election was to be held; that they met "pursuant to law for the purpose of canvassing returns of the election;" that they discharged that duty and certified that there was a majority of votes in favor of the proposition; that, in November, 1869, they resolved that, "in accordance with the vote, heretofore had and taken, of the electors of said county to that effect," they subscribed for the stock; and that, in July, 1870, in their order authorizing the bonds to be delivered by Joy to the company, they recited that the bonds were issued "according to the provisions of the vote of the electors of said county." In view of all this, the statement by the commissioners, in the bond, that it is issued "in pursuance to the vote of the electors of Anderson County, of September 13, 1869," is equivalent to a statement that "the vote" was a vote lawful and regular in form, and such as the law then in force required, in respect to prior notice. The case is, therefore, brought within the cases, of which there is a long line in this court, illustrated by *Town of Coloma* v. *Eaves*, 92 U. S. 484, 491, and which hold, in the language of that case, that, "where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment, that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This doctrine is adhered to by this court. *Dixon County* v. *Field*, 111 U. S. 83, 93, 94.

In the present case, there was nothing shown to rebut the

presumption arising from the production of the coupons, that the plaintiff was *prima facie* the holder of them for value. The defendant did not show any want, or failure, or illegality, of consideration. By the passage of the first resolution of November 5, 1869, the board thereby subscribed for the stock. The transactions between the board, on the one side, and Mr. Joy, as president of the company, and the company, on the other side, before and at the time the bonds were finally delivered to the company, were an acceptance of the subscription. The statute, § 53, provided, that, on the making of the subscription, the bonds should be issued to the company, to pay for the subscription and for the stock agreed to be taken. When the bonds were delivered to the company, the transaction was complete, and the bonds, as they afterwards passed to *bona fide* holders, passed free from any impairment by reason of any dealing by the board with the stock subscribed for, to which the county became entitled by the issuing and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a *bona fide* holder of the bonds or coupons.

It is further to be said, that if there was, in fact, any want of proper notice of the election, the omission was only an irregularity in the exercise of an express power to issue the bonds, an irregularity in respect to a step forming part of preliminary conditions, and that the failure of the municipality and of the tax-payers to enjoin the issue or use of the bonds, during the long period from the day of the election, September 13, 1869, until the bonds were registered in March, 1872, when they still belonged to and were in the hands of the company, coupled with the annual payment by the county, for ten years, of the interest on the bonds, are sufficient grounds for holding that the municipality is estopped from defending on the ground of such non-compliance with a condition precedent as is set up in this case, after the bonds have been negotiated for value by the company. The record of the proceedings of the board shows that a tax was levied to pay the interest which fell due January 1, 1871, while the company still held the bonds.

There was no error in overruling the demurrer to the evi-

dence which the plaintiff had given to sustain his case at the time the demurrer was interposed, or in overruling the motion to instruct the jury at that time, that, upon the pleadings and proofs he was not entitled to recover. Upon such evidence, all of which was record evidence, admitted without objection, and involving no disputed question of fact, but only matters of law, the plaintiff was entitled to recover, as has been shown. For the same reasons, it was not error to instruct the jury, at the close of the trial, to find a verdict for the plaintiff. The only defences set up in the answer were those as to the notice of the election and as to the transfer of the stock to Joy. The first resolved itself into a question of law, and the latter was immaterial. The defendant did not ask to go to the jury on any question of fact, and, if a verdict had been rendered for the defendant, it would have been the duty of the court, under the views of the law above laid down, to set it aside.

In *Pleasants* v. *Fant*, 22 Wall. 116, 120, this court said, by Mr. Justice Miller, citing *Improvement Co.* v. *Munson*, 14 Wall. 442, 448, that "in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." Those cases were cited in *Herbert* v. *Butler*, 97 U. S. 319, 320, and this court there said, by Mr. Justice Bradley: "Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render." It is true, that, in the above cases, the verdict was directed for the defendant. But where the question, after all the evidence is in, is one entirely of law, a verdict may, at the trial, be directed for the plaintiff, and, where the bill of exceptions, as here, sets forth all the evidence in the case, this court, if concurring with the court below in its views on the questions of law presented by the bill of exceptions and the record, will affirm the judgment.

In *Bevans* v. *United States*, 13 Wall. 56, a verdict was directed

for the United States, in a suit by them on the official bond of a public officer, and the ruling was sustained, the evidence for the plaintiff being all of it documentary, this court saying by Mr. Justice Strong: "The instruction was, therefore, in accordance with the legal effect of the evidence, and there were no disputed facts upon which the jury could pass."

The same rule was applied in *Walbrun* v. *Babbitt*, 16 Wall. 577, to the direction of a verdict for the plaintiff, after oral evidence which this court states "was received without objection, and about which there is no controversy," and on which it says it bases its decision. That was a suit to recover the value of goods transferred in fraud of the bankrupt law.

In *Hendrick* v. *Lindsay*, 93 U. S. 143, the Circuit Court directed the jury to find for the plaintiffs, in an action on a bond of indemnity, the plaintiffs' evidence being all of it documentary, and the defendant giving no evidence. This court said, by Mr. Justice Davis: "There were no disputed facts in this case for the jury to pass upon. After the plaintiffs had rested their case, the counsel for the defendant announced that he had no evidence to offer; and thereupon the court, considering that the legal effect of the evidence warranted a verdict for the plaintiffs, told the jury, in an absolute form, to find for them. This was correct practice where there was no evidence at all to contradict or vary the case made by the plaintiffs; and the only question for review here is, whether or not the court mistook the legal effect of the evidence."

In *Arthur* v. *Morgan*, at this term, 112 U. S. 495, after oral evidence for the plaintiff, there being no evidence for the defendant, the court below had directed a verdict for the plaintiff for the recovery of excessive duties paid under protest, to which direction the defendant had excepted, and this court, treating the question as one of law, as to the proper rate of duty, on undisputed facts, affirmed the judgment.

These decisions are controlling on the point.

Judgment affirmed.

HARVEY & Another *v.* UNITED STATES.

UNITED STATES *v.* HARVEY & Another.

APPEALS FROM THE COURT OF CLAIMS.

Argued January 13, 14, 1885.—Decided February 2, 1885.

In this case, before reported in 8 C. Cl. 501, 12 Id. 141, 13 Id. 322, and 105 U. S. 671, the Court of Claims, 18 C. Cl. 470, awarded to the claimants $16,250.95, for labor done and materials furnished by them in constructing coffer-dams, and in performing the work necessarily connected therewith, and preliminary to the mason work for the piers and abutments referred to in the contract. That court proceeded on the view that the claimants had no right to rely on the testimony of experts introduced by them, as to the value of the work, but should have kept and produced accounts of its cost and expense; but it gave to the claimants the benefit of the testimony of experts introduced by the United States, as to such value, in awarding the above amount: *Held*, That the claimants could not be deprived of reasonable compensation for their work because they did not produce evidence of the character referred to, when it did not appear that such evidence existed, if the evidence they produced was the best evidence accessible to them, and it enabled the court to arrive at a proper conclusion.

On evidence thus rejected by the Court of Claims, this court awarded to the claimants, for the above-named work, $40,093.77.

The Court of Claims having awarded nothing to the claimants for loss and damage from the reduction by the United States of the dimensions of piers and abutments, made subsequently to the making of the contract for doing the mason work thereof, on the view that it had before made an allowance for such loss and damage, this court, being of a different opinion, allowed $4,574.80 therefor.

Under § 1091 of the Revised Statutes, and the ruling in *Tillson* v. *United States*, 100 U. S. 43, interest cannot be allowed on the recovery, and there is nothing in the special act of August 14, 1876, ch. 279, 19 Stat. 490, which authorizes the allowance of interest.

The facts are stated in the opinion of the court.

Mr. Enoch Totten for Harvey & Livesey.

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

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This case was before this court at October Term, 1881, and is reported as *Harvey* v. *United States*, 105 U. S. 671. The history of it is there fully given, and, in connection with the reports of it in 8 C. Cl. 501, 12 Id. 141, and 13 Id. 322, what occurred in it prior to the decision of this court can be fully understood. The Court of Claims had dismissed the petition of the claimants, filed August 30, 1876, under the special act of Congress passed August 14, 1876, ch. 279, 19 Stat. 490. This dismissal involved the rejection of two items sued for in such petition: (1) Labor done, and materials furnished, by the claimants in constructing the coffer-dams, and in performing the work necessarily connected therewith, and preliminary to the masonry work for the piers and abutments, $75,000; (2) Loss and damages resulting to the claimants in consequence of the reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract, $33,600. The decision of the Court of Claims in regard to item (1) was, that the claimants had not shown that the written contract did not express the intent of both parties as to the coffer-dams, and that, even if that court were satisfied that the claimants executed the contract in mistake of their rights, there was no evidence that the defendants shared the mistake. Its decision in regard to item (2) was, that it would be disposed to regard the case, on the facts, as one for equitable interposition, for the purpose of further inquiry, and the ascertainment of the rights of the parties in equity, if it had jurisdiction, but that the statute did not authorize it to entertain those considerations, because, in the proceedings before it, it could hear and determine only claims for labor done and materials furnished by the claimants under their contract with the defendants.

This court held that the ruling of the Court of Claims in regard to item (1)—the coffer-dams—was erroneous, and that, by the actual contract between the parties, the claimants were not to do any of the work covered by the claim made by them under item (1), and that the written contract must be reformed accordingly.

As to item (2), this court held, that the Court of Claims had

placed too limited a construction upon the special act of Congress, and that its power, under that act, extended to reforming the contract in respect to permitting the officers of the United States to materially vary the plans for the piers, so as to essentially change the obligations of the parties.

The decree of the Court of Claims was reversed, and the cause was remanded, with directions to proceed in it according to law and in conformity with the opinion of this court.

The Court of Claims, 18 C. Cl. 470, proceeded to determine what the claimants did in constructing coffer-dams, and in pumping the water from the space enclosed in them, and in excavations for the preparation of the beds for the masonry. It held, that, as the claimants had been notified, at the outset, that the defendants expected them to do such work, and had, on their part, notified the defendants that they would do it and would hold the defendants liable for the cost and expense, it was their duty to keep and produce accurate accounts thereof, and they could not prove such cost and expense by the evidence of experts as to the value. But the court gave to them the benefit of the testimony of experts introduced by the defendants, and, on that testimony, awarded to the claimants $16,250.95, for the labor done and materials furnished by them in constructing coffer-dams, and in performing the work necessarily connected therewith, and preliminary to the mason work for the piers and abutments referred to in the contract, the same being on account of item (1) above referred to. A judgment having been entered against the United States for that sum, both parties have appealed to this court, the claimants contending that $75,000 should have been allowed for item (1), and the defendants that nothing should have been allowed.

In regard to the view adopted by the Court of Claims, that the claimants have no right to rely on the testimony of experts introduced by them, but should have kept and produced accounts of the cost and expense of the work, we are of opinion that the claimants cannot be deprived of reasonable compensation for the work they did because the evidence they produce as to the proper amount of such compensation is not of the

character referred to, when it does not appear that such evidence ever existed. If they produce the best evidence which is accessible to them, and it enables the court to arrive at a proper conclusion, that is sufficient. We think such evidence is found in the estimate made by Mr. Abbott. Taking as correct the statement made by the Court of Claims as to the work done by the claimants and the defendants respectively, in constructing coffer-dams, in pumping, in excavating, and in preparing the beds for the masonry, we arrive at these results, as to the work done by the claimants:

They made the coffer-dam at the Davenport abutment; that at pier 1; part of that at pier 2 (it being completed by the defendants); all but the inside dam of that at pier 4; $\frac{1}{3}$ of that at the upper rest of the draw; that at the pivot pier of the draw; that at the lower rest of the draw; and that at the Island abutment.

They did the pumping at the Davenport abutment; at pier 1; at the pivot pier of the draw; at the lower rest of the draw; and at the Island abutment.

They made the excavation at the upper rest of the draw; and that at the Island abutment.

They prepared the bed for the masonry at the Davenport abutment; at pier 1; at the upper rest of the draw; at the pivot pier of the draw; at the lower rest of the draw; and at the Island abutment.

Applying to the above work the estimates of Mr. Abbott, instead of those of Messrs. Scott and Stickney (which the Court of Claims adopted), we have these results, premising, that as Mr. Abbott's estimates are not made in separate specific items for dam, pumping, excavating, and preparing bed, respectively, in any case except that of the Davenport abutment, we have proceeded on the basis of taking (in regard to pier 2, pier 4, and the upper rest of the draw, where alone it was necessary), as and for Mr. Abbott's separate specific items, such proportion of his aggregate estimate as the corresponding specific item in the corresponding aggregate estimate of Mr. Scott bears to such last named aggregate estimate:

Davenport abutment—dam, pumping, and preparing bed	$2,668 35
Pier 1—dam, pumping, and preparing bed	4,668 00
Pier 2—part of dam; (the Court of Claims said that it had no means of knowing how much work the defendants did, and it deducted nothing therefor; we follow that suggestion, and allow the claimants for all the dam)	4,147 86
Pier 4—all but the inside dam; (the Court of Claims said that it had no means of knowing how much work the defendants did, and it deducted nothing therefor; we follow that suggestion, and allow the claimants for all the dam)	5,793 83
Upper rest of draw—⅓ of dam, of excavation, and of preparing bed	2,475 25
Pivot pier of draw—dam, pumping, and preparing bed	4,842 56
Lower rest of draw—dam, pumping, and preparing bed	3,698 19
Island abutment—dam, pumping, excavation and preparing bed	3,780 98
Total	$32,075 02

Mr. Abbott says that his estimates "are based upon cost of material and labor, and intended to cover cost alone;" that 40 per cent. is "a reasonable per cent. of advance, for contingencies and profits;" and that, with unusual floods in the river, 40 per cent. would be a minimum allowance. The evidence shows that the claimants met with great difficulties because of floods and high water. Mr. Van Wagenen's estimate is $36,000. We have concluded to add 25 per cent. to the $32,075.02, that is, $8,018.75, making, in all, $40,093.77.

As to item (2), that relating to loss and damage resulting to the claimants in consequence of the reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract, the claimants have appealed because nothing was allowed therefor. The Court of Claims held, that, if the

claimants were entitled to recover any sum in respect of that item, the sum was $3,066.42. But that court was of opinion that, in its judgment in favor of the claimants, in the suit at law, for $42,306.49, it had, in allowing $22,238.49, under item 5, as amended, "for handling, cutting, preparing and setting stone for and in the piers and abutments," allowed the following item:

"Stone received and handled, not set, and ready as backing to the 1,527 yards of the next preceding item" (that is, 1,527 yards of stone, dressed, not set), "an equal quantity, viz.: 1,527 cubic yards, at $11 per yard, less $2, which it would have cost to set it.....$13,743.00;"

that, in such allowance, it had allowed a profit of $8.65 a yard on the 1,527 yards of undressed backing stone, being $13,208.55, which had been paid to the claimants; that this was an allowance to the claimants of profits on masonry not constructed by them; and that, although it could not be recovered back, its payment must operate as a bar to any further recovery for the same thing. We find, however, that, in the suit at law, item 3 claimed was "for loss of profits incurred by the unlawful reduction of the dimensions of the piers and abutments, $33,600;" and that in its conclusions of law, in the suit at law, the Court of Claims held that the claimants were not entitled to any recovery under item 3. Moreover, that court allowed the $13,743 referred to, as a part of item 5, as amended (above quoted), for doing to the stone in question everything but setting it, it being undressed stone, in other respects prepared. We are unable to perceive how such allowance can be classed as an allowance for loss and damage from a reduction of the dimensions of the piers and abutments.

We think the proper allowance for item (2) is this; 449 yards for the three piers of the draw, at $10 per yard = $4,490; and $10\frac{3}{5}$ yards for pier 1, at $8 per yard = $84.80—total, $4,574.80.

The only remaining question is as to interest, which the Court of Claims disallowed. We think that, under the ruling

in *Tillson* v. *United States*, 100 U. S. 43, interest cannot be allowed on either of the items in question. We do not see anything in the special statute, act of August 14, 1876, ch. 279, 19 Stat. 490, which takes the case out of the rule prescribed by § 1091 of the Revised Statutes.

The judgment of the Court of Claims is affirmed for the full amount of the award made to the claimants, and an additional amount, of $23,842.82, is allowed for the labor done and materials furnished by the claimants, in constructing coffer-dams, and in performing the work necessarily connected therewith, and preliminary to the mason work for the piers and abutments referred to in their contract, the same being an additional allowance on account of item (1) in their petition filed August 30, 1876; and the said judgment is reversed, so far as respects item (2) in that petition, and the sum of $4,574.80 is allowed for that item; and

This cause is remanded to the Court of Claims, with a direction to enter judgment accordingly.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* MILLS & Another, Executors.

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

Submitted December 22, 1884.—Decided January 19, 1885.

A bill in equity, filed in the Court of Chancery of the State of New Jersey by citizens of that State, stockholders in a New Jersey railroad corporation, against that corporation, and a Pennsylvania railroad corporation, and several individuals, citizens respectively of New Jersey and Pennsylvania, and directors in one or both corporations, alleged that, without authority of law, and in fraud of the rights of the plaintiffs, and with the concurrence of the individual defendants, the New Jersey corporation, pursuant to votes of a majority of its stockholders, made, and the Pennsylvania corporation took, a lease of the railroad and property of the New Jersey corporation; and prayed that the lease might be set aside, the Pennsylvania corporation ordered to account with the New Jersey corporation for all profits received, the amount found due ordered to be paid to the New Jer-

Statement of Facts.

sey corporation by the Pennsylvania corporation, or, upon its failure to do so, by the individual defendants, and the New Jersey corporation ordered to administer the property in conformity with its charter, and to pay over to the plaintiffs their share of that amount. The defendants answered jointly, denying the illegality of the lease, and removed the case into the Circuit Court of the United States, under the act of March 3, 1875, ch. 137, as involving a controversy between citizens of different States, and a controversy arising under the Constitution and laws of the United States. The Circuit Court, upon the plaintiffs' motion, remanded the case to the State court. *Held*, That the case was rightly remanded.

This was an appeal from an order of the Circuit Court of the United States for the District of New Jersey, remanding to the Court of Chancery of the State of New Jersey a suit in equity brought by the appellees against the appellants. The case, so far as material to the understanding of the question presented by the appeal, was as follows:

The bill was filed by two citizens of New Jersey, executors of Stephen Vail, and, as such, stockholders in the Central Railroad Company of New Jersey, a New Jersey corporation, against that corporation, and the Philadelphia and Reading Railroad Company, a Pennsylvania corporation, and several individuals, citizens respectively of New Jersey, of Pennsylvania and of Maryland, and directors in one or both of those corporations, to set aside a lease made by the New Jersey corporation of its railroad and property to the Pennsylvania corporation, and for an account of profits received under the lease.

The bill set out the charter of the New Jersey corporation, enacting that its railroad should be operated by directors elected by its stockholders, and that dividends of its net earnings should be made semi-annually among its stockholders; and alleged that the road was afterwards constructed and operated accordingly; that the corporation, although holding the legal title to all its property, held it as a trustee for the stockholders, and the real, equitable and beneficial interest in the property, and in all dividends or income accruing or to accrue therefrom, was in the stockholders; "and that any act or thing done without the consent of all of said stockholders, or due process of law, which destroys the powers and control of those trustees, to whom the stockholders have confided their

property, or which prevents those trustees from fully and freely performing said trusts, or which in whole or in part substitutes new or other trustees for those selected by said stockholders, or which takes from said stockholders their estate or interest in said properties, or their control over them and their management, or transfers the possession and management of the property of said stockholders to another corporation or to any other person, or in any wise changes the scheme of said railroad company or the enterprise in which and to further which the said stockholders advanced and invested their capital, or which limits the productiveness of their property to them and diverts the earnings, or any part thereof, to other persons, natural or artificial, on any pretence whatever, is a fraud upon said stockholders, is unlawful as changing the contract between said corporation and said stockholders against their consent, and is absolutely void by the law of the land."

The bill further alleged that the directors of the New Jersey corporation, in accordance with votes of a majority of the stockholders, but without the consent of all the stockholders, or of the plaintiffs, executed and delivered a lease of its railroad and all its property to the Pennsylvania corporation, for the term of nine hundred and ninety-nine years, and the Pennsylvania corporation entered into possession under the lease; that the lease prevented those trustees from performing the trust reposed in them by the stockholders, and affected their rights and interests in the particulars above set forth, and "was made without any authority of law, and is illegal, inequitable and void;" that the individual defendants, under cover of that lease, and well knowing its illegality, had been and were actively engaged in furthering the aforesaid invasion of the rights of the plaintiffs as stockholders; that therefore any application by the plaintiffs to the corporation, or to the directors or stockholders, to institute this suit would have been futile, and had not been made; and that consequently the plaintiffs were entitled to bring and maintain this suit in their own name, as well for themselves as for other stockholders similarly situated.

The bill prayed for a decree that the lease and the delivery

of possession under it were illegal and void, and a fraud upon the rights of the plaintiffs; that the Pennsylvania corporation surrender to the New Jersey corporation the railroad and other property, and account with it for all tolls and profits received; that the New Jersey corporation take possession of the railroad and property, and use and administer it in conformity with the trusts imposed by its charter, and distribute and pay over to the plaintiffs their share of all the money to be found due upon such accounting from the Pennsylvania corporation to the New Jersey corporation; and that, upon the failure of the Pennsylvania corporation to pay back to the New Jersey corporation all moneys taken under the lease, the individual defendants pay the same to the New Jersey corporation; and for further relief.

The defendants filed a joint answer, admitting the plaintiffs' ownership of stock in the New Jersey corporation, the construction and operation of the railroad by that corporation, and the execution and delivery of the lease, and of possession under it; denying the other leading allegations of the bill; averring that the charter of the New Jersey corporation was subject by law to alteration, suspension or repeal in the discretion of the legislature; that the lease was expressly authorized by the laws of New Jersey; and that, if the bill could be maintained, all that the plaintiffs could claim was the value of their stock, and damages assessed according to any reasonable anticipation of its productiveness in the future, and such damages the defendants were willing and thereby proffered to pay.

Before the cause could be heard in the State court, all the defendants joined in a petition, under the act of March 3, 1875, ch. 137, for its removal into the Circuit Court of the United States, for the following reasons:

"That the said suit is one instituted by the plaintiffs, who are the executors of one Stephen Vail, and, as such, holders of certain shares of stock of the Central Railroad Company of New Jersey, one of the defendants above named, to obtain a decree requiring the surrender and cancellation, as illegal, void, and a fraud upon the rights of the plaintiffs, of a certain lease of all its railroads and other property, executed by the said

Central Railroad Company of New Jersey to the said Philadelphia and Reading Railroad Company, and the payment over by the said Reading Company to the said Central Company of all rents, tolls and profits by the former, as lessee as aforesaid, and further requiring that the said Reading Company should cease and refrain from doing any act under the terms of said lease.

"That the defendants, other than the two above-mentioned railroad companies, were made parties to the said suit only by reason of their official connection with the said two companies, and are not necessary or substantial parties to the controversy, which relates solely, as already mentioned, to the validity of the lease above referred to, of the railroads and other property of the Central Company to the Reading Company; that the plaintiffs in the suit claim that as stockholders in the Central Railroad Company of New Jersey they have the right to institute said suit upon behalf of the said company, to compel the surrender by the Philadelphia and Reading Railroad Company of the above-mentioned lease, and an accounting for and return by the latter company to the former of all moneys received as such lessee as aforesaid; and the controversy in said suit is therefore between citizens of different States, as the plaintiffs and the Central Railroad Company are citizens of the State of New Jersey, and the Philadelphia and Reading Railroad Company is a citizen of the State of Pennsylvania.

"That the controversy in said suit is, moreover, one arising under the Constitution and laws of the United States, in that the right to make said lease is rested by the defendants upon a certain statute of New Jersey, approved March 11, 1880, ch. 160, which provides, *inter alia*, as follows: 'It shall be lawful for any corporation incorporated under this act, or under any of the laws of the State, at any time during the continuance of its charter, to lease its road, or any part thereof, to any other corporation or corporations of this or any other State, or to unite and consolidate as well as merge its stock, property and franchises and road with those of any company or companies of this or any other State, or to do both; and such other company or companies are hereby authorized to take such, and to

unite, consolidate, as well as merge its stock, property, franchises and road with said company, or to do both; and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road may use and operate such road, and their own roads, or all or any of them, and transport freights and passengers over the same, and take compensation therefor, according to the provisions and restrictions contained in this act, notwithstanding any special privilege heretofore granted or hereafter to be granted to another corporation for the transportation of freights and passengers between any points on the lines of said road, or any other points within or without this State,' which said statute, it is contended by the plaintiffs, is null and void, in that it attempts to alter and amend charters of incorporated companies without the consent of all the stockholders of said companies, and is therefore violative of the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts."

The case was thereupon removed into the Circuit Court of the United States, but was remanded by that court to the State court. 20 Fed. Rep. 449.

Mr. James E. Gowen for appellants.—I. The pleadings in this case present a Federal question. The substantial complaint in the bill is, that the Central Company had, without authority of law, leased its railroad and franchises to the Reading Company. It is charged that the lease is unlawful as changing the contract between the corporation and its stockholders against their consent, and is absolutely void. The answer sets up that the lease is authorized by the laws of New Jersey. There is a law of New Jersey which authorizes it; and thus the question is expressly presented whether that law authorizes the impairment of a contract. In *Smith* v. *Greenhow*, 109 U. S. 669, the record presented no ground for holding that the Virginia statute was invalid, except that it was in conflict with the constitutional provision as to contracts; and this court reversed the remanding order. The test of jurisdiction is not the same in removal cases that it is in cases brought up by writ of error. In the

latter case it must appear not only that a Federal question was involved, but that it was raised, and was necessary to the judgment rendered. *Chouteau* v. *Gibson*, 111 U. S. 200. Such a rule, applied to removals, would practically annul the statute. And it has been held that though there may be many non-Federal questions, yet the existence of one in the case is sufficient to warrant removal. *Mayor* v. *Cooper*, 6 Wall. 247; *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Western Union Tel. Co.* v. *National Tel. Co.*, 19 Fed. Rep. 561; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, is not in conflict with these decisions. When the issue is whether a legislative act impairs a contract, a constitutional question arises; and on petition for removal the court is to decide, not whether the act does impair the contract, but whether the case fairly raises the question whether it does or not. *People* v. *Chicago & Burlington Railroad*, 16 Fed. Rep. 706. The decision of the real question here requires the court to determine whether the New Jersey act authorizing the lease conflicts with the charter of the Central Company. That is a Federal question, within *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.—II. This cause was removable on the ground of citizenship of the parties. Treating the individual defendants as merely formal parties to the main controversy in the case, and their citizenship consequently as immaterial, the controversy must be viewed as one between the plaintiffs and the Central Company, both citizens of New Jersey, upon the one hand, and the Reading Company, a citizen of Pennsylvania, upon the other; for in a stockholder's bill of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interests of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought, represent the other. *Arapahoe County* v. *Kansas Pacific Railroad*, 4 Dillon, 277. It is true that individual defendants, directors, were citizens of the same State as plaintiff. As to their position see *Pond* v. *Sibley*, 7 Fed. Rep. 129; *National Bank* v. *Wells River Co.*, 7 Fed. Rep. 750; *Hatch* v. *Chicago & Rock Island Railway*, 6 Blatchford, 105. Assuming that they

were necessary parties, yet there was a separate controversy between the plaintiffs and each of them. *Langdon* v. *Fogg*, 18 Fed. Rep. 5; *Barney* v. *Latham*, 103 U. S. 205; *Clark* v. *Railroad Companies*, 11 Fed. Rep. 355; *Sheldon* v. *Keokuk Packet Co.*, 9 Bissell, 307; *Kerting* v. *Cotzhausen*, 11 Bissell, 582; *Buford* v. *Strother*, 3 McCrary, 253. The position of the Central Company in this suit is analogous to that of the executors in *Walden* v. *Skinner*, 101 U. S. 577. See also *Bacon* v. *Rives*, 106 U. S. 99, 104.

Mr. Henry C. Pitney and *Mr. Barker Gummere* for appellees.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The controversy in this case is not between citizens of different States. In truth, as well as in form, the parties on one side of the controversy are citizens of New Jersey, and those on the other side of the controversy are a New Jersey corporation and other citizens of New Jersey, as well as a Pennsylvania corporation and citizens of Pennsylvania and of Maryland. The bill is filed by stockholders in the New Jersey corporation, in behalf of themselves and other stockholders similarly situated, to set aside a lease made by that corporation, acting in concert with the other defendants, of its railroad and property, in excess of its corporate powers, and in fraud of the rights of the plaintiffs. All the defendants unite in defending the acts complained of, and in denying the illegality and fraud charged against them. The New Jersey corporation is in no sense a merely formal party to the suit, or a party in the same interest with the plaintiffs; but is rightly and necessarily made a defendant. *Hawes* v. *Oakland*, 104 U. S. 450, 460; *Atwool* v. *Merryweather*, L. R. 5 Eq. 464, note; *Menier* v. *Hooper's Telegraph Co.*, L. R. 9 Ch. 350; *Mason* v. *Harris*, 11 Ch. D. 97. There is no separate controversy between the plaintiffs and those directors who are citizens of Pennsylvania. The bill seeks affirmative relief against the directors, as well as against the two corporations, for one and the same illegal and fraudu-

lent act; the single matter in controversy between the plaintiffs and all the defendants is the validity of that act; and unless it is determined that the action of the New Jersey corporation was invalid as against the plaintiffs, there can be no decree against any of the other defendants. All the parties on one side of this controversy not being citizens of different States from all those upon the other side, the citizenship of the parties did not bring the case within the jurisdiction of the Circuit Court. *Ayres* v. *Wiswall*, 112 U. S. 187.

No controversy has arisen under the Constitution and laws of the United States. Neither the bill nor the answer, in terms or in effect, claims any right or involves any question under that Constitution or those laws. The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party. The bill, while alleging the lease made by the New Jersey corporation to be inconsistent with its charter, illegal and void, does not assert or imply an intention to impugn the validity of any statute of the State for repugnancy to the Constitution or laws of the United States. And the counsel for the plaintiffs, at the hearing in the Circuit Court, as well as in this court, disclaimed the intention to do so. Should any such question arise in the progress of the cause, and be decided by the State court against a right claimed under the national Constitution and laws, relief may be had by writ of error from this court. But in the present condition of the case, the Circuit Court rightly held that it did not involve a controversy properly within its jurisdiction. *Gold Washing Co.* v. *Keyes*, 96 U. S. 199; *Smith* v. *Greenhow*, 109 U. S. 669.

Judgment affirmed.

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LOONEY *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 9, 1885.—Decided January 23, 1885.

A creditor who receives from his debtor a certificate in writing, not negotiable, of the amount of his debt, and sells the certificate to a third person for value less than its nominal amount, thereby authorizes the purchaser to receive the amount from the debtor, and cannot, after the debtor has paid it to the purchaser, maintain any action against the debtor.

A creditor who receives from his debtor a negotiable instrument of the debtor for the amount of his debt, and sells it for its market value to a third person, cannot sue the debtor on the original debt.

This suit, as appeared by the facts found by the Court of Claims, was upon a contract in writing made September 11, 1872, between the petitioner and the Board of Public Works of the District of Columbia, by which he agreed to furnish materials and labor, and in a good and substantial manner to grade and gravel Fourteenth Street East between B Street South and Boundary in the City of Washington, at prices specified, and among other things agreed to punctually pay in cash the workmen employed by him; and the Board of Public Works agreed to pay him in lawful money of the United States the amount which might be found to be due to him from time to time according to the contract.

He performed his part of the contract according to its terms. Upon measurements made and accounts stated during the progress and at the completion of the work, there appeared to be due to him $27,364.75 (which by a mistake of addition, unknown to either party, was $500 too much), for which he received certificates of the auditor of the Board of Public Works, issued in accordance with the usual course of business as conducted by that board with its creditors, in different sums and in the following form:

"No. 2179. Office of Auditor, Board of Public Works,
Washington, D. C., July 11, 1873.

"I hereby certify that I have this day audited and allowed

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the account of Dennis Looney for work on 14th street East, from B street South to Boundary, amounting to one thousand dollars.

"$1000. J. C. LAY, Auditor."

The Court of Claims, in addition to the facts above stated, found the following facts:

"The certificates so received by the claimant, amounting in all to $27.364.75, were disposed of by him as follows: He collected of the board in cash $744. One certificate of $1,000 was indorsed and sold by him at its market value, sixty-five cents on a dollar, and was redeemed by the board from his assignee at its face value in payment of special taxes due to the District. Three certificates (less cash received), of the face value of $9,100, he exchanged at par for 'sewer certificates,' so called, bearing interest at eight per cent. per annum, and other interest-bearing securities of the District of Columbia, all payable on time. The interest-bearing securities he sold at their market value, sixty-five cents on a dollar. Five certificates, of the face value of $16,520.75, he indorsed and sold at about their market value, seventy cents on a dollar, and they were funded by his assignee into District of Columbia three-sixty-five bonds issued under the act of June 20, 1874, ch. 337, 18 Stat. 116.

"Before selling his interest-bearing securities, for which he had exchanged his auditor's certificates, the claimant asked the treasurer what they were worth, and where he could sell them at par, and the treasurer replied, 'I do not know where you can get par for them; do as others are doing, and sell them the best way that you can.'"

Upon the foregoing findings of fact the Court of Claims decided as conclusions of law as follows: "1. The claimant has no cause of action, and is not entitled to recover on the demands sued upon. 2. The defendant is entitled to recover $500 from the claimant, as set up in the counterclaim, for overpayment made through an error in adding the account, upon a final settlement of which he was overpaid that sum." 19 C. Cl. 230.

Judgment was rendered accordingly, and the claimant appealed to this court.

Mr. Eppa Hunton and *Mr. V. B. Edwards* for appellant.— It is found as a fact that the claimant was, by the terms of his contract, to be paid in lawful money of the United States, and also that he was paid in certificates worth sixty-five cents on the dollar, which this court has decided in *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, to be non-negotiable. He is therefore entitled to recover, and his measure of damages is the difference between the market value of the certificates and lawful money of the United States at the date the certificates were received by him, and interest thereon to date of judgment. *Memphis* v. *Brown*, 20 Wall. 289.

Mr. Solicitor-General and *Mr. John C. Fay* for appellee.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The nature and history of the auditor's certificates, and of the so-called sewer certificates, and other securities issued by the District of Columbia, as well as the legislation of Congress relating to them, have been fully stated in opinions delivered by the Court of Claims in other cases, and need not be recapitulated. See *Fendall* v. *District of Columbia*, 16 C. Cl. 106; *Adams* v. *Same*, 17 C. Cl. 351; *Morgan* v. *Same*, 19 C. Cl. 156. It is enough for the purposes of this case to observe that the sewer certificates and other interest-bearing securities of the District were negotiable instruments; and that the auditor's certificates were not negotiable, but were merely evidence of the debt of the District to the claimant under its contract with him.

If he had kept the auditor's certificates, he could doubtless have recovered against the District the full amount of the debt of which they were the evidence.

But the facts found show that he has so dealt with these certificates as to prevent him from maintaining this suit. The amount of some of the certificates he has been paid by the District in

money. Others of the certificates he has sold and assigned for value, and thereby transferred the equitable title in them to the assignee, and authorized him to receive payment of their amount from the District; and the payment of that amount in full by the District to the assignee is a discharge of so much of its debt to the claimant. *Cowdrey* v. *Vandenburgh*, 101 U. S. 572; *Foss* v. *Lowell Savings Bank*, 111 Mass. 285. The remaining certificates he has exchanged with the District for an equal amount of its negotiable securities, payable on time with interest, and he has since sold those securities for their value in the market. The District is liable to the purchaser, either upon those securities themselves, or upon the other bonds since taken by him instead of some of them, and cannot be also held liable to the original creditor for the same amount or any part thereof. *Harris* v. *Johnston*, 3 Cranch, 311; *Emblin* v. *Dartnell*, 1 D. & L. 591.

The conversation, which is found to have taken place between the treasurer of the District and the claimant before he sold the negotiable securities, has no tendency to prove any authority or any intention of the treasurer to make a new or different contract in behalf of the District.

Judgment affirmed.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 9, 1885.—Decided January 26, 1885.

A decree in equity, by consent of parties, and upon a compromise between them, is a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit in which the decree was rendered.

A decree in a suit in equity by the United States against a railroad corporation in Tennessee, appearing upon its face to have been by consent of parties, and confirming a compromise of all claims between them before June 1, 1871, including any claim of the corporation against the United States

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for mail service, is a bar to a suit by the corporation in the Court of Claims for mail service performed before the war of the rebellion, although at the time of the decree payment to it of any claim was prohibited by law, because of its having aided the rebellion.

This was a petition in the Court of Claims to recover compensation for carrying the United States mails between certain places in Tennessee from March 31 to June 8, 1861. The material facts, as found by that court, were as follows:

The petitioner, a corporation under the laws of Tennessee, on May 27, 1858, entered into contracts with the United States in the usual form to transport the mails both ways between Nashville and Chattanooga and between Tullahoma and McMinnville for four years from July 1, 1858, at the yearly compensation of $32,750, payable quarterly; carried mails accordingly for the United States until June 8, 1861; from that date began carrying the mails for the Confederate Government, and was also largely engaged during the rebellion in transporting troops, supplies and munitions of war, as well as mails for that government, and was regularly paid therefor, but was not paid for the claim set up in this suit. The rest of the finding of facts was in the following words:

"In 1871 a bill in equity, filed in behalf of the United States against the Nashville and Chattanooga Railway Company, was pending in the United States Circuit Court for the Middle District of Tennessee, to enforce certain demands of the United States against said company. In pursuance of an agreement between and by consent of the parties to the suit, the decree hereinafter set forth was entered in said court. The cause of action now pending in this court was not a subject of litigation in the Circuit Court. The company there did not set up as a set-off or cross-action any demand for mail transportation accruing before or since the war. And in the negotiations which led to the decree above mentioned the claim which forms the subject matter of this action was not mentioned by either party. The following is the decree above described:

"Be it remembered that on the 10th day of November, 1871, this cause was heard before the Judges of the Circuit Court of

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the United States for the Middle District of Tennessee, at Nashville, upon its equity side, upon the bill of complaint, exhibits, previous proceedings, and agreement of parties, in the presence of R. McPhail Smith, United States district attorney, representing the complainant, and E. H. Ewing and W. F. Cooper, solicitors of the defendant, when it appeared to the court that since the last term, in and by virtue of an act of Congress in that behalf, a compromise of all the matters in litigation between the parties had been entered into and fully consummated upon the following terms, stipulations and conditions, namely: The defendant, the Nashville and Chattanooga Railway Company, for and in consideration of the return and surrender to it, by the United States, of its road as it existed at the time of the said return and surrender, with all the iron, crossties, bridges, and other fixtures, appurtenances and effects in any wise appertaining and belonging to the said road, and returned, surrendered and turned over therewith, and for and in consideration of the rolling stock, depot houses, and all other property and effects sold and delivered by the United States to the said defendant, and for which compensation is claimed by said bill, and for and in consideration of the transfer and assignment of said road, rolling stock, fixtures, appurtenances, and all other said property and effects as aforesaid by the United States to the said defendant, with all the rights of the United States therein, acquired by conquest or otherwise, and for and in consideration of the settlement, satisfaction and discharge of all mutual claims and accounts between the parties, as they existed on the 1st day of June, 1871, admitted that there was due from the defendant to the United States on that day the sum of one million of dollars, and agreed to pay the same as follows: One half of said sum, five hundred thousand dollars, to be paid ten years after the 1st of June, 1871, and the other half twenty years from said date, with interest upon the whole of said principal sum, until paid, at the rate of four per cent. per annum, payable semi-annually on the 1st day of December and June, counting from the 1st of June, 1871, the said principal and interest made payable at ——, and secured by the bonds of the Nashville and Chattanooga Railroad Com-

pany, and a mortgage on the company's road, property, income, and franchise.

"It was further agreed that a final decree might be entered in this cause, setting forth the terms of the compromise, and providing that, in case of default for more than ninety days in the payment of any instalment of interest as the same falls due, or any part thereof, or of the principal debt at maturity as aforesaid, or any part thereof, the sum in default might be collected by an execution of the decree.

"It further appearing by the admissions of the parties by their solicitors in open court, that this compromise has been carried out by the execution by the Nashville and Chattanooga Railroad Company of its bonds, with interest coupons attached as agreed upon, and by the further execution of a satisfactory mortgage of the road, property, income and franchises to secure the said bonds and coupons, according to the terms of the agreement, and the delivery thereof to, and acceptance thereof by, the United States. It is, therefore, by consent of parties ordered, adjudged and decreed, that the compromise as aforesaid be entered and made the decree of this court, and that the rights of the parties be, and they are hereby, declared adjudged and decreed accordingly.

"That the said Nashville and Chattanooga Railroad Company take their road and all its appurtenances as aforesaid, and all the rolling stock, property and effects as aforesaid, with all the rights of the United States therein, free from all claim or demand of the United States, and subject only to the debt and lien secured by the said agreement of compromise and of this decree.

"And it is further found by the court, in accordance with the terms of said agreement of compromise and settlement, that there was due from the defendant to the United States on the 1st day of June, 1871, for and on account of the claim set forth in the bill of complaint, after allowing all credits thereon for services rendered by the defendant, to and for the use of the complainant, for mail service, or military transportation, or on any other account, prior to the day last aforesaid, a balance amounting to the sum of one million dollars, to bear interest

from said day at the rate of four per cent. per annum, payable semi-annually on the 1st day of June and December of each year, one half of said principal, to wit, the sum of five hundred thousand dollars, to be paid on the 1st day of June, 1881, and the remainder thereof, to wit, the sum of five hundred thousand dollars, to be paid on the 1st day of June, 1891.

"It is therefore ordered, adjudged and decreed, that the defendant pay to the complainant the said sum so as aforesaid found due, with the interest thereon as the same accrues, and that the said sums of principal and interest thereon as aforesaid, and the payment thereof as hereby ordered, stand as a charge and lien upon the road and property of the defendant, hereinbefore described, and upon the road, property, income and franchises as set forth in the mortgage which has been executed in compliance with the agreement of compromise; and that if at any time hereafter the said Nashville and Chattanooga Railroad Company make default for the period of ninety days in the payment of any of the instalments of interest or of principal of said debt, or of any part thereof, after the same shall have become due and payable according to the terms and effect of said bonds and coupons, then the United States, on filing with the clerk of this court any of said coupons or bonds past due and unpaid for ninety days, shall have the right to have issued an order for the execution of this decree to the extent of such default by the sale of the railroad and other property of the defendant as hereinbefore described, subject to the continued lien of this decree and of the said bond and mortgage representing the same debt as to the amount thereof then remaining and not due at the time of said sale, the said sale to be made as other sales of real estate under judicial process as required by law and the practice of this court to be made, and for this purpose this cause is retained in court until otherwise ordered.

"It is further ordered that defendant pay all costs of this cause, including the cost of this decree, and in default thereof execution is hereby awarded."

Upon the foregoing facts the Court of Claims concluded as matter of law, and adjudged, that the petition be dismissed. 19 C. Cl. 476. The petitioner appealed to this court.

Mr. Charles F. Benjamin for appellant.

No appearance for appellee.

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

The grounds on which the appellant contends that the claim now asserted is not barred by the decree rendered in 1871 in the former suit in the Circuit Court, resolve themselves into these two: First. That it is found as a fact that this claim was not litigated in that suit. Second. That it could not have been considered in that suit, because the facts show that the appellant aided in sustaining the rebellion, and therefore, as matter of law, payment to it of any claim against the United States was prohibited by the joint resolution of March 2, 1867, No. 46, and was not authorized until the passage of the act of March 3, 1877, ch. 105, more than five years after that decree. 14 Stat. 571; 19 Stat. 344, 362.

But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal. Courts of chancery generally hold that from a decree by consent no appeal lies. 2 Dan. Ch. Pract. ch. 32, § 1; *French* v. *Shotwell*, 5 Johns. Ch. 555; *Winchester* v. *Winchester*, 121 Mass. 127. Although that rule has not prevailed in this court under the terms of the acts of Congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause. *A fortiori*, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree.

The decree of 1871 states that, "in and by virtue of an act of Congress in that behalf, a compromise of all the matters in litigation between the parties has been entered into and fully consummated upon the following terms, conditions and stipulations:" that one of the considerations for the sum of $1,000,000, thereby agreed to be paid and secured by the Nashville and Chattanooga Railroad Company to the United

States, was "the settlement, satisfaction and discharge of all mutual claims and accounts between the parties, as they existed on the first day of June, 1871:" that by the terms of the compromise "there was due from the defendant to the United States on the first day of June, 1871, for and on account of the claim set forth in the bill of complaint, after allowing all credits thereon for services rendered by the defendant, to and for the use of the complainant, for mail service, or military transportation, or on any other account, prior to the day last aforesaid, a balance amounting to the sum of one million dollars:" and that by consent of the parties, and in accordance with the compromise, it is so decreed.

The act of Congress to which the decree refers authorized the Secretary of War, with the advice of the counsel for the United States in that suit, "to compromise, adjust and settle the same upon such terms, as to amount and time of payment, as may be just and equitable, and best calculated to protect the interests of the government." Act of March 3, 1871, ch. 109, 16 Stat. 473. The terms of the compromise, as set forth in and confirmed by the decree, expressly included all credits for services rendered by the railroad company to and for the use of the United States, for mail service or on any other account, prior to June 1, 1871. The claim now asserted was for such a service, and was not the less within the terms and effect of the compromise and decree, because the law at that time prohibited its payment to the railroad company.

Judgment affirmed.

COON & Another *v.* WILSON.

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

Argued January 14, 15, 1885.—Decided January 26, 1885.

Reissued letters patent No. 8,169, granted to Washington Wilson, as inventor, April 9, 1878, on an application therefor filed March 11, 1878, for an "improvement in collars" (the original patent, No. 197,807, having been granted to him December 4, 1877), are invalid as to claims 1 and 4.

The original patent described and claimed only a collar with short or sectional bands, that is, a band along the lower edge of the collar, made in parts or sections, and having a graduated curve. The reissued patent and claims 1 and 4 thereof were so framed as to cover a continuous band, with a graduated curve, but not in sections. The defendants' collars were brought into the market after the original patent was issued, and before the reissue was applied for, and the reissue was obtained to cover those collars; and, although it was applied for only a little over three months after the date of the original patent, there was no inadvertence or mistake, so far as the short or sectional bands were concerned, and it was sought merely to enlarge the claim. Claim 2 of the reissue was substantially the same as the single claim of the original patent, and claim 3 had, as an element, short bands. As the defendants' collars had a continuous band, with a graduated curve, and not short or sectional bands, and did not infringe the claim of the original patent or claims 2 and 3 of the reissue, and claims 1 and 4 thereof were invalid, the bill was dismissed.

This was a suit in equity, brought, in May, 1878, in the Circuit Court of the United States for the Southern District of New York, for the infringement of reissued letters patent No. 8,169, granted to the plaintiff, Washington Wilson, as inventor, April 9, 1878, on an application therefor filed March 11, 1878, for an "improvement in collars" (the original patent, No. 197,807, having been granted to him December 4, 1877). The specifications and claims of the original and reissued patents were as follows, the original being on the left hand, and the reissue on the right hand, and the parts of each which are not found in the other being in italic:

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Original.

"Be it known that I, Washington Wilson, of the city, county, and State of New York, have invented a new and improved collar, of which the following is a specification:

In the accompanying drawings, Figure 1 represents a side elevation of my improved collar, and Fig. 2 a perspective view of the same. Similar letters of reference indicate corresponding parts.

This invention refers to an improved standing collar, that retains all the advantages of the old-style curved band, without the objection of springing the collar too far from the neck, so as to come in contact with the coat and soil the collar. The collar also hugs the neckband in such a manner that the collar is prevented from overriding it, resulting in a more comfortable fit.

The invention consists of a standing collar, having *sectional* bands, *starting* from centre of collar, or any other point between centre and ends, *and continuing with a graduated curve* to and beyond the ends of the collar.

Reissue.

"Be it known that I, Washington Wilson, of the city, county, and State of New York, have invented a new and improved collar, of which the following is a specification:

In the accompanying drawings, Figure 1 represents a side elevation of my improved collar, and Fig. 2 a perspective view of the same. Similar letters of reference indicate corresponding parts.

This invention refers to an improved standing collar, that retains all the advantages of the old-style curved band, without the objection of springing the collar too far from the neck, so as to come in contact with the coat and soil the collar. The collar also hugs the neckband in such a manner that the collar is prevented from overriding it, resulting in a more comfortable fit.

The invention consists of a standing *or other* collar, having *curved and graduated* bands *that extend along the lower edge of the collar*, *either* from *the* centre of *the* collar, or *from* any other point between centre and ends, to and beyond the ends of the collar. *The rear buttonhole is thrown into the top or*

Referring to the *drawing*, A represents a standing collar of my improved construction, and B the *short or sectional* bands, which *start* from the centre of collar, or any other point between the centre and ends, and continue along the lower part of the *same*, with a graduated curve and increasing width, to and beyond the ends of the collar, in the same manner as in ordinary bands.

The bands B are made either to overlap the collar proper, or the collar is made to overlap the bands, or one part of the bands laps over the collar ends, while the remaining part is overlapped by the collar, so as to obtain smoothly-covered joints at both meeting ends of collar and *sectional* bands.

The bead formed by the connection of collar and band may also be continued, if desired, along the lower edge of that part of the collar between the bands, and thereby a more ornamental appearance *imparted* to the *same*.

The *use of the short or sec-*

body of the collar above the band or binding of the same.

Referring to the *drawings*, A represents a standing *or other* collar of my improved construction, and B the *curved and graduated* bands, which *extend* from the centre of *the* collar, or any other point between the centre and ends, and continue along the lower part of the *top or body of the collar*, with a graduated curve and increasing width, to and beyond the ends of the collar, *the ends being curved* in the same manner as in ordinary bands.

The bands B are made either to overlap the collar proper, or the collar is made to overlap the bands, or one part of the bands laps over the collar ends, while the remaining part is overlapped by the collar, so as to obtain smoothly-covered joints at both meeting ends of collar and *graduated* bands.

The bead *or binding* formed by the connection of collar and band may also be continued, if desired, along the lower edge of that part of the collar-*body* between the bands, *so as to connect the graduated bands*, and *impart* thereby a more ornamental appearance to the *collar*.

The rear button-hole a is ar-

tional bands *produces* a saving of material, as compared to the old style of continuous band, *and furnishes a collar that hugs the neck-band in superior manner, without springing back so as to come in contact with the collar.*

Having thus described my invention, I claim as new and desire to secure by letters patent—

A collar, *A*, having sectional bands *B*, starting from the centre of the collar, or any point between the centre and ends thereof, and continuing with a graduated curve to and beyond the ends of the same, substantially as *described and shown*, and for the purpose set forth."

ranged in the top or body of the collar, above the bead or binding at the lower edge of the same, which position of the button-hole, in connection with the graduated bands, produces a collar that hugs the neck-band in superior manner without springing back, so as to come in contact with the coat-collar. The *shorter graduated* bands *produce also* a *considerable* saving of material, as compared to the old style of continuous band, *that extends at uniform width along the lower part of collar.*

Having thus described my invention, I claim as new and desire to secure by letters patent—

1. *A collar provided with a band composed of the parts B B, curved and tapered, or decreasingly graduated from the ends towards the middle, as shown and described.*

2. A collar having *short or* sectional bands, starting from the centre of the collar, or any point between the centre and ends thereof, and continuing with a graduated curve to and beyond the ends of the same, substantially as and for the purpose set forth.

3. *The combination, with a collar having short bands graduated on a curve and decreas-*

ingly toward the middle, of a band-connecting bead or binding along the lower edge, as set forth.

4. *A collar having curved and graduated bands that extend along the top or body of the collar, from the centre, or any other point between the centre and ends thereof, to and beyond the ends of the collar, and having the rear button-hole placed above the band or binding into the top or body of the collar, substantially as shown and described.*"

The following are the drawings of the reissue, those of the original patent being the same, except that the button-hole is not lettered in the original:

Fig. 1.

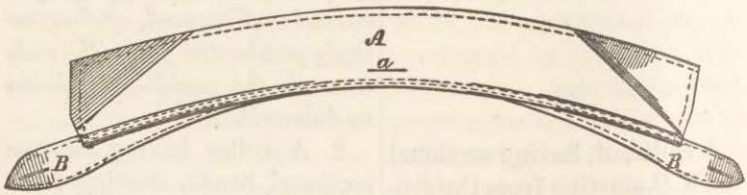
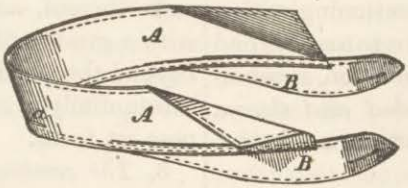


Fig. 2.



The answer set up, as defences, (1) that the reissue was ob-

tained for the purpose of covering a style or form of collar not intended to be covered by the original patent, the original covering a short or sectional band collar only, and the reissue being intended to cover a different style of band, subsequently adopted by the plaintiff, and not having been procured for the purpose of correcting a mistake in the claim of the original; (2) that the plaintiff was not the original and first inventor of the thing patented; (3) non-infringement.

The case was heard on pleadings and proofs, and a decision rendered, 18 Blatchford, 532, in favor of the plaintiff, on which an interlocutory decree was entered, January 8, 1881, adjudging the reissued patent to be valid, and to have been infringed by the defendants, by the manufacture and sale of four collars: Exhibit F, Delhi; Exhibit G, Orion; Exhibit H, Zenith; and Exhibit I, Spy; and awarding an account of profits and damages, to be taken by a master, and a perpetual injunction. On the report of the master, a final decree was entered, July 28, 1881, in favor of the plaintiff, for $8,355.32, which included costs. The defendants appealed to this court.

Mr. William F. Coggswell for appellants.

Mr. Edmund Wetmore and *Mr. Hamilton Wallis* for appellee, argued the questions of infringement and anticipation; and also the construction of § 4916 Rev. Stat., concerning reissues. So much of that section as is relevant is as follows: "Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, or without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee . . . for the unexpired part of the term of the original patent. . . . The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original appli-

cations are. Every patent so reissued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in the case of a machine patent shall the model or drawigns be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident or mistake, as aforesaid." The word "specification," when used separately from the word "claim," in § 4916, means the entire paper referred to in § 4888, namely, the written description of the invention "and of the manner and process of making, constructing, compounding and using it," and the claims made. The word "specification," meaning description and claims, is used in that sense in §§ 4884, 4895, 4902, 4903, 4917, 4920 and 4922. In some cases, as in §§ 4888 and 4916, the words "specification and claim" are used, and in § 4902 the word "description" and the word "specification" are used. But it is clear that the word "specification" when used without the word "claim" means description and claim. If, then, the original patent is within the statute as to either its "description" or "claim," or both, the reissue was valid. But what meaning shall be given to the remainder of the section? It will be observed that two terms are employed, "invalid" and "inoperative." The word "invalid" plainly refers to cases where, from either of the causes stated, the patent is a nullity and should never have been issued. Its application is limited to patents void for insufficiency of the specification. If the word "inoperative" is to be construed as meaning the same thing, its use was superfluous. We are then driven to seek another meaning for it, and this is not difficult to find. Where the subject of an invention is plain, from the drawing or model, or both, and the specification is defective, in that the language used fails to fully describe the thing invented, then, as to the part of the invention omitted, the specification may well be said to be inoperative. This

principle has received the general sanction of the courts, in a long line of authorities.

Mr. Justice Blatchford delivered the opinion of the court. He recited the facts as above stated, and continued:

The defendants' collars have bands which are continuous from end to end of the collar, and are not in two parts, nor divided by any vertical or other seam, at the centre of their length or elsewhere. They have no short or sectional bands, which start from the centre of the collar, or from any point between the centre and the ends. The band is not shorter than the length of the collar. In the original patent, the invention is stated to be a collar having short or sectional bands, that is, the collar has not a continuous band, of one piece of cloth as long as the collar, and extending from end to end of the collar, but has its band made in two sections, and each of those sections starts or begins to run from the centre of the length of the collar, or from a point between the centre and the end, to and beyond the end. The bands have a graduated curve and increasing width, from their starting points, to and beyond the ends of the collar. But that is only one feature in the claim of the original patent. The other feature, the sectional bands, is made equally important in that claim, and a collar is not the collar of that claim unless it has both of those features. That claim is limited to a collar with those features, "substantially as described and shown."

The Circuit Court adopted the view, that a band, composed of two sectional bands, starting from the centre, and proceeding with a graduated curve and increasing width, would not make the whole band any less a continuous band with a graduated curve and increasing width towards each end; that the use of a continuous band of the latter description would not make the parts of it each side of the centre any the less sectional bands; that neither would be a continuous band of uniform width, and, as compared with that, there would be a saving of material by the use of either arrangement; and that it made no difference, in the Wilson invention, whether there was a vertical seam in the centre of the band or not, provided

the other features of the collar existed; that, if there existed, before Wilson's invention, a collar having those features, the fact that it had not such vertical seam would not distinguish it from the Wilson invention; that the real invention shown in the original specification was that claimed in the reissue; and that the reissue was, therefore, valid.

The defendants' collars have a band of continuous material from end to end of the collar, and the back button-hole in the body of the collar, but the band is not of uniform width throughout, being narrowed in the centre. It has, as a whole, the same style of graduated curve which the Wilson collar has. The defendants' collars were first made and sold after the original patent of Wilson was granted, and after the defendants had seen sectional band collars made under it. The first of the defendants' four collars was made and sold in February, 1878, and the other three in March, or April, or May, 1878. The reissue was applied for March 11, 1878, and Wilson testifies that his impression is, that he had previously heard of the defendants' collars. It is evident that the reissue was obtained because the defendants' collar, with a continuous band, had been put on the market, and for the purpose of obtaining claims which would certainly cover such a collar. The changes made in the specification and claims show this. The specification of the reissue, in stating what the invention consists of, omits the statement that it is a collar having *sectional* bands, and states that it is a collar having *curved and graduated* bands. It also omits the statement that the bands *start* from the centre, or from a point between the centre and the ends, and states that the curved and graduated bands *extend along the lower edge of the collar*, from the centre, or from a point between the centre and the ends. The statement of the invention, in the original patent, did not cover the defendants' collars, nor did the claim of that patent. The 2d claim of the reissue is substantially the same as the claim of the original patent. But the 1st and 4th claims of the reissue, corresponding with the changes made in the description, ignore the short or sectional bands, and refer only to a curved and graduated band. The 3d claim preserves the short bands, curved and graduated. As the defendants'

collars do not have the short or sectional bands, and so do not infringe the 2d and 3d claims of the reissue, the question arises as to the validity of the 1st and 4th claims, which it is alleged are infringed.

The final decree in this case was entered July 28, 1881. The decisions of this court in *Miller* v. *Brass Co.*, 104 U. S. 350, and *James* v. *Campbell*, 104 U. S. 356, were made January 9, 1882. Under those decisions, and many others made by this court since, the 1st and 4th claims of the reissue cannot be sustained. Although this reissue was applied for a little over three months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent, by repeating that claim and adding others; where no mistake or inadvertence is shown, so far as the short or sectional bands are concerned; where the patentee waited until the defendants produced their continuous band collar, and then applied for such enlarged claims as to embrace the defendants' collar, which was not covered by the claim of the original patent; and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original. As the rule is expressed in the recent case of *Mahn* v. *Harwood*, 112 U. S. 354, 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 a reissue is made within a reasonably short period after the original patent was granted." But a clear mistake, inadvertently committed in the wording of the claim, is necessary, without reference to the length of time. In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing, so ingeniously worded as to cover collars with continuous long bands and which have no short or sectional bands. The draw-

ings show no continuous band; and the statement in the original patent, that "the use of the short or sectional bands produces a saving of material, as compared to the old style of continuous band," shows that the patentee was drawing a sharp contrast between the only bands he contemplated—short or sectional bands—and a continuous band, of one piece of material, as long as the collar. The original patent industriously excluded from its scope a continuous band. In the reissue, to cover a continuous graduated band, the two bands B B are converted into a single band composed of the parts B B, and, while that is described as extending along the top or body of the collar, the "shorter graduated bands" are described as saving material, as compared with an old style continuous band, of uniform width.

While we are of opinion that the views of the Circuit Court, as before recited, were erroneous, we presume that if this case had been decided after January, 1882, the decree would not have been for the plaintiff.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to dismiss the bill, with costs.

SPAIDS *v.* COOLEY.

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

Argued January 19, 1885.—Decided February 2, 1885.

The declaration in an action to recover money contained the money counts. The defendant pleaded the general issue, and the statute of limitation. The plaintiff replied a new promise within the statutory time. At the trial, before a jury, he offered in evidence a deposition, taken under a commission, to prove the new promise. The defendant objected to the deposition, but did not state any ground of objection. The bill of exceptions set forth, that the court "sustained the objection, and refused to permit the said deposition to be read to the jury, and ruled it out because of its informality." The deposition appearing to be regular in form; and the evidence contained in it, as to the new promise, being material, and such as ought to

have been before the jury ; and the court below having instructed the jury that the plaintiff had not offered sufficient evidence of a new promise to be submitted to the jury, and directed a verdict for the defendant ; and as, if there was such new promise, there was evidence on both sides, for the consideration of the jury, on the other issues, on proper instructions ; and as the bills of exceptions did not purport to set out all the evidence on such other issues ; this court reversed the judgment for the defendant, and awarded a new trial.

The facts are stated in the opinion of the court.

Mr. S. S. Henkle for plaintiff in error.

Mr. W. Penn Clarke for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was brought in the Supreme Court of the District of Columbia, on the 13th of December, 1876, by Chauncey D. Spaids against Dennis N. Cooley, to recover $6,593.70, with interest from July 1st, 1868. The declaration contains the common money counts, and nothing more. There are two pleas, one denying indebtedness, and the other averring that the alleged cause of action did not accrue within three years before the suit. The plaintiff's reply joins issue on the first plea, and, as to the second plea, avers that the defendant promised to pay the debt named in the declaration within three years next before the commencement of the suit. At the trial, the jury found "the issue in favor of the defendant," and there was a judgment accordingly, at special term. The plaintiff appealed to the general term, which affirmed the judgment, and he brings the case here by a writ of error.

There are four bills of exceptions. They show that the trial took place in March, 1880. The first one contains the following statement: "The plaintiff, to sustain the issue on his part, offered evidence tending to show, that, some time in December, 1866, he became acquainted with one John A. Hudnall, who had a claim against the United States for cotton captured by the army during the war of the rebellion, the proceeds of which had gone into the treasury of the United

States; that said Hudnall had no means to employ counsel, and applied to him to undertake the collection of his, said Hudnall's, claim against the United States; that the plaintiff agreed to do so for a contingent fee of 30 per cent. of the amount to be recovered; that plaintiff thereupon associated with himself one Joseph Parrish, to whom he agreed to give one-fourth of the said fee, if he would assist him in the collection of said claim; that, neither the said Parrish nor the plaintiff being a lawyer, they concluded to employ the defendant to prosecute the said case in the United States Court of Claims; that the defendant was absent from the city at the time; that the contract made by the plaintiff with Hudnall was in writing, and the plaintiff thinks he inserted the name of the defendant, as the contracting party with Hudnall at the suggestion of said Parrish or one Weed, and because the plaintiff was not an attorney at law; that the plaintiff and said Parrish procured the form of a petition for instituting a suit in the Court of Claims, and prepared a petition, and had it printed and filed, according to the rules of the Court of Claims, signing the name of the defendant to said petition, as the attorney of record, without his knowledge or consent; that the plaintiff proceeded at once, under the rules of the said court, to take some testimony in the case on behalf of the claimant; that he employed Judge Merriman, a competent lawyer, to assist him in taking the testimony; that the case was partly prepared for trial before the return of the defendant to the city, and, when he came, the plaintiff and said Parrish called upon him, and informed him what they had done, and he approved of it, and agreed to take charge of and prosecute the said case; that Parrish said to the defendant, that, if successful, he could have a fee of five thousand dollars, which the defendant said would be entirely satisfactory; that they then left the agreement made with Hudnall with the defendant; that, subsequently, the defendant said to the plaintiff that the contract did not provide for making the fee a lien upon the judgment which might be recovered, and he wanted Hudnall to come and indorse this stipulation on the agreement; that the defendant afterwards took into partnership W. Penn Clark, and the firm

of Cooley & Clark did go on with the case, and prosecute it to judgment, recovering about $44,000, which was paid to said Clark; that the money paid to said Clark was about $44,000, and the plaintiff demanded from the defendant his share of the fee, which defendant, who was about leaving for his home in Iowa, said he had instructed his partner Clark to retain, and not pay over any of the money until the plaintiff had been settled with; that said Clark did not pay him any part; and that the fee retained amounted to about eleven thousand dollars. The plaintiff also gave testimony tending to show that the defendant had on several occasions promised to pay the plaintiff his share of said fee, and once in the city of Chicago, within three years before the commencement of this suit, had promised to pay said plaintiff, but that he had not done so. He testified, on cross-examination, that, when Cooley returned, he approached him and told him what the arrangement was between him and Parrish—that Parrish was to have one-fourth of his fee, out of which he was to pay Cooley; that Cooley said that was satisfactory, and he would go on and prosecute the claim; and that that was the arrangement made between him and Cooley. And the plaintiff further testified, that he rendered no services in the case at the request of Cooley or Clark, and rendered none at all after his first conversation with Cooley about it."

The fourth bill of exceptions contains the following: "And whereas the defendant had pleaded the statute of limitations, and the plaintiff replied a new promise within the three years preceding the commencement of this suit, the plaintiff, to support this issue on his part, did testify in chief, as follows: 'I next saw Cooley—well, I have seen him so many times I cannot remember when the next time was; I saw him twice in Chicago. . . . My recollection is that I next saw him in 1874. Well, I cannot exactly fix the time; it was during the oyster season, I remember; either in the spring or fall. Well, from about the first of September to the latter part of April or the first of May; mean, between the first of September, 1874, and the last of April or first of May, 1875. I met him in the street, with his satchel in his hand. He said he was

going to Washington. I asked him if he intended to pay me that money. He replied, "You should have had your money long ago, but my partner, Col. Clark, is behaving very badly; he has got a portion of the money into his hands and refuses to pay you." He said: "I am now on my way to Washington; I am going to get the best settlement I can from Clark, and upon my return I will positively pay you." He said further that he did not know but he would have to pay me himself.' And upon cross-examination, he further testified: 'Remember quite distinctly, I asked Cooley if he was going to pay me that money in the Hudnall case, or whether he was going to force me to further proceedings at law.' He said: 'You ought to have had that money long ago; it would have been paid, but Clark is behaving very badly in the matter; he has part of it in his hands and refuses to pay you. I do not know but what I will have to pay you myself.' That is as near precisely what he said as language can make it. I think, I cannot be much mistaken, that was, as near as possible, the very language he used. I said to Cooley: 'Are you going to pay me that money due me in that Hudnall case, or are you going to force me to further legal proceedings to get it?' He said: 'Mr. Spaids, you ought to have had your money long ago, but Mr. Clark is behaving very badly in the matter; he has a portion of the money in his hands and refuses to contribute towards paying you, and I do not know but that I will have to pay you myself.'' And this was all the evidence offered by the plaintiff in support of the new promise. After overruling the prayer of the plaintiff, the court instructed the jury that the plaintiff had not offered sufficient evidence of a new promise, on the part of the defendant, to take the case out of the statute of limitations, to be submitted to them, and directed them to return a verdict for the defendant. To which instruction and direction of the court the plaintiff, by his counsel, excepted."

It must be inferred, that, as the fourth bill of exceptions states that the evidence set forth in it "was all the evidence offered by the plaintiff in support of the new promise," such evidence is the testimony referred to in the first bill of exceptions, in the statement there made that "the plaintiff also gave testimony

tending to show that the defendant had, on several occasions, promised to pay the plaintiff his share of said fee, and once, in the city of Chicago, within three years before the commencement of this suit, had promised to pay said plaintiff," but in regard to which evidence, notwithstanding the above statement, the court afterwards "instructed the jury that the plaintiff had not offered sufficient evidence of a new promise, on the part of the defendant, to take the case out of the statute of limitations, to be submitted to them, and directed them to return a verdict for the defendant."

The second bill of exceptions states that the plaintiff offered in evidence the deposition of Joseph E. Spaids, of which a copy is set forth, to which the defendant objected; that the court "sustained the objection, and refused to permit the said deposition to be read to the jury, and ruled it out because of its informality, to which ruling the plaintiff excepted."

The record shows that in December, 1879, on motion of the plaintiff, the court made an order "that a commission issue to John M. Robertson, Esq., a justice of the peace, of Algonac, St. Clair County, and State of Michigan, to take the testimony of Joseph E. Spaids, a witness for the plaintiff, on the interrogatories and cross-interrogatories filed herein, to be read in evidence on the trial of this case." The commission was issued by the court, under its seal, and the signature of its clerk, December 27, 1879, to Mr. Robertson, empowering him to examine Joseph E. Spaids "as a witness for the plaintiff in the above-entitled cause, upon the interrogatories annexed to this commission," "on oath or affirmation." The entire deposition is as follows:

"In the Supreme Court of the District of Columbia.

Chauncey D. Spaids
v.
Dennis N. Cooley. } At Law. No. 16,894.

Interrogatories to be propounded to Joseph E. Spaids, a witness on behalf of the plaintiff in the above-entitled case, by John M. Robertson, Esq., justice of the peace, a commissioner appointed by the said court for that purpose:

1. What is your name, age, and place of residence?

2. Of what relation are you to the plaintiff?

3. Are you acquainted with the defendant Dennis N. Cooley?

4. When and under what circumstances and where you first met him? What took place between you at that time?

5. When and under what circumstances and where did you next see him?

6. State fully and particularly the conversation which took place between your father, the plaintiff, and the defendant Cooley at that time?

Answers to Interrogatories hereunto annexed.

STATE OF MICHIGAN, }
County of St. Clair, } *ss:*

On this thirty-first day of December, A. D. 1879, before me, the undersigned, a justice of the peace in and for said county, personally appeared Joseph E. Spaids, of Algonac, in said county, who, being by me duly sworn according to law, doth depose and say, in relation to the case of Chauncey D. Spaids *versus* Dennis N. Cooley, hereunto annexed.

Said deponent states as follows:

No. 1. My name is Joseph E. Spaids; my age is forty-four years; and residence is Algonac, St. Clair County, Michigan.

No. 2. That the said Chauncey D. Spaids is my father.

No. 3. And am acquainted with the said Dennis N. Cooley, defendant.

No. 4. I first met the said Cooley at Chicago, in the State of Illinois, about the year 1870; that I was appointed a deputy sheriff to serve a process of a court, to wit, a summons, upon the said Cooley, in a suit then and there commenced by said Spaids against said Cooley; that I did serve said summons upon said Cooley.

No. 5. I next saw the said Cooley at Chicago, aforesaid, in year 1874. I met him on Randolph street, of said city, going towards the Pittsburgh and Fort Wayne depot. I then went into an office where my father, the plaintiff, was, and informed him that said Cooley was in the city. He asked me where he (said Cooley) was. We stepped out of said office on to the street; said Cooley being in sight, I pointed him out to said

Spaids. We both proceeded down to said Cooley, and, after the usual compliments were exchanged between said Spaids and Cooley, the following conversation took place:

No. 6. The said Spaids asked said Cooley if he was going to pay him (said Spaids) the money due him and now in his (said Cooley's) hands, in the Hudnall case, without my being obliged to resort to legal proceedings; to which said Cooley replied as follows: Mr. Spaids, you ought to have had your money long ago, for you got the case and done most of the work in the case before I (Cooley) knew much about it; but my partner, Mr. Clark, is acting very bad in the matter, and I don't know but what I will have to pay the whole amount myself; but I am now on my way to Washington, and while there I will try and get the best settlement I can with Clark, and on my return from there, which will be in about ten days, you shall have your money, if I have to pay it all myself.

I paid particular attention to said conversation, as I had often heard my father speak of said case both before and after I served said summons in 1870.

And further saith not. JOSEPH E. SPAIDS.

Taken, subscribed, and sworn to before me, the day and year first above written.

JOHN M. ROBERTSON,
Justice of the Peace."

Appended to the deposition is a certificate under the hand and seal of the clerk of the county of St. Clair, Michigan, certifying to the official character of Robertson, as a justice of the peace.

It must be intended that the defendant objected to the admission of the deposition because of some alleged informality, but what that was is not set forth in connection with the objection; nor is it stated what the informality was on account of which the court ruled out the deposition. The deposition appears to be regular in form. It was taken under a commission issued by the court, and executed by the commissioner named. The interrogatories forming part of it were put and

answered under a sufficient oath, administered before the answers were taken. The answers are not in narrative form, nor in the form of an affidavit, but each is an answer to the specific interrogatory of corresponding number. The place where the deposition was taken sufficiently appears. The fact that there were no cross-interrogatories cannot affect the regularity, because, under the order for the commission, made twelve days before it issued, and providing for the taking of the testimony "on the interrogatories and cross-interrogatories filed herein," it was for the defendant to show distinctly that there were cross-interrogatories filed which had not been annexed to the commission. In the absence of any apparent informality, if the objection made by the defendant to the admission of the deposition was made on the ground of an informality, that ground, to avail him here, should appear in the bill of exceptions, with a sufficient statement to enable this Court to see that the ground was a valid one; and the informality on which the deposition was ruled out should, to avail him, be stated in the bill of exceptions, with sufficient other matter to enable this Court to say that the identical informality on which the ruling of the court proceeded existed, and was good ground for the ruling. As the defendant made the objection to the admissibility of the deposition, and it was excluded, it was incumbent on him to make it appear, by the bill of exceptions, what the ground of objection was, and that it was a valid ground. The evidence, in the excluded deposition, as to the new promise, was material, and ought to have been before the jury, as tending to show an absolute promise by the defendant to the plaintiff, made within three years before the bringing of the suit, to pay to the plaintiff the money in question, as money then in the hands of the defendant, and due to the plaintiff. As the direction of a verdict for the defendant appears to have been rested on the instruction that there was not sufficient evidence to be submitted to the jury, of a new promise, to take the case out of the statute of limitations, and as, if the jury had found that there was such new promise, there was evidence on both sides for the consideration of the jury on the other issues, under proper instructions, and the bills of exceptions do

not purport to set out all the evidence on such other issues, a new trial must be had.

The judgment of the court in general term is reversed, and the case is remanded to that court, with a direction to reverse the judgment of the court in special term, with costs, and to direct that court to award a new trial.

SULLY *v.* DRENNAN & Others.

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

Submitted January 20, 1885.—Decided February 2, 1885.

The assignment by a railroad company of a tax voted by a township to aid in the construction of its railroad, conveys the rights of the company subject to all the equities between the company and the tax-payers, if it conveys it at all.

In a suit by a tax-payer to invalidate such tax, by reason of failure of the company to comply with conditions precedent to its collection, the company and the assignee are necessary parties with an interest opposed to that of the tax-payer; the trustees of the township and the county treasurer are also necessary parties with an interest different from that of the tax-payer.

Harter v. *Kernochan*, 103 U. S. 562, distinguished from this case.

This appeal was from the order of the Circuit Court for the Southern District of Iowa, remanding to the State court a case which had been removed from the State into the Circuit Court.

This suit was brought originally in the District Court of the State by James N. Drennan and others, tax-payers of Prairie Township, in the county of Mahaska.

The allegations of the bill which were regarded by this Court as necessary for its consideration were, that on May 11, 1880, the voters of said township voted a tax of three per cent. upon the taxable property of said township to aid in constructing a railroad by a company whose name was afterwards lawfully changed to that of the Chicago, Burlington and Pacific Railroad Company. That, by the order and notice submitting the

question to vote, it was provided that one-half of the tax should be collected the first year, and one-half the second year, the said road to be fully completed and running to a depot within the town of Sharon, in said township, before the tax was due and collectible by the said railroad company; and, if not built within two years from the day of the election, said tax never to be collectible. That the railroad was not completed to a depot in Sharon within two years from the date of the vote. That it was not completed from Sharon to any other town.

That Morgan, president of the railroad company, and another director, pending the consideration of the matter by the voters, made false and fraudulent representations to them that the company had arrangements with the Chicago, Burlington and Quincy Railroad Company, and the Chicago, Milwaukee and St. Paul Railroad Company, by which either of these companies would build and equip the road to the town of Sharon as soon as the tax was voted. That the railroad company, by its officers and agents, were demanding of the trustees of the township that they certify to the county treasurer of Mahaska County that the conditions required by said vote had been complied with, and were threatening by suits against them and otherwise to compel them to make such certificate, and petitioners feared that said trustees would yield and make the certificate unless restrained by the act of the court.

They averred that one Alfred Sully claimed some interest in the tax, and asked that he be made a party to the suit, so that he might be estopped by the judgment. They said the tax was illegal and void for many reasons, and prayed for an injunction against the trustees from certifying to the county treasurer that the conditions of the vote had been complied with, and the county treasurer, John H. Warren, and his successor in office, and the Chicago, Burlington and Pacific Railroad Company, and Alfred Sully, from in any manner attempting to collect said tax, or from endeavoring to procure said certificate from the trustees of Prairie Township.

The notice which in the Iowa practice stands for the original writ was returnable to the May term, 1883, and service acknowledged by the trustees and treasurer on the 20th day of

Argument for Appellant.

March, and on the railroad company March 29. The day required for the appearance aud pleading of the defendants was May 11.

A temporary injunction was granted September 13, 1883. It seems that on the 15th day of May the case was, by order of the judge of the District Court, who had been of counsel in it, transferred to the Circuit Court of the same county, the judge of which granted the injunction. At the October term of the latter court all the parties, including Sully, who had not been served with notice, appeared. A demurrer was interposed by Sully and overruled. Many motions were made and decided about the pleadings, and the railroad company, Sully and Warren, filed a joint answer denying the right to the relief prayed. The pleadings were finally made up at that term. At the next term of that court, in May, the application of Sully to remove the case into the United States Court was made on the ground that he was a citizen of the State of New York, and all the other parties were citizens of Iowa. He claimed to have an assignment from the railroad company of the right to the taxes. The State court refused to make the order, and Sully took a transcript of the record and filed it in the Circuit Court for the Southern District of Iowa. When the attention of that court was called to the matter the case was remanded to the State court, and from that order this appeal was taken.

Mr. Charles A. Eldredge and *Mr. J. C. Cooke* for appellant. —I. The assignment was made after the tax was earned, and in payment of money advanced for constructing the road. Where by the terms of the instrument the assignment is prohibited, it may be assigned, and the assignee may sue thereon in his own name; but the same defences may be made against the assignee as could have been made in an action by the assignor. Code, Iowa, § 2086. It is held, construing this section, that choses in action of all kinds are transferable, and that a right of action exists thereon in favor of the assignee. *Richards* v. *Daily*, 34 Iowa, 427. Even a guaranty, not negotiable at the common law, is transferable in Iowa. *National*

Bank v. *Carpenter*, 41 Iowa, 518, 521. The courts have also expressly held that taxes are assignable. *Merrill* v. *Welcher*, 50 Iowa, 61. Merrill in that case was in the precise condition of Sully in this. The act of 1874, which was the foundation of the holding in *Merrill* v. *Welcher*, is still in force. See also *Goodnow* v. *Stryker*, 61 Iowa, 261; *Goodnow* v. *Moulton*, 51 Iowa, 555; and *Goodnow* v. *Wells*, 54 Iowa, 326.—II. The trustees and the treasurer are not interested with Mr. Sully. So far as they have an interest, the facts show that it is against him. See *Barnes* v. *Marshall County*, 56 Iowa, 20. See also *Harter* v. *Kernochan*, 103 U. S. 562, and *Vimont* v. *Chicago & Northwestern Railroad*, 17 Northwestern Rep. 31, as to citizenship of parties in cases like this. The company is not a necessary party. The issuing of the stock is not a condition precedent to the payment of the tax, or the receipt of the collected money by the railroad or its assignee.—III. The application for removal was made in time. Suits in equity are not triable in Iowa until the second term. § 2745 Code. No removal can be made until after joinder of issue. *Stanbrough* v. *Griffin*, 52 Iowa, 112; *Bosler* v. *Booghe*, 54 Iowa, 251. In the Drennan case there had been submission on demurrer; but unlike the circumstances in *Alley* v. *Nott*, 111 U. S. 472, it was not within the discretion of the court to enter final judgment on overruling the demurrer. The statute gives the party the right of reply without leave of court. § 2653 Code. These are regarded as interlocutory rulings, which do not defeat the right of removal. *Stone* v. *Sargent*, 129 Mass. 503.

Mr. H. S. Winslow, *L. C. Blanchard*, and *George C. Morgan* for appellees.

Mr. Justice Miller delivered the opinion of the court. He recited the facts as above stated, and continued:

We think the order remanding the case was well made.

1. Mr. Sully is the only defendant who is not a citizen of Iowa. The other defendants, against whom relief is sought, are the railroad company, the trustees of Prairie Township, and the treasurer of the county. All of these are proper

parties, and are necessary parties, against whom positive and affirmative relief is sought.

Without deciding whether the railroad company could assign the right to sue for and enforce these taxes to Mr. Sully, it is sufficient to say that the assignment did not carry that right to him discharged of the equities between the company and the tax-payers, as if they had been negotiable bonds. To any suit, therefore, to invalidate this tax the company was a necessary party. It is especially so in equity, where the matter set up to defeat the tax, as in this case, was the failure of the company to comply with the conditions of the vote, and its false and fraudulent representations by which the vote was secured. In such a suit the company has a right to defend against these allegations, and the plaintiffs have a right that the company shall be bound by the judgment in the case. The interest of Sully and the company in this controversy are the same, and are both opposed to the interests of defendants. This railroad company is organized under the laws of Iowa, and is a citizen of that State as well as plaintiffs.

2. The township trustees are also citizens of Iowa.

These are not nominal parties and their interest is not identical with that of plaintiffs. What may be their personal wishes is not known, nor is it material. They are sued in regard to their official position, to restrain them in the threatened exercise of their official authority, to the prejudice of plaintiffs. The exercise of this power lies at the root of plaintiffs' case, and of defendants' rights. The statute of Iowa which authorizes this vote by a township declares that the money collected under it shall be paid out by the county treasurer, "at any time after the trustees of the township, or a majority of them, shall have certified to the county treasurer that the conditions required of the railroad and set forth in the notice for the special election, at which the tax was voted, have been complied with." Until this is done no right to the money accrues to the railroad company or any one else.

The act here required of the trustees is not a mere ministerial one. It requires them to ascertain and decide what was required of the company by the notice, with the meaning of its

terms, and, when they have construed these, to ascertain, as a matter of fact, whether they have been complied with.

So important is this action to Sully and to the railroad company, that the bill alleges they are seeking to drive them to make the certificate by threats of expensive litigation, and it is said, in the brief, that Sully has resorted already to a writ of mandamus. Are these trustees nominal parties? Are they, in their official action, on the same side of this controversy with plaintiffs?

If they were there would be no necessity to sue out an injunction to prevent them from issuing this certificate. If there is any nominal party, or any party unnecessary to the relief sought by plaintiffs, it is Sully, for if plaintiffs can procure a decree enjoining the trustees from making that certificate, their relief is sufficient, if not complete.

So of the treasurer, Warren, who, so far from siding with plaintiffs in the suit, has joined Sully and the railroad company in a demurrer to the bill, and in his answer denies the merits.

The case of *Harter* v. *Kernochan*, 103 U. S. 562, is cited in opposition to this view of the case. But in that case negotiable bonds had been issued and were in the hands of Kernochan as a *bona fide* holder. The case between him and the township of Harter was a very different one from the present case. In that case the whole right was vested in Kernochan, and the whole matter in controversy could be determined between him and the township. In the suit as brought in the State court in that case the officers who were served with the writ made default, and a notice by publication against the unknown owner of the bonds being unanswered, a default was taken against them and a decree made enjoining all proceedings to collect the bonds. Under a statutory provision Kernochan came in due time, and, alleging himself to be a holder of the bonds, the default as to the *unknown owner* was set aside, and he was permitted to answer. As to the other defendants, they were now out of the case, and Kernochan being a citizen of another State, removed the case into the Circuit Court of the United States.

Statement of Facts.

The difference between the two cases is obvious.

The judgment of the Circuit Court remanding the case is affirmed.

The cases of *Sully* v. *Manning*, and *Sully* v. *Matthews*, submitted with the foregoing, are governed by the principles announced in it, and are accordingly

Affirmed.

AVEGNO & Others *v.* SCHMIDT & Others.

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

Submitted January 12, 1885.—Decided January 26, 1885.

A decree confiscating real estate under the confiscation act of July 17, 1862, 12 Stat. 589, has no effect upon the interest of a mortgagee in the confiscated property.

A District Court of the United States in proceedings for confiscating real estate under the act of July 17, 1862, 12 Stat. 589, had no jurisdiction to pass upon the validity of a mortgage upon the estate proceeded against.

The well established rule in Louisiana that where a mortgage contains the *pact de non alienando*, the mortgagee may enforce his mortgage by proceedings against the mortgagor alone, notwithstanding the alienation of the property, applies to an alienation by condemnation in proceedings for confiscation, and as against the heirs at law of the person whose property is confiscated. *Shields* v. *Schiff*, 36 La. Ann. 645, approved.

The heirs at law of a person whose life interest in real estate was confiscated under the act of July 17, 1862, take, at his death, by descent, and not from the United States, under the act.

This was an action brought in the Civil District Court of the Parish of Orleans, in the State of Louisiana, by the plaintiffs in error, heirs of Bernard Avegno, deceased, two of whom, being minors, were represented by his widow, as their tutrix, against the defendants in error, to establish their title to certain real estate in the city of New Orleans, and to recover possession thereof. The case was tried by the court without a jury and judgment was rendered for the defendants. Upon appeal to the Supreme Court of the State, the judgment of the Civil

District Court was affirmed. To reverse that judgment of affirmance, the plaintiffs brought this writ of error. The pleadings and evidence disclosed the following facts:

On April 3, 1862, Bernard Avegno, being the owner of the property in dispute, executed a mortgage thereon to Israel C. Harris to secure promissory notes made by Avegno, payable to his own order and indorsed by him, amounting in the aggregate to $36,500, which he delivered to Harris. The mortgage contained the *pact de non alienando*, by which the mortgagor agreed not to sell, alienate, or encumber the mortgaged property to the prejudice of the mortgagee. The notes and mortgage were afterwards transferred by Harris to Charles Morgan. The mortgage being still in force on January 20, 1865, the United States filed, in the District Court for the District of Louisiana, a libel of information against the mortgaged property, of which Bernard Avegno was still the owner, to condemn it as confiscated, under the act of July 17, 1862, 12 Stat. 589, entitled "An Act to suppress insurrection, to punish treason and rebellion, and confiscate the property of rebels, and for other purposes," for the offences of its owner, Avegno. A writ of seizure was issued to the marshal, who, in his return, dated February 14, 1865, stated that he had seized and taken into his possession the property libelled.

Morgan, the mortgage creditor, intervened in the suit for confiscation, claiming to be paid out of the proceeds of the property the amount due on his mortgage. The District Court, on August 1, 1865, made a decree condemning the property in question as forfeited to the United States, and ordering it to be sold, and dismissing the intervention of Morgan, on the ground that his mortgage "could not be acknowledged." The decree of condemnation made by the District Court was not followed by a sale of the forfeited premises, nor were any proceedings taken under it.

Afterwards, on June 25, 1867, Morgan filed his bill in the Circuit Court for the District of Louisiana against Avegno, for the enforcement of his mortgage. On July 11 following, the court made a decree, under which, on December 21, 1868, the property was sold by the marshal and purchased by Morgan,

to whom, on December 26, the marshal made a deed therefor. On March 1, 1869, Morgan conveyed the premises to the defendants.

On August 12, 1872, Bernard Avegno died, leaving the plaintiffs, who are his children, as his heirs at law. They claim title to the property sued for under Bernard Avegno as his heirs. The averment of their petition is, "that, by reason of such confiscation and forfeiture, all right, title, interest and ownership of Bernard Avegno (deceased) was absolutely divested; that said real estate was during his lifetime forfeited to the United States, but that the naked ownership thereof was then vested in your petitioners, who were his legitimate children, living at the time of the rendition of said decree and judgment of condemnation and forfeiture; that, on the 12th day of August, 1872, Bernard Avegno died, whereupon the title and interest of the United States in the said property came to an end, and said life estate was terminated, your petitioners being therefore entitled to the full ownership thereof."

Mr. Albert Voorhies for plaintiffs in error.—The record shows a preliminary seizure before filing the libel for confiscation, and a subsequent seizure and actual possession by the marshal. This will be presumed to have continued till subsequent dispossession is shown. The judgment of confiscation vested the life estate in the United States, and the remainder in the presumptive heirs. *Semmes* v. *United States*, 91 U. S. 21. The title of the presumptive heirs does not spring from the sale, but from the forfeiture. See *Wallach* v. *Van Ryswick*, 92 U. S. 202; *Pike* v. *Wassell*, 94 U. S. 711; *French* v. *Wade*, 102 U. S. 132. Defendants are so impressed with the legal difficulties in the way of their title, resulting from want of proper parties in the foreclosure proceeding, that they fall back on the *pact de non alienando* contained in the mortgage act. There are in the Louisiana statutes, no textual provisions defining and regulating the *pact de non alienando*. Hence, when the Codes were adopted, it was at first objected that the pact itself was inconsistent with the provisions of both Codes—of 1808 and 1825. But the courts held otherwise, placing the matter upon

its true basis, to wit; a contractual stipulation, which parties are at liberty to make to the extent that the stipulation does not conflict with, or militate against existing legislation. *Nathan* v. *Lee*, 2 Martin, N. S. 32; *Donaldson* v. *Maurin*, 1 La. 29; *Barrow* v. *Bank of Louisiana*, 2 La. Ann. 453; *Snow* v. *Trotter*, 3 La. Ann. 268; *Stanbrough* v. *McCall*, 4 La. Ann. 324. Individuals have no right to stipulate against forced sales of their property under judicial sanction; nor can they shield their property against legal proceedings for its condemnation in cases of rebellion;—nor can they bind government against any expropriation for public purposes. In other words, a debtor may bind himself by contract not to alienate his property; but he cannot thereby estop or paralyze the action of courts of justice, or of the government. The defendants contend that the remedy of the mortgage creditor is by foreclosure against the confiscatee, or against him and the purchaser at the condemnation sale. There is no support for this position. *Day* v. *Micou*, 18 Wall. 156, cited in support of it, does not sustain it. Morgan was a party to the suit below, by intervention, and his claim was rejected, on the merits. The agreement with the District Attorney, subsequently filed, left the judgment of condemnation in full force, and without appeal. The record shows affirmatively that the court dismissed Morgan's intervention upon rejection of his demand, while it sanctioned the other claimants' demands as mortgage creditors. Defendants further contend that, before the appeal was finally disposed of, Avegno was pardoned, and that restored to him the property in question. There is a plain answer to this. The four lots had already been sold at the suit of *Morgan* v. *Avegno*, and had been purchased by the former for the amount of his mortgage notes, before the proclamation of amnesty. How then can defendants invoke the doctrine of *Knote* v. *United States*, 95 U. S. 149, 154?

Mr. Henry C. Miller for defendants Schmidt and Ziegler.

Mr. Henry J. Leovy for Morgan's estate.

Opinion of the Court.

Mr. Justice Woods delivered the opinion of the court. He recited the facts as above stated, and continued :

It is plain, and is not disputed by the plaintiffs, that if there had been no proceeding instituted by the United States for the condemnation of the property, and no intervention therein by Morgan, he would have acquired a good title to the premises, by his purchase thereof at the sale made under the decree of the Circuit Court rendered upon his bill to enforce his mortgage, and his deed therefor to the defendants would have vested in them a good and indefeasible title.

The plaintiffs contend, however, that the title so conveyed is void, for two reasons, first, because the judgment of condemnation divested Avegno of all interest and estate in the forfeited premises, and the Circuit Court was, therefore, without jurisdiction to render a decree for the sale of the property in the suit brought to foreclose the mortgage to which Avegno was the only defendant; and, second, because the District Court dismissed Morgan's intervention on the ground that his mortgage "could not be acknowledged," and because this was, in effect, the judgment of a court of competent jurisdiction in a proceeding to which Morgan was a party, declaring his mortgage to be void, and he and those claiming under him were bound by that judgment. We do not think that either of these grounds is well taken.

The interest of Morgan as a mortgagee was not divested or affected by the judgment of condemnation rendered by the District Court. *Day* v. *Micou*, 18 Wall. 156; *Claims of Marcuard*, 20 Wall. 114. Notwithstanding the judgment of condemnation, therefore, he had a valid subsisting mortgage superior to any estate in the mortgaged property acquired by the judgment of condemnation, or which could be acquired under a sale made by virtue thereof. A decree for the foreclosure of his mortgage and a sale under such a decree would carry to the purchaser the entire estate in the mortgaged premises, provided the necessary parties were made to the proceeding to foreclose. It does not lie with the plaintiffs to object that the United States were not made defendants to Morgan's suit. The estate of the government in the property having been de-

termined by the death of Avegno, it is now of no concern to any one, so far as it respects the title to the property, whether the government was represented in the suit of Morgan to enforce his mortgage or not. Without pointing out who were the necessary and proper parties to such a suit, the plaintiffs say that Avegno was neither a necessary nor a proper party, and that as he was the sole defendant the Circuit Court was without jurisdiction to make any decree in the suit brought by Morgan to enforce his mortgage.

One answer of the defendants to this contention of the plaintiffs is, that the proceedings and decree of the District Court, in the suit brought by the United States to enforce the forfeiture of the mortgaged premises, were void because there was no sufficient averment in the libel of a preliminary seizure, by authority of the President, of the premises against which the libel was filed, as required by the act of July 17, 1862, and that consequently the title of Avegno was never divested, and he was not only a necessary, but the only proper party to the suit of Morgan to foreclose his mortgage. We have not found it necessary to pass upon this question. Assuming that the decree of condemnation made by the District Court was valid, its effect was to vest in the United States an estate in the property condemned, for the life of Avegno, and it left in Avegno no estate or interest of any description which he could convey by deed or devise by will; but the ownership after his death was in nowise affected, except by placing it beyond his control while living. *Wallach* v. *Van Riswick*, 92 U. S. 202; *Pike* v. *Wassell*, 94 U. S. 711, and *French* v. *Wade*, 102 U. S. 132. The cases cited also declare that the joint resolution passed contemporaneously with the act of July 17, 1862, 12 Stat. 627, was intended for the benefit of the heirs of the person whose property was condemned, to enable them to take the inheritance after his death. And in the case of *Pike* v. *Wassell*, *ubi supra*, a bill filed during his lifetime by the children of the person whose life estate had been condemned and sold, to protect the property from the encumbrance arising from the failure of the purchaser of the life estate to pay the current taxes thereon, was sustained, the court declaring that, as there was

no one else to look after the interests of the succession, the children might be properly permitted to do so.

These decisions, alone considered, apparently sustain the contention of the plaintiffs, that a decree in a suit to foreclose the mortgage, to which Avegno was the sole defendant, was without the necessary parties, and was, therefore, void for want of jurisdiction in the court to render it.

The answer of the defendants to this contention of the plaintiffs is, that, as the mortgage executed by Avegno contained the *pact de non alienando*, he was a proper and the only necessary party to the suit brought by Morgan to foreclose his mortgage.

The effect of the stipulation in a mortgage called the *pact de non alienando*, by which the mortgagor agrees not to alienate or encumber the mortgaged premises to the prejudice of the mortgage, is well settled in Louisiana. In *Nathan* v. *Lee*, 2 Martin, N. S. 32, the effect was decided to be, that "the mortgagee is not bound to pursue a third possessor, but may have the hypothecated property seized in *via executina* as if no change had taken place in its possessors, because any alienation or transfer made in violation of the *pact de non alienando* is *ipso jure* void as it relates to the creditor, and that this effect of the *pact* is not annulled by the provisions of the Civil Code in relation to mortgages, and the rules laid down for pursuing the action of mortgage."

In *Stambaugh* v. *McCall*, 4 La. Ann. 324, the court reviewed the cases on this subject, and held that where a mortgage contained the *pact de non alienando*, one who subsequently purchases the property from the mortgagor cannot claim to be in any better condition than his vendor, nor can he plead any exception which the latter could not, and that any alienation in violation of the *pact* is null as to the creditor.

These cases, and those cited in the note,* establish the rule

* *Donaldson* v. *Maurin*, 1 La. 29; *Moss* v. *Collier*, 14 La. 133; *Lawrence* v. *Burthe*, 15 La. 267; *Nicolet* v. *Moreau*, 13 La. 313; *Guesnard* v. *Soulie*, 8 La. Ann. 58; *Succession of Vancourt*, 11 La. Ann. 383; *Smith* v. *Nettle*, 13 La. Ann. 241; *Murphy* v. *Jandot*, 2 Rob. La. 378; *New Orleans Gas Light & Banking Co.* v. *Allen*, 4 Rob. La. 389; *Dodd* v. *Crain*, 6 Rob. La. 58.

that where a mortgage contains the *pact de non alienando* the mortgagee may enforce his mortgage by proceeding against the mortgagor alone, notwithstanding the alienation of the property, and that all those claiming under the mortgagor, whether directly or remotely, will be bound, although not made parties.

In the present case, and in the later case of *Shields* v. *Schiff*, 36 La. Ann. 645, the Supreme Court of Louisiana has held that there was such a privity between a person whose life estate had been condemned under the act of July 17, 1862, and his heirs, that the latter were bound by a suit and decree to enforce a mortgage executed by their ancestor containing the *pact de non alienando*, to which the ancestor alone had been made a party defendant.

We think this decision is right. It is sustained by the case of *Wallach* v. *Van Riswick*, *ubi supra*, as will appear by the following passages fom the opinion of the court in that case, delivered by Mr. Justice Strong:

"If it be contended that the heirs of Charles S. Wallach," the person whose property had been condemned, "cannot take by descent unless their father, at his death, was seized of an estate of inheritance, *e. g.*, reversion or a remainder, it may be answered, that even at common law it was not always necessary that the ancestor should be seized to enable the heir to take by descent. Shelley's case is, that where the ancestor *might* have taken and been seized the heir shall inherit. Fortescue, J., in *Thornby* v. *Fleetwood*, 1 Str. 318.

"If it were true that at common law the heirs could not take in any case where their ancestor was not seized at his death, the present case must be determined by the statute. Charles S. Wallach was seized of the entire fee of the land before its confiscation, and the act of Congress interposed to take from him that seizin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood. In *Lord de la Warre's Case*, 11 Coke, 1 *a*, it was resolved by the justices 'that there was a difference betwixt disability personal and temporary, and a disability absolute and perpetual; as where one is attainted of treason or

felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him or to any ancestor above him; but when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is a personal disability for his life only, and his heir, after his death, may claim as heir to him or to any ancestor above him.' There is a close analogy between that case and the present."

"Without pursuing this discussion further, we repeat, that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy, would defeat the avowed purpose of the confiscation act and the only justification for its enactment; and to hold that the joint resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We cannot so hold."

These extracts show that it was the opinion of the court that the children of a person whose estate was condemned under the act of July 17, 1862, took, at his death, by descent as his heirs, the fee simple, and did not derive their title from the United States, or by virtue of the confiscation act.

Avegno, the mortgagor, was, therefore, the only person necessary to be made a party to the suit brought by Morgan to foreclose his mortgage, and the proceedings and sale were valid and binding on the plaintiffs, and vested in Morgan a good title to the premises in dispute, which he conveyed to the defendants.

But the plaintiffs insist that the mortgage had been declared inoperative and void by the District Court in dismissing the intervention of Morgan in the proceeding to condemn the mortgaged property, and that the defendants are bound by that judgment. There are two answers to this contention. The first is that this defence, if it be a defence, should have been pleaded in Morgan's suit brought to enforce his mortgage. The decree of a court of competent jurisdiction cannot be collaterally attacked by averring and proving that there was a good defence to the suit if the defendant had chosen to make

Statement of Facts.

it. The second answer is that the District Court was without jurisdiction to pass upon the validity of the mortgage in the suit for the condemnation of the mortgaged property. *Bigelow* v. *Forrest*, 9 Wall. 339; *Day* v. *Micou*, 18 Wall. 146; *Claims of Marcuard*, 20 Wall. 114. It does not clearly appear from the record that the District Court intended by its decree dismissing the intervention of Morgan to pass upon the validity of the mortgage; but if its decree is to be interpreted as declaring the mortgage to be invalid and void, the court exceeded its jurisdiction, and the decree was without effect upon the mortgage.

In our opinion, therefore, Morgan acquired a good title to the premises in controversy by his purchase at the sale made to satisfy his mortgage lien, and his deed to the defendants having vested them with his title, the judgment of the Supreme Court of Louisiana in their favor was right.

Judgment affirmed.

STONE *v.* CHISOLM & Others.

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

Submitted January 5, 1885.—Decided February 2, 1885.

A suit in equity is the proper remedy, in the courts of the United States, to enforce the statutory liability of directors to a creditor of a corporation, (organized under the act of the legislature of South Carolina of December 10, 1869), by reason of the debts of the corporation being in excess of the capital stock. An action at law will not lie.

This was a writ of error prosecuted to reverse a judgment of the Circuit Court for the District of South Carolina, dismissing the complaint, in which the plaintiff asked for a recovery for the sum of $1,050, with interest from July 1, 1883. The jurisdiction of this court depended upon and was limited by a certificate of division of opinion between the Circuit and District

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Judges, before whom the case was tried, and was confined to the single question so certified whether the remedy of the plaintiff below was by an action at law, or by a suit in equity.

The allegations of the complaint were as follows:

"I. That the plaintiff, Roy Stone, is a citizen of the State of New York.

"II. That the defendants, Robert G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred Ravenel, and Sallie E. Conner, as executrix of James Conner, deceased, are citizens of the State of South Carolina.

"III. That heretofore, to wit, on the — February, 1881, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina was a corporation under the laws of the State of South Carolina, with a paid-up capital stock of fifty thousand dollars, and no more; that said company was, by the terms of the charter, authorized to increase its capital stock, in the manner provided by law, to an amount not exceeding two hundred and fifty thousand dollars, and by an act amendatory of its charter, passed — December, 1882, the said company was further authorized to increase its capital stock to an amount not exceeding four hundred thousand dollars in the whole, inclusive of the stock then existing; that the company did, from time to time, between the said February, 1881, and 21st March, 1883, increase its capital stock to the sum of three hundred thousand dollars, that is to say, scrip for shares of capital stock to the par value of three hundred thousand dollars were issued; but, as the plaintiff is informed and believes, and so alleges and charges, of the additional amount of stock issued after — February, 1881, only the sum of twenty-five thousand dollars, or thereabouts, was ever actually paid in, making the entire aggregate of capital stock actually paid in not to exceed in all the sum of seventy-five thousand dollars.

"IV. That by an act amendatory of its charter, passed 21st December, 1882, the name of said Marine and River Phosphate Mining and Manufacturing Company was changed to the Marine and River Phosphate Company.

"V. That on the 21st day of March, 1883, the said Robert G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred

Ravenel, and James Conner were directors of said company. That thereafter, to wit, July, 1883, the said James Conner departed this life, leaving a last will, whereof he appointed his wife, Sallie E. Conner, executrix, who has duly qualified thereon.

"VI. That on said 21st March, 1883, the said Marine and River Phosphate Company was indebted in an amount not less in the aggregate than seventy-five thousand dollars.

"VII. That on said 21st March, 1883, in the administration of the aforesaid directors, there were issued the following bonds, being a debt contracted by the said company additional to the debt existing as aforesaid, to wit:

"Sixty bonds or obligations of said company, bearing date the twenty-first day of March, 1883, and each conditioned for the payment to bearer of the sum of five hundred dollars on the first day of January, 1893, with interest thereon, payable semi-annually, at the rate of seven per cent. per annum on the presentment of the interest coupons therefor, attached to said bonds, and payable on the first days of July and January of each year. That an interest coupon for the sum of $17.50 became due on each of said bonds on the first day of July last past, and the same were, at maturity, duly presented for payment and payment refused, and no part of the same has been paid.

"VIII. That plaintiff is the lawful owner and holder of said bonds and coupons.

"IX. That the said bonds, so conditioned, for the aggregate sum of thirty thousand dollars, were in addition to the debt already existing as aforesaid, and constituted an indebtedness in excess of the capital stock of said company actually paid in as aforesaid.

"X. That by the 1367th section of the General Statutes of the State of South Carolina, and by the provisions of an act of the said State, approved 10th December, 1869, entitled 'An Act to regulate the formation of corporations' (under which act the said Marine and River Phosphate Mining and Manufacturing Company of South Carolina was incorporated), and by sundry other laws of said State, the said defendants are jointly and

severally liable to the plaintiff for the payment of the said bonds and coupons.

"XI. That the said Marine and River Phosphate Company is totally insolvent; that all its property is mortgaged to an extent far in excess of its value; that, as plaintiff is advised, its property, consisting of personalty so mortgaged, is not subject to levy under execution; and that, even if it were, plaintiff alleges and charges that there is no unencumbered property of said company subject to levy, and that judgment and execution would be wholly nugatory and fruitless to effect anything, as the encumbered property, upon a sale thereof, would not bring sufficient to discharge the liens on the same, and the execution creditors would only be cast in the costs of such levy and sale.

"XII. That by reason of the premises defendants are indebted to plaintiff, upon the coupons held by him as aforesaid, in the sum of one thousand and fifty dollars, and interest from the 1st day of July, 1883.

"Wherefore plaintiff prays judgment against said defendants for the sum of one thousand and fifty dollars, with interest from 1st July, 1883, and costs."

Thereupon the defendants demurred orally, on the ground—

"That the liability imposed by the statutes referred to in the complaint cannot be enforced in an action at law, but by a proceeding in equity only, and, consequently, that this being a court of law, has no jurisdiction to entertain the plaintiff's case."

And this question having been fully argued before the judges aforesaid, and their opinions thereupon being opposed, the point upon which they disagreed was stated as follows:

"Whether the liability imposed upon the directors of a corporation by the provisions of the statutes referred to in the complaint can be enforced by a single aggrieved creditor in an action at law against one or more directors, or whether such creditor must proceed by a creditor's bill in equity."

Mr. William B. Earle for plaintiffs in error.

Mr. Theodore G. Barker and *Mr. James Lowndes* for defendants in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court. He recited the facts as above stated, and continued:

The statutes referred to in the complaint are § 1367 of the General Statutes of South Carolina, the act of December 10, 1869, entitled "An Act to regulate the formation of corporations," and "sundry other laws of said State." This last reference would broaden the question certified, so as to embrace the inquiry whether the remedy insisted on was conferred by any law of the State; but counsel for the plaintiffs in error disclaim reliance upon any provisions of the statutes, except those specifically referred to, which they have accordingly printed with their brief.

§ 1367 of the General Statutes of South Carolina occurs in a general act on the subject of the organization and government of corporations, contained in the revision of 1882, in Chapter XXXVIII., under the sub-title "Of corporations organized under charters." It reads as follows:

"SEC. 1367. The total amount of debts which such corporations shall at any time owe shall not exceed the amount of its capital stock actually paid in; and, in case of excess, the directors in whose administration it shall happen shall be personally liable for the same, both to the contractor or contractors and to the corporation. Such of the directors as may have been absent when the said excess was contracted or created, or who may have voted against such contract or agreement, and caused his vote to be recorded in the minutes of the board, may respectively prevent such liability from attaching to themselves by forthwith giving notice of the fact to a general meeting of the stockholders, which they are authorized to call for that purpose. The provisions of this section shall not apply to debts of railroad corporations secured by mortgage."

This provision was a re-enactment of, and consequently superseded, a similar provision contained in section 33 of the act of December 10, 1869, under which the Marine and River Phosphate Company had been organized as a corporation, and which being a general law was subject to modification and repeal. The language of that section was as follows:

"SEC. 33. The whole amount of the debts which any such company at any time owes shall not exceed the amount of its capital stock actually paid in; and, in case of any excess, the directors under whose administration it occurs, shall be jointly and severally liable to the extent of such excess, for all the debts of the company then existing, and for all that are contracted, so long as they respectively continue in office, and until the debts are reduced to the amount of the capital stock; *Provided*, that any of the directors, who are absent at the time of contracting any debt contrary to the foregoing provisions, or who object thereto, may exempt themselves from liability by forthwith giving notice of the fact to the stockholders at the meeting they may call for that purpose."

The act of 1869 also contained the following:

"SEC. 35. When any of the officers of a company are liable, by the provisions of this act, to pay the debts of the company, or any part thereof, any person to whom they are so liable may have an action against any one or more of said officers, and the declaration in such action shall state the claim against the company and the grounds on which the plaintiff expects to charge the defendants, personally: and such action may be brought, notwithstanding the pendency of an action against the company for the recovery of the same claim or demand; and both of the actions may be prosecuted until the plaintiff obtains the payment of his debt, and the cost of both actions."

This section now appears as § 1401 of the General Statutes, but under a subdivision of "Provisions applicable solely to corporations under Class I.;" and this class is defined by § 1377 as "all labor, agricultural, manufacturing, industrial, mining, or companies or associations of like nature," the organization and government of which is the subject of Chap. XXXIX., entitled "Of corporations organized under general statutes."

On the other hand, § 1367 of the General Statutes, which, as we have seen, corresponds to and supersedes § 33 of the act of 1869, is contained in Chapter XXXVIII. of the General Statutes under the head "Of corporations organized under charters."

But § 1370 of the same chapter, under a subdivision designating "manufacturing companies," provides that "all manufacturing companies which shall be incorporated in this State shall have all the powers and privileges, and be subject to all the duties, liabilities and other provisions contained in §§ 1361 to 1369, inclusive, of this chapter, unless the said corporations be specially exempted therefrom by their respective charters."

It thus appears, that, although § 35 of the act of 1869 furnished the remedy for enforcing the liability imposed by § 33 of the same act, the former has been superseded by § 1401, and the latter by § 1367 of the General Statutes, but with a totally different relation in the latter, from that sustained by the corresponding sections in the former, so that it cannot be said that the action given by and described in § 1401 of the General Statutes applies as the remedy expressly prescribed for enforcing the liability imposed by § 1367. It follows that, if § 1401 applies to the Marine and River Phosphate Company, § 1367 does not. Either there is no such liability as is sought to be enforced in the present action, or the remedy resorted to cannot rest upon the section cited as expressly conferring it.

It is argued, indeed, on behalf of the defendants in error, that § 1367, which declares the liability of the directors in the case stated in the complaint, cannot apply, because the Marine and River Phosphate Company is not a corporation organized under a charter, but under a general law, that provision being applicable, it is said, only to those of the former description.

But we deem it unnecessary to consider and decide that question, because no special remedy being prescribed by statute for enforcing the liability defined by that section, from a consideration of its nature and the circumstances which are made the conditions of it, we are led to the conclusion that the only appropriate remedy in the courts of the United States is by a suit in equity.

The conditions of the personal liability of the directors of the corporation, expressed in the statute, are that there shall be debts of the corporation in excess of the capital stock actually paid in, to which the directors sought to be charged shall have assented, and this liability is for the entire excess

both to the creditors and to the corporation. To ascertain the existence of the liability in a given case requires an account to be taken of the amount of the corporate indebtedness, and of the amount of the capital stock actually paid in; facts which the directors, upon whom the liability is imposed, have a right to have determined, once for all, in a proceeding which shall conclude all who have an adverse interest, and a right to participate in the benefit to result from enforcing the liability. Otherwise the facts which constitute the basis of liability might be determined differently by juries in several actions, by which some creditors might obtain satisfaction and others be defeated. The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it according to their interest, an apportionment which, in case there cannot be satisfaction for all, can only be made in a single proceeding to which all interested can be made parties.

The case cannot be distinguished from that of *Hornor* v. *Henning*, 93 U. S. 228, the reasoning and result in which we reaffirm.

It is immaterial that in the present case it does not appear that there are other creditors than the plaintiffs in error. There can be but one rule for construing the section, whether the creditors be one or many.

To the question certified, therefore, it must be answered that an action at law will not lie, and that the only remedy is by a suit in equity.

The judgment is accordingly

Affirmed.

THORNLEY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 13, 1885.—Decided February 2, 1885.

Officers on the Retired List of the Navy are not entitled to longevity pay.

The appellant brought this suit against the United States to recover a balance due him, as he contended, on his pay as an officer of the navy. His petition alleged that, on September 1, 1855, he was commissioned a surgeon in the navy; that on June 1, 1861, while he still held the grade or rank of surgeon, he was, by order of the Secretary of the Navy, issued by direction of the President, placed on the retired list, in accordance with the provisions of § 3 of the act of Congress approved February 21, 1861, 12 Stat. 150, by reason of incapacity for further service at sea, but that for some years after said retirement he was assigned to and performed active duty; that by § 3 of the act of Congress approved July 15, 1870, 16 Stat. 333, the sea-pay of an officer on the active list of the navy of the grade or rank held by the appellant at the time of his retirement was fixed, for the first five years from the date of commission, at $2,800 per annum; for the second five years from the date of commission, at $3,200 per annum; for the third five years from the date of commission, at $3,500 per annum; for the fourth five years from the date of commission, at $3,700 per annum; and after twenty years from the date of commission, at $4,200 per annum.

The petition further alleged that § 1 of the act of Congress approved March 3, 1873, 17 Stat. 547, fixed the pay of officers of the navy, who were then or might thereafter be retired on account of incapacity, resulting from sickness or exposure in the line of duty, at seventy-five per cent. of the sea-pay of the grade or rank which they held at the time of their retirement; that the act of Congress approved April 7, 1882, 22 Stat. 41, entitled "An Act for the relief of Medical Director John Thornley, United States Navy," the appellant, directed that he be considered as having been retired from active service as a

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surgeon and placed on the retired list of officers of the navy, June 1, 1861, on account of physical incapacity originating in the line of duty, and that he be paid accordingly.

The petition also referred to § 1 of the act approved August 5, 1882, 22 Stat. 286, which provided that all officers of the navy should "be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and receive all the benefits of such actual service, in all respects, in the same manner as if said service had been continuous in the regular navy."

The petition further alleged that the appellant, under a proper construction of said acts, should have received pay since March 3, 1873, at the following rates, to wit: from March 3, 1873, to September 1, 1875, $2,775 per annum, or seventy-five per centum of the sea-pay of a surgeon on his fourth lustrum from the date of his commission; and from September 1, 1875, to the time of filing his petition, $3,150 per annum, or seventy-five per centum of the sea-pay of a surgeon after twenty years from the date of his commission; that such pay had been wrongfully withheld from him, and he had only been paid since March 3, 1873, at the rate of $2,400 per annum. The petitioner, therefore, demanded judgment for $6,343.67.

The findings of fact made by the Court of Claims, January 29, 1883, were as follows: "On the 3d of September, 1855, the petitioner was commissioned a surgeon in the navy. On the 1st of June, 1861, on account of physical incapacity to perform further service at sea, he was placed on the retired list as a surgeon, under § 3 of the act of February 21, 1861, 12 Stat. 147, 150. From March 3d, 1873, to November 16, 1882, he was paid at the rate of $2,400 per annum, but the accounting officers of the treasury have refused to allow him any more than that amount."

From these facts the court deduced the conclusion of law, that the petitioner was not entitled to recover, and dismissed his petition. From this judgment the petitioner appealed.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellant.

Mr. Solicitor-General for appellee.

Opinion of the Court.

MR. JUSTICE WOODS delivered the opinion of the court. He recited the facts as above stated, and continued:

It is not seriously contended that § 1 of the act of August 5, 1882, referred to in this petition, has any application to the case. The controversy arises upon § 3 of the act of July 15, 1870, 16 Stat. 321, entitled "An Act making appropriations for the naval service for the year ending June 30, 1871, and for other purposes," and the second clause of § 1 of the act of March 3, 1873, entitled "An Act making appropriations for the naval service for the year ending June 30, 1874, and for other purposes," 17 Stat. 547. These sections have been reproduced in the Revised Statutes, and read as follows, respectively:

"SEC. 1556. The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the navy shall be entitled to receive annual pay at the rates herein stated, after their respective designations: The admiral, thirteen thousand dollars; . . . surgeons, paymasters and chief engineers, who have the same rank with paymasters during the first five years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave or waiting orders, two thousand dollars; during the second five years after such date, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; on leave or waiting orders, two thousand four hundred dollars; during the third five years after such date, when at sea, three thousand five hundred dollars; on shore duty, three thousand two hundred dollars; on leave or waiting orders, two thousand six hundred dollars; during the fourth five years after such date, when at sea, three thousand seven hundred dollars; on shore duty, three thousand six hundred dollars; on leave or waiting orders, two thousand eight hundred dollars; after twenty years from such date, when at sea, four thousand two hundred dollars; on shore duty, four thousand dollars; on leave or waiting orders, three thousand dollars.

* * * * * *

Opinion of the Court.

"SEC. 1588. The pay of all officers of the navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement."

§ 1 of the act of March 3, 1873, upon which § 1588 is based, also provided that no officer on the retired list of the navy should be employed on active duty except in time of war. This provision is now reproduced in § 1462 Revised Statutes.

The contention of the appellant is that upon these enactments he is entitled to what is known as "longevity pay." The contention of the United States is that longevity pay is only given to officers on the active list of the navy, and not to retired officers, to which latter class the appellant belongs.

Where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction. *Benton* v. *Wickwire*, 54 N. Y. 226; *Woodbury* v. *Berry*, 18 Ohio St. 456; *Bosley* v. *Mattingly*, 14 B. Mon. 89; *Ezekiel* v. *Dixon*, 3 Georgia, 146; *Farrel Foundry* v. *Dart*, 26 Conn. 376; *Sussex Peerage Case*, 11 Cl. & Fin. 85, 143; Bishop on the Written Laws, § 72. Applying this rule, we are of opinion that the case of the appellant finds no support in any act of Congress.

The effect of the act for the relief of the appellant referred to in his petition was simply to allow him the rate of pay of the grade in which he was retired, prescribed by § 1588 of the Revised Statutes, for officers retired on account of incapacity

resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein. It placed him on the same footing in respect of his pay, and no other, as § 1588 placed the retired officers therein mentioned.

There have been but three acts of Congress giving longevity pay to officers of the navy. The first was the act of March 3, 1835, 4 Stat. 755, by which longevity pay was given to surgeons only. At that time retired officers were unknown to the navy. The second was the act of June 1, 1860, 12 Stat. 23, which gave it to commanders, lieutenants, surgeons, engineers, pursers, boatswains, gunners, carpenters and sailmakers, when on duty at sea; and the third was the act of July 15, 1870, which gave it generally to officers on the active list of the navy, including surgeons.

By no act, therefore, since the foundation of the government, has Congress ever given longevity pay to officers of the navy, except those on duty at sea, or on the active list of the navy; and the statute book is now bare of any enactment which awards to any officer of the navy, not on the active list, any increase of pay for length of service.

The appellant seeks to find a reversal of this persistent policy of Congress, in respect to the pay of naval officers, in the expression found in § 1588 of the Revised Statutes, to wit, that "the pay of all officers of the navy, who have been retired, . . . shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held respectively at the time of their retirement." The contention is that by these words Congress intended to give, in this roundabout and indirect manner, longevity pay to the retired officers, which, when dealing directly with the subject, it had uniformly refused to give them. To our minds the section will bear no such construction. Its plain meaning is that the pay of a retired officer shall be three-fourths of the sea-pay to which he was entitled when he was retired. It is contended that, because Congress graduated the pay of officers on the active list by the length of their time of service, officers not on the active list are entitled to the same

increase. But the contrary is the true construction. By omitting retired officers from the class entitled to longevity pay, Congress expressed its purpose not to allow them longevity pay. No other construction can be put upon the law without importing into it words which Congress has left out, namely, that besides the pay to which his grade or rank at the date of his retirement entitled him, the retired officer should also receive, for every period of five years after his retirement, the increased pay allowed officers on the active list. To give the statute this meaning would be legislation and not interpretation.

The case of *United States* v. *Tyler*, 105 U. S. 244, relied on by appellant, brings no support to his suit. The statute allowing longevity pay to officers of the army, § 1262 Rev. Stat., declared that there should be allowed and paid to all officers below the rank of brigadier-general ten per cent. of their current yearly pay for every term of five years' service, but it did not restrict the increased pay to officers in active service. The point on which the case turned was the decision of the court, that an officer of the army, though retired, was still in the service, and he was included in the very terms of the statute allowing the increased pay. The statute on which the appellant relies excludes him by its terms from its benefits.

We are not called on to explain why Congress should apply one rule to the officers of the army and another to the officers of the navy. It is sufficient to say that it has clearly done so. If the law is unequal and unjust, the remedy is with Congress and not with the courts.

Judgment affirmed.

BAYLIS *v.* TRAVELLERS' INSURANCE COMPANY.

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

Argued January 5, 1885.—Decided February 2, 1885.

When parties do not waive the right of trial by jury, the court may not substitute itself for a jury, by passing upon the effect of the evidence—finding the facts—and rendering judgment thereon.

At the trial of this case, after close of the testimony, defendant moved to dismiss on the ground of the insufficiency of the evidence to sustain a verdict. This motion being denied, plaintiff asked that the case be submitted to the jury to determine the facts on the evidence. The court refused this, and plaintiff excepted. The court then ordered a verdict for plaintiff, subject to its opinion, whether the facts proved were sufficient to render defendant liable to plaintiff on the cause of action stated. Plaintiff moved for judgment on the verdict, and defendant moved for judgment on the pleadings and minutes of trial. Judgment was rendered for defendant, upon an opinion of the court as to the effect of the evidence, and as to the law on the facts as deduced from it by the court: *Held*, That the plaintiff was thereby deprived of his constitutional right to a trial by jury, which he had not waived, and to which he was entitled.

This was an action brought by the plaintiff in error to recover upon a policy of insurance issued by the defendant, whereby it insured William Edward Parker Baylis, the father of the plaintiff, in the sum of $10,000, to be paid to the plaintiff, in case said assured should accidentally sustain bodily injuries which should produce death, within ninety days.

The complaint alleged that the assured, "on or about the 20th day of November, 1872, did sustain bodily injuries accidentally, to wit, in that wholly by accident he took certain drugs and medicines, which, as taken by him, were poisonous and deadly, when, in fact, he intended to take wholly a different thing and in a different manner; and that, in consequence of said accident solely, said assured died on said 20th day of November, 1872."

An issue was made by a denial in the answer of this allega-

tion, so far as it alleged that the poisonous and deadly drugs were taken "accidentally, or by accident, or with the intent, or under the circumstances stated or mentioned in the complaint."

The cause came on for trial by jury, when, as appears by the bill of exceptions, the plaintiff put in evidence the policy of insurance, proved the fact and circumstances of death, and notice thereof to the defendant, and it was conceded that the question of suicide was not raised by the evidence.

The testimony being closed, the counsel for the defendant moved to dismiss the complaint on the ground that the evidence was insufficient to sustain a verdict. This motion was denied, and thereupon the plaintiff's counsel insisted "that the evidence presented questions of fact which ought to be submitted to the jury, and asked that the case be submitted to the jury to determine upon the evidence."

The bill of exceptions further stated, that "the court refused to submit the cause to the jury, and the plaintiff's counsel duly excepted."

The court then directed the jury to render a verdict for the plaintiff for the full amount claimed, subject to the opinion of the court upon the question whether the facts proved were sufficient to render the defendants liable upon their policy, and the jury accordingly rendered a verdict for the plaintiff for the amount sued for, with interest.

The plaintiff moved for judgment upon the verdict, and the defendant moved for judgment in its favor, on the pleadings and minutes of trial.

Judgment was accordingly rendered for the defendant upon the opinion of the judge, a copy of which is set out in the record, and is as follows:

"This action is brought upon a policy of insurance against accident, issued by the defendants, whereby they agree to pay to the plaintiff the sum of $10,000 'within ninety days after sufficient proof that the insured, William E. P. Baylis, at any time within the continuance of the policy, shall have sustained bodily injuries effected through external, violent, and accidental means, within the intent and meaning of this contract

and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof.' The contract contained the following proviso: '*Provided*, That this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation or medical or mechanical treatment for disease.' The cause was tried before the court and a jury, when, upon the evidence adduced, a verdict for the plaintiff was directed, subject to the opinion of the court upon the question whether the facts proved were sufficient to render the defendants liable upon their policy. The following are the facts as derived from the evidence, and in stating them I adopt the conclusions of fact most favorable to the plaintiff that the evidence will permit to be drawn: The insured died on the 20th of November, 1872. A week or so previous to his death he was suffering from influenza, the result of a cold, and was then treated therefor by his physician. He began to get better, when, on Friday night before his death, he had an attack of cholera morbus, accompanied with convulsions, which seemed to completely shatter his nervous system, and left him in a wholly nervous state. On Monday following he was again better, proposed to go to business, and asked his physician, on account of restlessness, to give him some opiate for a quiet night's sleep. The physician ordered a preparation of opium, and directed him to take twenty drops of it before going to bed. He was at this time taking chloral, under the same medical advice, and the opium was directed to be taken in addition to a prescribed dose of chloral. That night the insured took the prescribed dose of chloral, and as may be inferred from the facts shown, a dose of opium also. There is no direct evidence as to the quantity of opium he took, but I shall treat the case as if the evidence respecting the symptoms that followed, and the actions of the insured, was sufficient to warrant a jury in finding that, through inadvertence, the insured took more opium than he intended to take, and such a quantity that his death was caused thereby. It is by no means clear that such finding would be warranted by the evidence given, and it is certain that no conclusion more favorable to the plaintiff can

be drawn from the proofs. I am therefore to determine whether, as matter of law, such a death is within the scope of the policy sued on. Upon this question my opinion is adverse to the plaintiff. As I view the evidence the death was caused by 'medical treatment for disease,' and, if so, it was excepted by the terms of the policy.

"The contention in behalf of the plaintiff is that the opium was not administered by the hand of a physician, and, moreover, was not the dose directed by the physician to be taken, but was a dose taken by the insured upon his own judgment, and that these facts take the case out of the exception in the policy. But it must be conceded that the opium which caused the death was taken by the insured with the object of allaying the nervous excitement from which he was suffering. Certainly, then, this was disease. The advice of a physician had been taken as to its cure. It is equally certain that there was a treatment of this disease, for the remedy prescribed by the physician was taken, although in excessive quantity, and the opium taken was so taken because the physician had prescribed it to remedy the disease. The opium was taken with no other object than to effect the result which the physician had advised should be attained by using opium. Under these circumstances the fact that the patient deviated from the direction given by the physician in the matter of amount, and, upon his own judgment, took a larger dose than had been directed, does not change the character of the act. The object of the insured in taking the opium he did was to cure or else to kill. The facts repel the idea of an intention to kill and prove the intention to cure. Death caused by such an act, done with such an intent, is, in my opinion, a death caused wholly or in part by medical treatment for disease, and, therefore, is not covered by the policy. I am also of the opinion that the facts do not disclose a case of bodily injury effected through 'external, violent, and accidental means,' occasioning death, within the meaning of the policy. I do not consider that violence can fairly be said to be an ingredient in the act of taking a dose of medicine, although the medicine be destructive in its action and death the result.

"These considerations compel to a denial of the motion for judgment in favor of the plaintiff, and a direction that judgment for the defendants be entered."

To which ruling and conclusion the plaintiff duly excepted.

Mr. John L. Hill for plaintiff in error.

Mr. F. E. Mather for defendant in error.

Mr. Justice Matthews delivered the opinion of the court. He recited the facts as above stated, and continued:

If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this court. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, and cases there cited. And, in that event, the plaintiff, having duly excepted to the ruling in a bill of exceptions, setting out all the evidence, upon a writ of error, would have been entitled to the judgment of this court, whether, as a matter of law, the ruling against him was erroneous.

Or, if in the present case, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict, on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might, with propriety, have reserved the question, what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect

of the evidence, finds the facts involved in the issue, and renders judgment thereon.

This is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury.

In this particular, we think error has been well assigned.

The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Rev. Stat. §§ 648, 649.

This constitutional right this court has always guarded with jealousy. *Elmore* v. *Grymes*, 1 Pet. 469; *De Wolf* v. *Rabaud*, 1 Pet. 476; *Castle* v. *Bullard*, 23 How. 172; *Hodges* v. *Easton*, 106 U. S. 408.

For error in this particular, the

Judgment is reversed, and the cause is remanded, with directions to grant a new trial.

PNEUMATIC GAS COMPANY *v.* BERRY & Another.

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

Argued January 7, 1885.—Decided February 2, 1885.

A release by a corporation to one of its directors of all claims, equitable or otherwise, arising out of transactions under a contract between the corporation and the director made in excess of its corporate powers, is valid, if made in good faith, and without fraud or concealment.

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

Mr. Walter H. Smith and *Mr. C. W. Holcomb* for appellant.

Mr. Ervin Palmer for appellees.

Mr. Justice Field delivered the opinion of the court.

This case comes before us on appeal from the decree of the Circuit Court for the Eastern District of Michigan. The facts, so far as necessary to present the point of our decision, are as follows:

In 1869, and previous to March of that year, several persons interested in a patent for the manufacture of illuminating gas, and gas machines known as "Rand's Patent," for the States of Michigan, Wisconsin, Illinois and Iowa, agreed to unite their interests, obtain an act of incorporation from the legislature of Illinois and do business in Chicago. They accordingly applied to the legislature of the State, and, on the 24th of March following, obtained an act duly incorporating them and their associates and successors under the name of the Illinois Pneumatic Gas Company. By its third section the corporation was invested with power to manufacture and sell illuminating gas, to be made from petroleum or its products under the patents owned or to be owned by the company, or in which it may have any title or interest, issued or to be issued to A. C. Rand; also to manufacture and sell the works and machinery with all

needed materials and appliances for such manufacture, and to make assignments and grant licenses under the patents in the same manner and to the same effect as if the corporation were a natural person.

In September, 1869, the corporators organized under the act of the legislature, adopted a set of by-laws for the management of the affairs of the company, and, pursuant to them, elected a board of nine directors, with full control of its property and franchises, and a president, secretary and treasurer and general manager. The defendant, Joseph H. Berry, was chosen as one of the directors, and Mahlon S. Frost was chosen treasurer and general manager. From this time until the 1st of June in the following year, 1870, the company carried on at Chicago the business of manufacturing gas machines. But the business was not profitable, and the company ran in debt and became embarrassed. Judgments were recovered against it, upon which executions were issued and levied upon its property. It was without money, or credit, or any available means of raising funds, and the forcible sale of its whole property was imminent. Under these circumstances, the general manager, Frost, consulted the defendants as to the course which should be pursued, and, as the result of the conference, the defendants entered into an agreement with him to the effect that, if he would take the property of the company and continue its business under his personal supervision and management, they would advance sufficient money to pay its outstanding debts and to carry on the business already obtained and to develop and increase it. Having this agreement with the defendants, Frost made a proposition to the board of directors of the company to take its property and franchises for two years from June 1, 1870, continue its business for that period at his own expense, pay its existing liabilities, and at the end of two years return to the company the property received, and transfer to it the right to manufacture gas with a machine known as the "Maxim Gas Machine," and the right to sell the same in Illinois. This proposition was accepted by the directors and embodied in a written agreement, executed by the company through its president and secretary, bearing date on that day. This agreement is, in fact, a lease by the

company to Frost, for the period of two years, of the good-will of its business, of its right to manufacture gas and gas machines, of its franchises, machinery, implements, tools and fixtures, and a sale of its gas fixtures then on hand, and machines then in process of being made, and its stock and materials, notes, book accounts, claims and demands. And the agreement provided that, in consideration of the lease and sale of the property, Frost should pay all the then liabilities of the company as the same matured, excepting the amount then due to him (which was to continue a liability as though the agreement had not been made), procure the right to vend the patented "Maxim Gas Machine" for the State of Illinois, and at the end of the lease return to the company all the property received from it and the business which he had built up or acquired. Frost was then a director of the company, and, upon the execution of the agreement, he took possession of its property and assets, and conducted the business until August 1, 1870, when he transferred to the defendants all his interests and privileges. They thereupon took possession of the property, commenced the manufacture of gas machines at Chicago, and continued in the business until their machinery was destroyed by fire in October, 1871. During this period they paid the debts of the company, and carried out the conditions of the lease and sale, except as to the purchase of the "Maxim" patent. After the fire the directors extended the lease for two years, and consented to the removal of the manufacturing works to Detroit. The defendants accordingly removed the works to that city, where they afterwards carried on the business.

The lease, as extended, did not expire until June 1, 1874, but in April, before its expiration, the defendants offered to surrender it and the business to the company on certain conditions. The offer was accepted, but the proposed agreement fell through from a failure of the company to comply with the conditions.

Again, after the termination of the lease, and on October 15, 1874, the defendants made another proposition to the board of directors, which was, in substance, to sell to the company their stock on hand, including machines finished wholly or in

part, at a valuation to be estimated by a committee to be appointed by the company, less the value of the property to be turned over to the company under the terms of the lease and their proportion of the working capital necessary to purchase the tools and machinery. In consideration of this agreement the defendants were to be released from all claims of the company, and were to carry on the business at Detroit for one year without compensation, the company to have the profits made. This proposition was accepted, and, pursuant to it, certain of the stockholders gave their notes to the defendants in purchase of the property then on hand, which were afterwards paid. This arrangement, however, fell through, as some of the stockholders failed to furnish their proportion of the purchase money for the property.

On the 15th of March, 1876, the defendants made a third proposition to the directors for the adjustment of their business, which was accepted and incorporated into an agreement executed on that day. It transferred to the company the interest in the lease to Frost remaining in them, and stipulated to assign and transfer on demand all of the capital stock owned by them for the sum of $274 and the right to manufacture gas machines at some one place to be selected by them in certain named States, with the privilege of selling the machines. It stipulated to pay and deliver to the stockholders the moneys received from them under the contract of October 15, 1874, with interest thereon, and to deliver up such notes as they then held. And on the other hand, the company stipulated to pay to the defendants their proportion of any royalty that might be collected on the patents during the time the defendants owned stock in the company in the proportion that their stock bore to the whole stock of the company, and it released them from all claims, either equitable or otherwise, which it had by virtue of previous agreements or transactions.

The provisions of this agreement were fully carried out by the defendants. They paid over to the several stockholders the money and surrendered the notes they had received under the agreement of October 15, 1874, and interest on the money. Notwithstanding this settlement, and the release of the com-

pany thereby executed, the present bill was filed by it in September, 1877, upon instructions of its board of directors, to cancel the lease and contracts, to charge the defendants as trustees, and compel them to account for the property received from the company and profits made by them in their business under the lease. It set forth the lease and the transactions we have mentioned, and charges that they were made in excess of the authority of the directors, and were therefore null and void; that it was a breach of duty on their part to make the lease to Frost, and, on his part, to receive it, he being the treasurer and general manager of the company; and, also, that the release was invalid because the defendants then had in their possession unaccounted for, the sum of at least $60,000 derived from their business under the lease, which belonged to the company.

The answer of the defendants explained the agreements and transactions with the company, its insolvent condition when the lease was made, the repeated offers to return the property and turn over the business to the company, and the final settlement and execution of the release of the company by the agreement of March 15, 1876. The lease to Frost and the contracts and transactions between the parties were fully disclosed by the proofs produced, and the court held, after full consideration, that under the embarrassed circumstances in which the company was placed at the time, judgments being rendered against it and executions levied upon its property, which was about to be sold, the lease was a valid transaction. Had it not been made, said the court, and the money furnished by the defendants to meet the liabilities of the company, its whole property would have been sacrificed and its business entirely broken up; and though Frost, to whom the lease was made, was at the time a director of the corporation, that fact of itself was not sufficient ground to set aside the contract, it being made to protect the interests of the company and without any fraudulent design on his part.

The court also held that it ought not to set aside the lease for other reasons, namely, that it had been executed over seven years before any objection was made to it, and had during this

time been repeatedly ratified; and, that the release executed under the agreement of March 15, 1876, was a full and final settlement of the matters and claims between the parties, there being no evidence that the settlement was obtained by fraud or any improper conduct of either party. The court therefore dismissed the bill, and from its decree the cause is brought by appeal to this court.

A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which had its approval, which were essential to its protection, and the benefits of which it has fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone preserved its existence.

But it is not necessary to rest our judgment of affirmance of the decree of the court below upon any consideration of the character of those transactions. After seven years' acquiescence in the lease, something more must be shown than that it was executed in excess of the powers of the directors, before the lessee will be required to surrender the profits he has made under it. The lease expired June 1, 1874; the disposition of the property was settled by the agreement of March 15, 1876; and the release is an answer to all claims for the profits made by the defendants. The release is of itself sufficient to justify the dismissal of the bill. There is no evidence that it was obtained upon any fraudulent representations. Nothing was kept from the parties when it was executed. Indeed, all the transactions between the defendants and the company, from the time they took from Frost an assignment of the lease, were open and well known. There was no concealment, either had or attempted, of anything that was done, and no just reason can be given for disturbing the settlement made.

Decree affirmed.

EX PARTE BIGELOW.

ORIGINAL.

Submitted January 19, 1885.—Decided February 2, 1885.

The Supreme Court of the District of Columbia has jurisdiction to determine whether an arraignment of a prisoner under several indictments; an order of court that the indictments shall be consolidated and tried together; an empanelling of a jury for that purpose; an opening of the case on the part of the prosecution; and a discharge of the jury at that stage in order to try the prisoner before the same jury on the indictments separately, so put the prisoner in jeopardy in regard to the offences named in the consolidated indictments, that he cannot be afterwards tried for any of those offences.

When a court has jurisdiction by law of an offence and of the person charged with it, its judgments are, in general, not nullities: an exception to this rule if relied on, must be clearly found to exist.

This was a motion for leave to file a petition for a writ of habeas corpus. The facts upon which the motion was founded appear in the opinion of the court.

Mr. Robert Christy for petitioner.

Mr. Justice Miller delivered the opinion of the court.

This is an application for a writ of habeas corpus to release the petitioner from imprisonment in the jail of the District of Columbia, where he is held, as he alleges, unlawfully by John S. Crocker, the warden of said jail. He presents with the petition the record of his conviction and sentence in the Supreme Court of the District to imprisonment for five years, under an indictment for embezzlement; and this record and the petition of the applicant present all that could be brought before us on a return to the writ, if one were awarded. We are thus, on this application for the writ, placed in possession of the merits of the case.

The single point on which petitioner relies arises out of the following facts, which occurred at the trial. There were pending before the court fourteen indictments against the petitioner for embezzlement as an officer of the Bank of the Republic, and an order of the court had directed that they be consolidated

under the statute and tried together. A jury was then empanelled and sworn, and the District Attorney had made a statement of his case to the jury, when the court took a recess. Upon reconvening, a short time afterwards, the court decided that the indictments could not be well tried together, directed the jury to be discharged from further consideration of them, and rescinded the order of consolidation. The prisoner was thereupon tried before the same jury on one of those indictments and found guilty. All of this was against his protest and without his consent. The judgment was taken by appeal to the Supreme Court in general term, where it was affirmed.

It is argued here, as it was in the court in general term, that the empanelling and swearing the jury, and the statement of his case by the District Attorney, put the prisoner in jeopardy with regard to all the offences charged in the consolidated indictments, within the meaning of the Fifth Amendment of the Constitution, so that he could not be again tried for any of those offences. That amendment declares, among other things, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property without due process of law."

If the transaction, as thus stated, brings the prisoner's case within this principle of the Constitution, the court committed an error. On account of this error, among others assigned, the case was carried by appeal to the court in general term, where the matter was heard by other judges, and, after full consideration, the judgment of the trial court was affirmed.

No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain.

It is said, however, that the court below exceeded its jurisdiction, and that this court has the power, in such case and for that reason, to discharge the prisoner from confinement under a void sentence. The proposition itself is sound if the facts justify the conclusion that the court of the District was without authority in the matter.

But that court had jurisdiction of the offence described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defences offered by him. The matter now presented was one of those defences. Whether it was a sufficient defence was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury.

If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offence, and if the identity of the offence were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea.

The same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea both as matter of law and of fact cannot be doubted.

This Article V of the Amendments, and Articles VI and VII, contain other provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. Do all of these go to the jurisdiction of the courts? And are all judgments void where they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation?

It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general

rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities.

There are exceptions to this rule, but when they are relied on as foundations for relief in another proceeding, they should be clearly found to exist.

The case of *Lange*, 18 Wall. 163, 166, is relied on here. In that case the petitioner had been tried, convicted, and sentenced for an offence for which he was liable to the alternative punishment of fine or imprisonment. The court imposed both. He paid the fine, and made application to the same court by writ of habeas corpus for release on the ground that he was then entitled to his discharge. The Circuit Court, on this application, instead of releasing the prisoner, set aside its erroneous judgment, and sentenced him to further imprisonment. This court held that the prisoner, having been tried, convicted, and sentenced for that offence, and having performed the sentence as to the fine, the authority of the Circuit Court over the case was at an end, and the subsequent proceedings were void.

In the present case no verdict, nor judgment was rendered, no sentence enforced, and it remained with the trial court to decide whether the acts on which he relied were a defence to any trial at all.

We are of opinion that what was done by that court was within its jurisdiction. That the question thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and that its decision was the exercise of jurisdiction. *Ex parte Watkins*, 3 Pet. 193, 202; *Ex parte Parks*, 93 U. S. 18, 23; *Ex parte Yarbrough*, 110 U. S. 651, 653; *Ex parte Crouch*, 112 U. S. 178.

Without giving an opinion as to whether that decision was sound or not,

We cannot grant the writ now asked for, and it is, therefore, denied.

Statement of Facts.

QUINCY *v.* JACKSON.

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

Submitted January 9, 1885.—Decided February 2, 1885.

A provision in a city charter, which confers power on the city council to levy and collect taxes annually on real and personal property, to pay debts and meet the general expenses of the city, not exceeding fifty cents on each hundred dollars, relates only to debts and expenses for ordinary municipal purposes; and not to those debts and expenses which can be incurred only by special legislative authority.

An act authorizing a municipal corporation to incur a debt for the purpose of subscribing to the stock of a railroad company, confers authority to levy taxes for the payment of the debt in excess of limit of taxation authorized by law for ordinary municipal purposes. *United States* v. *Macon County*, 99 U. S. 582, distinguished from this case.

Defendant in error petitioned below for mandamus against the mayor and aldermen of the city of Quincy, the plaintiffs in error, to compel the levy of a tax to pay a judgment recovered against the city.

The material allegations of the petition were that the judgment was had upon certain coupons of certain bonds of said city, duly issued by the city in payment of its subscription to the capital stock of the Mississippi and Missouri River Air Line Railroad Company. That said bonds recited that they were issued under an order of the city council, passed August 7, 1868, and an act of the General Assembly of the State of Illinois, approved March 27, 1869, legalizing the act of the said city of Quincy in voting said subscription. That there were no funds in the city treasury of said city to pay said judgment. That the special charter of said city, as amended in 1863 by the act of the legislature of said State, provided that there should be levied on all real and personal property, within the limits of said city, to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each $100 per annum, on the annual assessed value thereof. That the legislature of said State in 1881 gave said city power to levy on all its taxable property, for all purposes other than for schools and

the interest on its registered bonds, not exceeding in any year the rate of one per cent. of the equalized assessed valuation of such taxable property. That the revenues of said city, from every source, for the year ending March 31, 1885, after paying the necessary running expenses of said city, and the sum of $20,000, and the surplus above the running expenses of said city upon certain other judgments, in pursuance of certain mandamus writs, would not be sufficient to pay relator's judgment, and that the relator was without remedy except by writ of mandamus. The defendants demurred by general demurrer. The demurrer being overruled, the defendants elected to abide by it, and the writ of mandamus issued as prayed for. This writ of error was brought to reverse that judgment.

Mr. George A. Anderson for plaintiff in error.—Courts cannot clothe a municipal corporation with powers of taxation. They can only compel it to exercise those already possessed. *United States* v. *Macon County*, 99 U. S. 582, 591. All such powers of taxation are derived from legislative grant, either express or necessarily implied. *Champaign* v. *Harmon*, 98 Ill. 491. And power by implication must arise when the act, out of which it is implied, takes effect. It cannot arise afterwards by reason of failure of existing laws to accomplish their supposed objects. The act of 1863, § 4, clause 3, was the act in force when these bonds were legalized, and was the only authority then existing to levy taxes for payment of debts. It (1) authorized a levy of fifty cents on the hundred dollars and (2) prohibited a levy of a further amount. This law formed a part of the measure of the obligations on one side, and of the rights on the other. *Rees* v. *Watertown*, 19 Wall. 107, 120. This act has not been expressly repealed. If repealed at all, that was effected by the act of 1869 legalizing these bonds. It is familiar law that this court does not favor repeals by implication. *Ex parte Crow Dog*, 109 U. S. 556, 570. The act of 1869 enacted "That the acts of the City Council of the City of Quincy, from June 2, A.D. 1868, to August 28, A.D. 1868, in ordering an election on the proposition to subscribe the sum of one hundred thousand dollars to the capital stock of the Mis-

sissippi & Missouri River Air Line Railroad Company, and the subscription to said stock, and all other acts of said Council in connection therewith, are hereby legalized and confirmed." It may well have been the intention of the legislature that this debt should be paid like all others out of the proceeds of the fifty cent tax. There is no allegation or presumption that this tax was insufficient for the purpose. If it proved so in practice, it would not follow that the legislature intended to repeal the restrictive clause of the act of 1863. It is a much safer position to assume that it regarded the existing laws as sufficient. *Supervisors* v. *United States*, 18 Wall. 71, 81. The Constitution of Illinois, § 23, art. 3, provides that "no private or local law, which may be passed by the general assembly, shall embrace more than one subject, and that shall be expressed in the title." The act of 1869 showed but one subject in the title—the legalization of the bonds. It made no reference to the increase of the taxing power. The object of the act was to place the city in the position it would have been in, had it possessed the power to subscribe, at the time when the subscription was made: it was not its purpose to place the municipality in a different position from what it would have been in by increasing the taxing power. Had the city possessed no taxing powers when the debt was incurred, the case would have been different. This distinguishes it from *United States* v. *New Orleans*, 98 U. S. 381, and *Loan Association* v. *Topeka*, 20 Wall. 655. The current of authority is strong against the doctrine of implied powers of municipal taxation. Cooley on Taxation, 200, 209; *Chestnutwood* v. *Hood*, 68 Ill. 132. A mere grant of authority to contract a debt cannot by implication repeal a pre-existing charter limitation upon the power to raise taxes for payment of debts. *Shackelton* v. *Guttenberg*, 10 Vroom, 660; *Leavenworth* v. *Norton*, 1 Kansas, 432; *Clark* v. *Davenport*, 14 Iowa, 494. The case of *United States* v. *Macon County*, 99 U. S. 582, seems to be identical, in principle, with this case. If so, this court has already decided the question of issue. If not, then the case of *Binkert* v. *Jansen*, 94 Ill. 283, upon the same question, is decisive and conclusive.

Mr. Carl E. Epler for defendant in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

The relator, Jackson, recovered a judgment in the court below against the city of Quincy, Illinois, for the sum of $9,546.24, with costs of suit.

There are no funds in its treasury out of which the judgment can be paid, and its corporate authorities have refused upon demand of the relator to satisfy it, in the only way in which it can be paid, by a levy of taxes for that specific purpose. The judgment in the present action, which was commenced by a petition for mandamus, requires the city council of Quincy to levy and collect a special tax sufficient to discharge the amount thereof, with interest from the date of its rendition, and also the costs of this and the former action. We have only to inquire whether the corporate authorities of the city have the power under the laws of Illinois to levy and collect such a tax.

By an act of the General Assembly of Illinois, amendatory of the special charter of the city, approved February 14, 1863, it is provided that "the city council of said city shall have power to levy and collect, annually, taxes . . . on all real and personal property within the limits of said city, to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each one hundred dollars per annum on the annual assessed value thereof."

By an act, approved March 27, 1869, it was declared that "the acts of the city council of the city of Quincy, from June 2, 1868, to August 28, 1868, in ordering an election on the proposition to subscribe the sum of $100,000 to the capital stock of the Mississippi and Missouri River Air Line Railroad Company, and the subscription to said stock, and all other acts of said council therewith, are hereby legalized and confirmed." Under the authority conferred by this act negotiable bonds of the city were issued, and the judgment in the first action was for the amount of certain coupons of bonds embraced in that issue. The authority of the city, after the passage of the act of March 27, 1869, to execute bonds in payment of stock subscriptions therein referred to was sustained in *Quincy* v. *Cooke*, 107 U. S. 549.

Subsequently, by an act approved May 30, 1881, it was provided that all cities, villages and incorporated towns in Illinois not then having, by their respective charters, the power to levy and collect as high a rate of taxation as one per cent. annually upon their taxable property, should thereafter have power to assess, levy and collect annually upon the taxable property within their respective limits for all corporate purposes—in addition to all taxes which any such city, town or village was then, or might thereafter be, authorized by law to levy and collect to support and maintain schools, erect school buildings and for all other school purposes, and to pay interest on its registered bonded indebtedness—such an amount as their respective corporate authorities might prescribe, not exceeding in any year the rate of one per cent. of the assessed valuation of such taxable property, as equalized by the State board of equalization, for the preceding year; the said rate to be in lieu of all other rates and items of taxation then provided and authorized in such charters, for all purposes other than for schools, the erection of school buildings, and all other school purposes, and for paying interest on the registered bonded indebtedness of such city, town, or village. Laws of Ill. 1881, p. 59.

It is conceded by the case before us that the revenue of the city for its fiscal year ending March 31, 1885, to accrue from the taxes it could levy under the act of 1881, after meeting its necessary current expenses and other demands prior to that of the relator Jackson, will be insufficient to pay his judgment, interest and costs.

On behalf of the city it is contended that when these bonds were issued, the act of 1863 prohibited any annual levy of taxes "to pay the debts and meet the general expenses of the city," in excess of fifty cents on each one hundred dollars of the assessed value of its real and personal property. To this it may be replied, as was done in *Quincy* v. *Cooke* in reference to similar language in the original charter of the city, that the act of 1863 related to debts and expenses incurred for ordinary municipal purposes, and not to indebtedness arising from railroad subscriptions, the authority to make which is not implied

from any general grant of municipal power, but must be expressly conferred by statute. When the legislature in 1869 legalized and confirmed what the city council had previously done touching the subscription to the stock of the Mississippi and Missouri River Air Line Railroad Company, and thereby authorized bonds in payment thereof to be issued, it could not have been contemplated that indebtedness thus created would be met by such taxation as was permitted for ordinary municipal purposes. In giving authority to incur obligations for such extraordinary indebtedness, the legislature did not restrict its corporate authorities to the limit of taxation provided for ordinary debts and expenses. In *Loan Association* v. *Topeka*, 20 Wall. 655, 660, the court, after observing that the validity of a contract, which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose, said: "It is, therefore, to be inferred that, when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." So in *United States* v. *New Orleans*, 98 U. S. 381, 393: "When authority to borrow money or incur an obligation, in order to execute a public work, is conferred upon a municipal corporation, the power to levy a tax for its payment, or the discharge of the obligation, accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation." The same question arose in *Ralls County* v. *United States*, 105 U. S. 733, 735, where it was said: "It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligations to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests

a contrary legislative intention." Again: "If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other." See also *Parkersburg* v. *Brown*, 106 U. S. 487, 501. The doctrine announced in these cases is sustained by *United States* v. *County of Macon*, 99 U. S. 582, upon which the plaintiff in error relies; for, in that case, the very act, conferring upon the county authority to make a subscription to the stock of a railroad corporation, made special provision for a tax to meet the subscription, and thus negatived the inference that the legislature intended to permit any taxation beyond that allowed by that special act and the general laws of the State.

These decisions cover the present case; for, in the first place, neither the act of 1869, from which the city derived authority to issue negotiable bonds in payment of its subscription, nor any general law of the State, forbids, expressly or by necessary implication, taxation to the extent necessary to meet the obligations thus incurred; and, in the second place, the limitation imposed by the city's charter upon its power of taxation had reference to its ordinary municipal debts and expenses.

In reference to the act of 1881, it is only necessary to say that, if it refers to indebtedness for railroad subscriptions, the limit imposed by it cannot be made to apply to indebtedness created prior to its passage, accompanied, as the latter was, with power in the city, at the time it was created, to impose taxation sufficient to discharge it.

Judgment affirmed.

SANTA ANNA *v.* FRANK.

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

Submitted January 9, 1885.—Decided February 2, 1885.

When a jury is waived by stipulation, a general finding of the issues by the court is not open to review.

The declaration contained a special count upon municipal bonds and coupons, and general counts for money had and received, &c. A jury was waived, and the court found generally on all the issues. The bill of exceptions contained all the evidence, but showed no exception to its admission. *Held*, That the general counts were sufficient to support the judgment, and that questions raised as to the subject matter of the special count were therefore immaterial.

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

Mr. Hamilton Spencer and *Mr. Thomas F. Tipton* for plaintiff in error.

Mr. T. C. Mather for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The first count in the declaration is upon certain bonds and coupons purporting to be the obligations of the town of Santa Anna, in the State of Illinois, and to have been issued in pursuance of an act of the legislature of Illinois, entitled "An Act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same," approved February 28, 1867, and in accordance with the vote of the electors of said township, at the special election held July 21, 1866. The declaration, also, contains the common counts for money paid, money had and received, &c. A jury having been waived by a stipulation in writing, the case was tried by the court. The bill of exceptions, which embodies all the evidence, does not show any exception by either party to the admission of evidence, and concludes: "This was all the evi-

dence offered by either party, and thereupon the court found the issues for the plaintiff." A judgment was entered for plaintiff, and a motion in writing for new trial was overruled, to which defendant excepted.

1. There is no special finding of facts; and the general finding of the issues for the plaintiff is not open to review by this court. *Martinton* v. *Fairbanks*, 112 U. S. 670.

2. The questions discussed by counsel for the defendant as to the legal authority of the town to issue the bonds referred to fairly arise upon the first count of the declaration. But their determination cannot affect the judgment, for the common counts are sufficient under the statutes of Illinois to support the judgment, without reference to any question of the legal authority to issue the bonds described in the first count. Rev. Stat. Ill. 1870, ch. 110, § 58; *Bond* v. *Dustin*, 112 U. S. 604.

Judgment affirmed.

McARTHUR & Others *v.* SCOTT & Others.

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

Argued January 28, 29, 1884.—Reargued April 7, 8, 9, 1884.—Decided March 2, 1885.

Words in a will, directing land to be conveyed to or divided among remaindermen at the expiration of a particular estate, are to be presumed, unless clearly controlled by other provisions, to relate to the beginning of enjoyment by remaindermen, and not to the vesting of the title in them.

A testator devised lands and personal property to his executors and their successors, and their heirs, in trust; and directed that the income, until his youngest grandchild, who might live to be twenty-one years of age, should arrive at that age, should be divided equally among the testator's children, or the issue of any child dying, and among the grandchildren also as they successively came of age; that "after the decease of all my children, and when and as soon as the youngest grandchild shall arrive at the age of twenty-one years," the lands should be "inherited and equally divided between my grandchildren *per capita*," in fee, and that "in like manner" the personal property should "at the same time be equally divided among my said grandchildren, share and share alike *per capita*;" and that if any grandchild should have died before the final division, leaving children, they

Syllabus.

should take and receive *per stirpes* the share which their parent would have been entitled to have and receive if then living; and provided that any assignment, mortgage or pledge by any grandchild of his share should be void, and the executors, in the final division and distribution, should convey and pay to the persons entitled under the will. *Held*, That the executors took the legal title in fee, to hold until the final division; and that the trusts were imposed upon them as executors. *Held, also*, That all the grandchildren took equitable vested remainders, opening to let in those born after the testator's death, and subject to be divested only as to any grandchild who died before the expiration of the particular estate, leaving issue, by an executory devise over to such issue.

Under the statute of Ohio of December 17, 1811, providing that no estate in lands "shall be given or granted by deed or will to any person or persons, but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will," a devise of a vested remainder to grandchildren of the testator, with an executory devise over of the share of any grandchild, who shall have died, leaving children, before the coming of age of the youngest grandchild, to the children of such deceased grandchild, is valid, so far, at least, as concerns the grandchildren, though born after the testator's death.

All persons interested in a suit in equity, and whose rights will be directly affected by the decree, must be made parties to the suit, unless they are too numerous, or some of them are out of the jurisdiction, or not in being; and in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all.

A trustee having large powers over the trust estate, and important duties to perform with respect to it, is a necessary party to a suit by a stranger to defeat the trust.

A court of probate has inherent power, without specific statute authority, to grant administration limited to the defence of a particular suit.

A citizen of Ohio devised lands in that State to his three executors in fee, in trust, to pay the income to his children and grandchildren until the youngest grandchild who should live to be twenty-one years of age should arrive at that age and then to convey the remainder to his grandchildren in equal shares; and provided that if any executor should die, resign, or refuse to act, a new executor, to act with the others, should be appointed by the court of probate. The will was admitted to probate, upon the testimony of the attesting witnesses, under the statute of Ohio of February 18, 1831, and three executors were appointed and acted as such. Two of them afterwards resigned and their resignations were accepted by the court of probate. A bill in equity to set aside the will and annul the probate was then filed, under that statute, by one of the children against the other children and all the grandchildren then in being, alleging that they were the only persons specified or interested in the will, and were the only heirs and personal representatives of the deceased; those grandchildren being infants, one of the children was appointed guardian *ad litem* of each; the third executor, who was one of the children made defendants in their own right,

and who was not made a party as executor or trustee, and did not answer as such, resigned, and the resignation was accepted by the court of probate, pending that suit, and no other executor, trustee, or administrator with the will annexed was made a party; it was found by a jury that the instrument admitted to probate was not the testator's will, and a decree was entered setting aside the will and annulling the probate. Partition was afterwards decreed among the heirs, and they conveyed portions of the lands set off to them to purchasers for value and without actual notice of any adverse title. *Held*, That the decree annulling the probate was absolutely void as against grandchildren afterwards born, and that they were entitled to recover their shares under the will against the heirs and purchasers, and might, if the parties were citizens of different States, bring their suit in the Circuit Court of the United States.

Holt v. *Lamb*, 17 Ohio St. 374, followed.

This is a bill in equity by the children of Allen C. McArthur, a son of General Duncan McArthur, to enforce a trust and establish a title in fee in lands in Ohio under the will of their grandfather.

The case was heard in the Circuit Court on the bill and answers, by which it appeared to be as follows:

Duncan McArthur, of the County of Ross and State of Ohio, died on May 12, 1839, leaving an instrument in writing, dated October 30, 1833, purporting to be duly executed and attested as his last will, by which he empowered and directed his executors to sell and convey all his lands not described, devised his home farm to his wife for life, and other lands not now in question to Samson Mason and Samuel F. Vinton, in trust for the benefit of his five surviving children and their heirs, made various bequests, and further provided as follows:

[15.] "Item. It is my will and direction that my lands and lots not otherwise herein disposed of, lying and being in the counties of Ross and Pickaway, shall not be sold; but the said lands and lots, together with the lands herein devised to my said wife, after her death, shall be by my executors leased or rented out to the best advantage, for improvements to be made thereon, or for money rents, until the youngest or last grandchild which I now have, or may hereafter have, the lawfully begotten child of either of my said sons Allen C. or James McD., or of my daughters Effie, Eliza Ann, or Mary, who may live to be twenty-one years of age, shall arrive at that age.

[16.] "Item. And it is my further will and direction that, after the several sums of money hereinbefore devised shall have been in all cases first paid and deducted therefrom, as the same shall from time to time become due and payable, the overplus or residue of the rents and profits of the lands so to be rented or let, and of the lots not otherwise disposed of in the counties of Ross and Pickaway, and of the dividends arising from the stock owned by me at the time of my death, and of such stocks as shall be purchased by my said executrix and executors, shall be annually divided equally among my children and grandchildren who may be the age of twenty-one years when such divisions shall be made; which division shall be made until the power of my executors to lease said lands shall terminate, viz., until the aforesaid youngest grandchild above designated and described shall arrive at the age of twenty-one years. And said annual division of rents and profits and dividends of stock aforesaid shall be made among and between said Allen C., James McD., Effie, Eliza Ann and Mary, and their children, share and share alike, *per capita*, the said children to come in for a share in the annual division when they shall respectively attain the age of twenty-one years, and not before; and in case of the death of either of my said last-named sons or daughters, leaving a lawful child or children under age, the child or children of such deceased parent shall take *per stirpes*, for their education and maintenance, the dividends in such division which such deceased parent would, if living, have been entitled to receive. And when such child or children of such deceased parent shall respectively come of the age of twenty-one years, he, she or they shall no longer take *per stirpes*, but shall then and from thenceforth take in said annual division his, her or their share *per capita*; but the coming of one of such children of any such deceased parent to the age of twenty-one years shall not bar or preclude those children of such parent who may be still in their minority from continuing to take the full share, *per stirpes*, of such deceased parent. And in said annual division the children of my daughter Margaret Campbell Kercheval, deceased, or the legal issue of such said children as may

be deceased, shall annually for the period of ten years after my death take and receive, *per stirpes*, one share as the representatives of their deceased mother, to be equally divided among them; and at the expiration of ten years after my death the said children of my said daughter Margaret Campbell shall not thenceforth take or be entitled to any part of said division; but the said division shall thenceforth be made among my said children, Allen C., James McD., Effie, Eliza Ann, Mary, and their children, exclusively, in the manner hereinbefore directed, intending hereby to exclude altogether from said division the children of my deceased daughter Helen Mar.

[17.] "Item. It is my further will and direction that after the decease of all my children now living, and when and as soon as the youngest or last grandchild, in the next preceding clause but one of this will designated and described, shall arrive at the age of twenty-one years, all my lands and lots not otherwise disposed of in said counties of Ross and Pickaway, and all my other lands, if any shall remain unsold at that time, shall be inherited and equally divided between my grandchildren *per capita*, the lawful issue of my said sons and daughters, Allen C., James McD., Effie, Eliza Ann, and Mary, for them and their heirs forever, to have and to hold, or to sell and dispose of the same at their will and pleasure; and in like manner all the stocks belonging to my said estate, whether invested before or after my death, shall at the same time be equally divided among my said grandchildren, share and share alike, *per capita;* but it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children lawfully begotten, such child or children shall take and receive *per stirpes* (to be equally divided between them) the share of my said estate, both real and personal, which the parent of such deceased child or children would have been entitled to have and receive if living at the time of such final distribution. In making this last and final division and distribution of my lands and stocks, I have excluded the children of my deceased daughters Helen Mar, late wife of Alexander Bourne, and Margaret Campbell, late

wife of Robert Kercheval, deceased, their parents having in my opinion received their full share and portion of my estate.

[18.] "Item. And it is further my will that my said children or grandchildren, or any of them, by their own act or in conjunction with the husband of any of them, shall not have power or authority to assign, transfer, pledge, mortgage or encumber in any way his or her or their share of the annual dividends or profits of my said estate herein above devised; but every such assignment, transfer, pledge, mortgage or encumbrance, by any instrument or device whatsoever, shall be wholly null and void, and the proper receipt of such child or grandchild, or his, her or their lawful authorized guardian, shall alone be a discharge to my said executors; and in like manner every conveyance, assignment, transfer, pledge, mortgage or encumbrance, by any instrument or device whatsoever, made by any one of my said grandchildren or their legal representatives, by any act or deed of him or her or them, or in conjunction with the husband of any of them, whereby his, her or their share of said lands and stocks in the final distribution thereof shall be in any way affected or disposed of, shall be wholly null and void. And in such final distribution of my lands, it is my direction that deeds of partition thereof shall be made to and in the names of those who may be thus entitled thereto, and in the name and for the use of no other person whatsoever, which deeds of partition shall be executed by my executors for the time being; and to enable my executors the more effectually to execute the powers and duties by this will devolved upon them, and to protect my said children and grandchildren against fraud and imposition, I hereby devise to my said executrix and executors, and the successors of them, all of said lands so directed to be leased and finally divided as above, and to their heirs, in trust for the uses and purposes and objects expressed in this my will, and the performance of which is herein above directed and prescribed, to have and to hold the title thereof till such final division or partition thereof, and no longer. And it is my further direction that in the final division of the stocks aforesaid the executors in whose name the same may then be vested in trust shall assign and transfer to such grandchild, or

his or her legal representatives, the share or portion of such stock belonging and coming to such grandchild or his or her legal representatives, so that the same shall be vested in the name of such grandchild or legal representatives; and the proper receipts of such grandchild or legal representatives, or of his or her or their duly authorized guardian, shall alone discharge the executor or executors in whom the stocks aforesaid shall or may then be vested."

[23.] "Item. It is my direction that my executors shall give bond and security for faithful administration, as in other cases."

[24.] "Item. And finally, for the purpose of carrying all and singular the provisions of this my last will and testament into effect, I do hereby nominate and appoint my wife, Nancy McArthur, executrix, and my friends, Presley Morris and William Key Bond, Esquires, of Ross County, my executors; and in case any one or more of the above named executors shall die, resign, or refuse to act and qualify according to law, it is my will and request that the Court of Common Pleas for said County of Ross for the time being, or such other court as may hereafter be constituted and authorized to do testamentary business, shall nominate and appoint a suitable person or persons, who will qualify and act, to supply the place or places of the person or persons by me herein named and appointed as my executors, and who may not qualify and act as such, or who may, after accepting and qualifying, die, refuse or neglect to act; and such person or persons so to be nominated and appointed by said court shall not be administrators *de bonis non* with the will annexed, but the nomination by the court shall be in execution of this will, as though the same individual had been nominated by this my will to fill a vacancy, or as though a power of nomination had been vested in some person or individual herein named; and such person so nominated shall act and be executor with my other executors for the time being, it being my intention that the duties herein required shall always be performed by at least three executors, that being the number by me herein named and appointed."

A transcript of a record of the Court of Common Pleas of

the county of Ross and State of Ohio (referred to in the bill, and annexed to it) showed the following proceedings:

On May 6, 1839, the alleged will of Duncan McArthur was produced to the court, and proved by the oaths of the attesting witnesses, and ordered to be recorded. On the next day, the court granted letters testamentary to Morris and Bond, the surviving executors named in the will, and to Effie McArthur Coons, an additional executrix then appointed by the court, pursuant to the will, in the place of the testator's wife, who died before him; and the three executors so appointed were qualified and gave bond with sureties as required by law. On June 21, 1839, Bond tendered his resignation of the office of executor, and it was accepted by an order which recited that the court was of opinion that good cause had been shown for such resignation. On June 25, 1839, Morris likewise resigned, and his resignation was accepted by a similar order. On October 22, 1839, "Effie McA. Coons having this day tendered her resignation to the court of her office of one of the executors of the last will of the late Duncan McArthur, deceased, late of Ross County, it is ordered by the court that the said resignation be, and the same is hereby, accepted, and the said resignation ordered to be recorded." On December 4, 1839, letters of administration on the estate of Duncan McArthur were granted to William McDonald, and he was qualified and gave bond accordingly.

A transcript of a record of the same court, sitting in chancery, (set forth and referred to in the answers), showed the following proceedings:

On July 8, 1839, Allen C. McArthur, the eldest son of the testator, filed a bill before the judges of the court, sitting in chancery, setting forth the death of Duncan McArthur, the probate of the instrument aforesaid as his will by the oaths of the witnesses, the appointment in that instrument of his wife and Morris and Bond to be executors, the death of the wife before the testator, and the nomination and appointment by the court of Mrs. Coons to act as executrix in her place; and alleging that Morris, Bond and Mrs. Coons took upon themselves the executorship of the will; that Bond and Morris, at

the then present term of the court, had severally resigned, and their resignations had been accepted; and "that by the provisions of the said instrument in writing all acts to be done by the executors require the concurrence of three executors, and that no suitable persons can be found whom the court are willing to appoint executors of the said will, and who are able to give the bonds required by the said instrument or the law of the land."

That bill "further insists and states that the said instrument is void and of none effect, because it is wholly impracticable and cannot be carried into effect; because many of its provisions are impracticable and cannot be carried into effect; because it tends to establish perpetuities, and does establish such perpetuities, which are contrary to the genius of our institutions and the spirit of our people and their laws, and indeed contrary to the common law;" and "that the said instrument in writing is void, because its provisions or many of them are in violation of and contrary to the common and statute law;" and also alleged that Duncan McArthur, at the time of executing it, was of insane memory and not possessed of a testamentary capacity; and that it was never legally executed as, and was not, his last will and testament.

That bill further alleged that "the only persons who have an interest in the said instrument in writing" were the complainant; Duncan McArthur's other four children, James McD. McArthur, Effie McA. Coons, Eliza Ann Anderson and Mary Trimble, and the husbands of Mrs. Anderson and Mrs. Trimble; three minor children of James McD. McArthur, a minor son of Mrs. Coons, and a minor son of Mrs. Anderson; a minor son and an adult daughter (with her husband) of Margaret C. Kercheval, a deceased daughter of Duncan McArthur; Alexander Bourne, husband of Helen M. Bourne, another deceased daughter of Duncan McArthur; one adult and two minor sons of Mrs. Bourne; and Samson Mason and Samuel F. Vinton, as devisees in trust of lands not now in question.

That bill further alleged "that the aforesaid persons are the only heirs and personal representatives of the said Duncan McArthur, and that they are also the only persons specified in

the said instrument in writing, claimed as the will of said Duncan McArthur;" and made them defendants; and prayed that an issue might be directed to be made up whether that instrument was the last will of Duncan McArthur or not, and that it might be set aside as void, and for further relief.

On July 10, 1839, the complainant in that cause had leave to amend his bill, and the cause was continued. On October 7, 1839, he filed a supplemental bill, alleging that a daughter had been born to Mrs. Trimble, and was a granddaughter of Duncan McArthur, and as such entitled to a provision under and an interest in the supposed will, and praying that she might be made a defendant.

Among the defendants named in the bill and supplemental bill in that cause were all the children and grandchildren of Duncan McArthur who were in existence at any time during the pendency of that suit; and due service of process was made on all of them. Mason and Vinton, trustees, were served with process, and severally filed answers, declining to accept the trust conferred upon them by the will, and disclaiming all interest in the lands devised to them.

On October 22, 1839, the following proceedings were had in that cause: The court appointed James McD. McArthur guardian *ad litem* of his three minor children; Mrs. Coons guardian *ad litem* of her minor son; Mrs. Trimble's husband guardian *ad litem* of their minor daughter; Mrs. Anderson's husband guardian *ad litem* of their minor son, and of Mrs. Bourne's two minor sons; and Mrs. Kercheval's son-in-law guardian *ad litem* of her minor son; and an acceptance of each appointment was filed.

On the same day, answers to that bill were filed in behalf of all the defendants. The answers of the four children of the testator, James McD. McArthur, Mrs. Coons, Mrs. Anderson and Mrs. Trimble, and the husbands of the last two, as well as the answers of Mrs. Kercheval's daughter and son-in-law, and of Alexander Bourne and his adult son, severally stated that they admitted and confessed all the allegations of the bill. The answer of Mrs. Coons further stated that "since the filing of the same she has, to wit, at the present term of October, re-

signed the office and charge of executrix of the said supposed last will and testament of her deceased father, the late General Duncan McArthur, from a conviction of her inability to discharge the duties incumbent on her as such executrix, and the impossibility of procuring suitable associates agreeably to the provisions of the said instrument in writing." The several answers of the infant defendants by their guardians *ad litem* stated that they would neither admit nor deny the allegations of the bill, but left the complainant to prove them.

On the same day, the court ordered "that an issue at law be made up between the parties to try the validity of said will and to ascertain by the verdict of a jury whether said writing is the valid last will and testament of the said Duncan McArthur or not;" and that in making up that issue the defendants file a declaration affirming it to be his will, and the complainant plead thereto that it is not his will.

On October 27 the defendants filed a declaration and the complainant a plea accordingly. On October 28 a jury was empanelled and sworn and returned a verdict that the instrument "is not the valid last will and testament of the said Duncan McArthur, deceased;" and on the same day the court entered this decree:

"The jury to whom was committed for trial the issue made in pursuance of the order of the court, between the respondents and the complainant, whether the instrument filed and exhibited in this cause and purporting to be the last will and testament of the late Duncan McArthur, of Ross County, deceased, was or was not the valid last will and testament of the said Duncan McArthur, deceased, having returned their verdict that the said instrument in writing is not the valid last will and testament of the said Duncan McArthur, deceased; and the court, having heard the arguments of counsel and being fully advised in the premises, are of opinion that the law and equity of the case are with the complainant, and do order, adjudge and decree that the said instrument in writing, filed and exhibited by the complainant, purporting to be the last will and testament of the said Duncan McArthur, deceased, and admitted to probate as such last will and testament in the Court of Common Pleas of

this county, be annulled, set aside and held for nought; and the infant defendants shall respectively have until they severally attain the full age of twenty-one years and six months thereafter, and the femes covert defendants shall respectively have until they are discovert and six months thereafter, to show cause against this decree. And it is further ordered by the court that the defendants pay the costs herein expended, taxed at forty dollars and twenty-five cents. The complainant's costs are taxed at thirty-three dollars and fifty-five cents. The defendants' costs are taxed at six dollars and seventy cents."

William McDonald, appointed on December 4, 1839, administrator of the estate of Duncan McArthur, as stated in the record annexed to the present bill and above mentioned, afterwards administered the entire personal estate of the deceased, and his final account was settled by the court on August 2, 1865.

Upon a petition for partition of all the real estate of which Duncan McArthur died seized, filed on April 2, 1840, by his daughter Mrs. Anderson and her husband, against Duncan McArthur's other four children, Allen C. McArthur, James McD. McArthur, Mrs. Coons, and Mrs. Trimble and her husband, and against the two children of his deceased daughter, Mrs. Kercheval, the Court of Common Pleas for Ross County, on April 17, 1841, made partition among them, one sixth part each to said Allen C. McArthur, Mrs. Coons, Mrs. Anderson and Mrs. Trimble, one sixth to the heirs of James McD. McArthur (who had died pending that suit), and one twelfth to each of the two children of Mrs. Kercheval.

Upon the rendition of the decree in partition, the parties thereto entered into possession of their shares, and afterwards made sales of portions thereof to purchasers for valuable consideration, and without actual notice of any adverse title or claim; and they, and other persons claiming under or through them, respectively occupied and improved the same for the period of thirty-four years and eleven months, and until the filing of the present bill, and during all that time their use and possession was distinct, continued, exclusive, actual and notorious, under a claim of title in fee simple, and adverse to the claims of all other persons.

Statement of Facts.

After the decree setting aside the will, and before the filing of this bill, one of James McD. McArthur's children died under nine years of age, and another child was born to him; the son of Mrs. Coons died, unmarried and intestate, and she married William Allen and had a daughter by him; Mrs. Anderson had five more children born, of whom two died under eleven years of age; Mrs. Trimble's daughter married one Madeira, and died, leaving three children; and Allen C. McArthur, Duncan McArthur's eldest son, had five children born to him, four daughters and a son.

This son, also named Allen C. McArthur, was the youngest grandchild of Duncan McArthur who arrived at twenty-one years of age. He arrived at that age on March 4, 1875, after the death of all the children of Duncan McArthur; and he, together with his four sisters and their husbands, all being citizens of Illinois or of Kentucky, are the plaintiffs in the present bill, which was filed on March 17, 1876. An authentic copy of the will of Duncan McArthur, and of the original probate thereof, was recorded by the probate court in Pickaway County on February 11, 1876.

The defendants in this bill were all citizens of Ohio, and were the three surviving children of James McD. McArthur, the surviving daughter of Mrs. Effie McA. Allen, the four surviving children of Mrs. Anderson, the three children of Mrs. Madeira, and numerous purchasers of different parcels of land from the parties to the proceeding for partition.

The present bill (without mentioning the proceeding to annul the probate, set forth in the answers), alleged that, immediately after the death of Duncan McArthur, his five children, desiring to obtain for themselves the whole of his real and personal estate, and to deprive his grandchildren of all the provisions intended for them by his will, unlawfully combined and confederated with other persons, and, contriving to defraud the plaintiffs, procured and brought about the tender and acceptance of the resignations of the executors, and appropriated to their own use all his personal property, and, by means of the proceeding in partition above mentioned, divided all his lands among themselves, and conveyed parts of the same to

Counsel for Parties.

other persons, and, in defence of their fraudulent conspiracy and doings, pretended that he died intestate, and they as his children had inherited his lands. These allegations were denied in the answers.

At the hearing upon bill and answers, the Circuit Court dismissed the bill, and the plaintiffs appealed to this court.

The cause was first argued in January, 1884. It was reargued in April, 1884, by order of the court.

Mr. Lawrence Maxwell, Jr., for appellants at the first argument. *Mr. Maxwell* and *Mr. William M. Ramsey* for appellants at the re-argument.

Mr. Richard A. Harrison for the appellees David H. Scott, Administrator of William Allen, deceased, David H. Scott, and Effie H. Scott, heirs at law of William Allen, deceased, at the first argument; and also at the rehearing in April.

Mr. John W. Herron for James M. Glenn, Trustee, appellee, at the first hearing.

Mr. W. T. McClintick for Dr. C. A. Trimble and Anna T. Madeira and others, heirs of Mary Trimble, deceased, appellees, at the first hearing.

Mr. Henry F. Page for Johnson Caldwell, Lawrence Crookham, Aristeus Hulse, Levi Luiz, Hepzibah Hulse, Sarah Florence, and others, appellees, at the first hearing.

Mr. P. C. Smith filed a brief on behalf of Jonas Hulse and Samuel M. Owens, appellees.

It is not possible to report the substance of each of these elaborate arguments without doing injustice to other cases. Abstracts are given: (1) of the argument of appellants' counsel; (2) of the argument of *Mr. Harrison;* (3) of so much of

the arguments of his associates, as supplemented his argument, or varied from, or was in conflict with, his positions.

Mr. Maxwell and *Mr. Ramsey* for appellants: (their brief was also signed by *Mr. Rufus King* and *Mr. S. J. Thompson*).— I. *As to the question of perpetuities.* 1. The case is governed by the statute, passed December 17, 1811,* which has since been in force in Ohio continuously. 2 Chase's Statutes of Ohio, 762. It is not disputed that the common law was in force in Ohio prior to the passage of this act, *Railroad Co.* v. *Keary*, 3 Ohio St. 201. The policy of Ohio in favor of issue and descendants is shown, by this act, to be more liberal than the common law. In Ohio an estate tail is not alienable by the donee in tail, *Pollock* v. *Speidel*, 17 Ohio St. 439; nor, during his life, by his issue, *Dart* v. *Dart*, 7 Conn. 250, approved in *Pollock* v. *Speidel*. Therefore, an estate tail given, as it may be, to the unborn issue of a person in being, is, in Ohio, inalienable during three successive generations, whereas, at the common law, land could never be tied up longer than two generations and twenty-one years. On the part of the courts of the State, the same liberal tendency is disclosed. In *Gibson* v. *McNeely*, 11 Ohio St. 131, a doubtful clause of a will was construed as giving a life estate to children, with remainder in tail to their issue, rather than as making the children donees in tail; and upon the very ground, as stated by the court, that such construction would better effect the desire of the testator to restrain alienation as long as possible. The Supreme Court of Ohio has never yet declared a devise void for remoteness. The

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* "An Act to restrict the entailment of real estate.

Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That from and after the taking effect of this act, no estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this State, shall be given or granted by deed or will to any person or persons, but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and that all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. This act to take effect and be in force from and after the first day of June next."

following cases show to what extent it has gone to uphold wills against that charge. *Stevenson* v. *Evans*, 10 Ohio St. 307; *Gibson* v. *McNeely*, 11 Ohio St. 131; *Turley* v. *Turley*, 11 Ohio St. 173; *Brasher* v. *Marsh*, 15 Ohio St. 103.—The act of 1811 is a restraining, not an enabling act. It does not supersede the common law. It modifies it, by cutting off altogether the period, within which, after lives in being, an estate must vest, except in favor of the immediate issue or descendants of persons in being at the making of the will; so that there may be no devise except to persons in being or to their immediate issue or descendants, leaving the common-law rule intact with respect to such issue or descendants. The statute does not contemplate the necessity of a precedent particular estate to the person to whose immediate issue or descendant the estate is subsequently limited. There need be no particular estate, or if there be one it may be granted to some one other than the one to whose immediate issue the ultimate estate is given, and still the grant is valid under the statute.—2. The provision for children of predeceased grandchildren, if illegal, does not affect the validity of the devise to complainants. It is settled that the words "immediate issue" in this statute mean children, and "immediate descendants" include all to whom, under the statute of descents, an inheritable estate would descend immediately. *Turley* v. *Turley*, 11 Ohio St. 173. The complainants are the immediate issue of persons in being at the making of the will, and are therefore within the terms of the statute, and the time for final distribution is within twenty-one years after lives in being. If the complainants, being immediate issue of persons in being at the making of the will, are, under its terms, and necessarily within twenty-one years after lives in being, entitled each to an ascertainable aliquot part of the lands in suit, they may recover; and it is no answer that other portions of those lands are limited to others too remotely. *Wilkinson* v. *Duncan*, 30 Beav. 111; *Griffith* v. *Pownall*, 13 Sim. 393; *Storrs* v. *Benbow*, 3 DeG. M. & G. 390, and 2 Myl. & K. 46; *Cattlin* v. *Brown*, 11 Hare, 372; *Goodier* v. *Johnson*, 18 Ch. D. 441; *Darling* v. *Rogers*, 22 Wend. 483; *Kane* v. *Gott*, 24 Wend. 641; *Savage*

v. *Burnham*, 17 N. Y. 561, 576; *Downing* v. *Marshall*, 23 N. Y. 366; *Adams* v. *Perry*, 43 N. Y. 487; *Purdy* v. *Hayt*, 92 N. Y. 446; *Lowry* v. *Muldrow*, 8 Rich. Eq. 241. Counsel for appellees rely upon *Leake* v. *Robinson*, 2 Meriv. 363 and the cases which follow it. Those cases do not decide that a devise to two classes, or individuals, void as to one is, therefore, void as to the other; or that if the entire intention of the testator with respect to any subject matter may not be lawfully carried out, it must, therefore, fail altogether; or that if a gift includes in one description persons capable and persons incapable, by reason of remoteness, it is, therefore, invalid as to all; on the contrary, they recognize, and some of them expressly decide, the very opposite doctrine. The common-law rule is completely expressed in the simple statement that a devise, to be valid, must necessarily vest, if at all, within twenty-one years after lives in being, counting a child *en ventre sa mere* as in being. Any devise, which necessarily vests within that period is good; and it is quite immaterial that in the same sentence or clause, or with respect to the same subject matter, there be other devises which are too remote, or even that upon the identical devise there be engrafted remote ulterior limitations.

II. The devise to the grandchildren was a vested estate. It has been assumed for the purposes of argument thus far, that the estate devised did not vest at testator's death. But it did vest then; and that being so, the question of remoteness disappears. The trustees took a legal estate, in fee simple. Nothing less would suffice for the execution of the trusts imposed upon them. *Sears* v. *Russell*, 8 Gray, 86; *Rees* v. *Williams*, 2 M. & W. 749; *Garth* v. *Baldwin*, 2 Ves. Sen. 646; *Doe* v. *Edlin*, 4 Ad. & El. 582; *Doe* v. *Field*, 2 B. & Ad. 564; *Moore* v. *Burnet*, 11 Ohio, 334; *Neilson* v. *Lagow*, 12 How. 98. This disposes of the claim that the estate devised to the grandchildren is a vested legal remainder limited upon the legal estate given to the trustees. Nor is the estate of the grandchildren an equitable remainder. The estate of the grandchildren is not a remainder at all; it is not what remained after carving out a particular estate, legal or equitable; it is

not an estate limited to take effect at the expiration of a prior estate; but an equitable right, upon the happening of a particular event, to wit, the arrival at majority of the youngest grandchild, the children being dead, to have the lands partitioned, and conveyed to them in fee simple. *Holt* v. *Lamb*, 17 Ohio St. 374, 387; *Phipps* v. *Ackers*, 9 Cl. & Fin., 583. The devise is an executory trust, which creates a legal estate in fee simple in the trustees, and an equitable estate in fee, to commence *in futuro*, in the grandchildren living at the death of the testator, subject to open and let in after-born grandchildren, with a devise over of the share of any grandchild dying leaving issue, to such issue. *Phipps* v. *Ackers*, 9 Cl. & Fin. 583; *Jeefers* v. *Lampson*, 10 Ohio St. 101; *Linton* v. *Laycock*, 33 Ohio St. 128; *Fox* v. *Fox*, L. R. 19 Eq. 286; *Doe* v. *Considine*, 6 Wall. 458; Hawkins on Wills, 237–241.—To prevent a perpetuity the devise to grandchildren dying before distribution may be construed as an estate tail. *Allyn* v. *Mather*, 9 Conn. 114, 127; *Doe* v. *Cooper*, 1 East, 229, 234; *Humberston* v. *Humberston*, 1 P. Wms. 332. Where an instrument is open to two constructions, the one consistent and the other repugnant to law, or the one will give effect to the whole instrument and the other will destroy a part, the former must be adopted. *Pruden* v. *Pruden*, 14 Ohio St. 251. The whole doctrine of estates tail *cy pres* is founded on this principle. See Hawkins on Wills, 181, quoting *Moneypenny* v. *Dering*, 16 M. & W. 428; same, 182, citing *Vanderplank* v. *King*, 3 Hare, 1.

III. *As to the Ross County Record.* 1. Neither the complainants nor their trustees were parties to this record. The only parties to the proceeding, so far as the land in question is concerned, were the children of the testator, and his then living grandchildren. The complainants were not then in being. The trustees for grandchildren were not parties; and the bill alleged that the persons made defendants were the only persons specified in the will.—2. A proceeding to contest a will under the statute of Ohio* binds only the parties thereto.

* The statute in force at the time, and under which these proceedings were had, was the act relating to wills, passed February 18, 1831, 3 Chase Stat.

It is not an *ex parte* proceeding, or in the nature of a proceeding *in rem*, but a suit *in personam* in chancery, whose decree binds none but the parties. *Holt* v. *Lamb*, 17 Ohio St. 374. This settled construction of the statute by the courts of Ohio is binding upon this court, as much so as if part of the statute. *Polk* v. *Wendall*, 9 Cranch, 87, 98; *Thatcher* v. *Powell*, 6 Wheat. 119, 127; *Jackson* v. *Chew*, 12 Wheat. 153; *Nichols* v. *Levy*, 5 Wall. 433; *Williams* v. *Kirtland*, 13 Wall. 306; *Barrett* v. *Holmes*, 102 U. S. 651; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Leffingwell* v. *Warren*, 2 Black, 599, 603; *McKeen* v. *Delancy*, 5 Cranch, 22; *Christy* v. *Pridgeon*, 4 Wall. 196. In order that there may be a proceeding *in rem*, the *res* must be either (1) a thing guilty, that is, some act must have been done in, with, or by it, in contravention of some law having the forfeiture of such misused thing as its sanction; or (2) it must be a thing hostile, in other words, owned or controlled by a public enemy; or (3) it must be a thing indebted, that is liable in law for the payment of a sum of money. It is manifest that a suit to set aside a will is not *in rem*. Strictly speaking, it is not a suit, but a proceeding to secure the registration of a posthumous conveyance.—3. The legal trust estate was not affected by the proceedings to set aside the will. The resignations did not divest the trustees of the legal estate; but even if they did, the estate passed to the heirs charged with the trust. *Adams* v. *Adams*, 21 Wall. 185, 192; Story Eq. Jur. § 976; Jeremy Eq. 163; Hargrave's note 146 to Co. Lit. 113 *a*; 1 Spence Eq. Jur. 501; Perry on Trusts, § 240.—It is equally clear that the equitable estate of the complainants was not affected by the suit to set aside the will. If it did not vest at the testator's death in the grandchildren then living,

1785. Sec. 20 (p. 1788), is as follows: "That if any person interested shall, within two years after probate had, appear and by bill in chancery contest the validity of the will, an issue shall be made up, whether the writing produced be the last will of the testator or testatrix or not; which shall be tried by a jury, whose verdict shall be final between the parties, saving to the court the power of granting a new trial, as in other cases; but if no person appear in that time, the probate shall be forever binding; saving also to infants, married women, and persons absent from the State, or of insane mind, or in captivity, the like period after the removing of their respective disabilities."

it was not represented. If it was then vested in the grandchildren who were parties to the suit, it was subject to be divested to let in after-born grandchildren. It is well settled that the rights of the unborn in such case are not affected by a decree against the living holders. *Downin* v. *Sprecher*, 35 Maryland, 474; *Graham* v. *Houghtalin*, 1 Vroom, 552; *Monarque* v. *Monarque*, 80 N. Y. 320; *Goodess* v. *Williams*, 2 Yo. & Col. Ch. 595. The cases cited by opposite counsel on this point are all cases of contingent remainders, or estates tail, or suits for partition, or by trustees to change investments. See *Watson* v. *Watson*, 3 Jones Eq. 400; *Lancaster* v. *Thompson*, 5 Madd. 4, 13; *Adair* v. *New River Co.*, 11 Ves. 428, 444; *York* v. *Pilkington*, 1 Atk. 282; *Attorney General* v. *Corporation of London*, 8 Beav. 270, 282; *Holland* v. *Baker*, 3 Hare, 68. "The great and essential difference between the nature of a contingent remainder, and that of an executory devise (and that, indeed, which renders it material to distinguish the one from the other in their creation) consists in this: that the first may be barred and destroyed, or prevented from taking effect, by several different means; whereas, it is a rule, that an executory devise cannot be prevented or destroyed, by any alteration whatsoever in the estate out of which, or after which it is limited." Fearne on Remainders, 418. If courts, where no person is in existence entitled to an estate of inheritance, have sometimes placed on record an existing tenant for life, that has never been done unless the tenant was one whose issue, if he were to have any, would become entitled to the inheritance. Calvert on Parties, 60. And the bill must contain a specific allegation that the parties are suing on behalf of themselves and others. The right of one defendant to represent many in a common interest is limited to cases where the rights in issue are in the nature of general rights, and to cases in which the object of the suit is merely to change the form of the property to which they attach—certainly not where its object is to divest or destroy them. Representation by an adverse interest is an absurdity which the law does not contemplate. Thus the unborn grandchildren, not being represented in law or in fact, in the suit to set aside the will, their estate remains intact. Even if the will

is in law set aside, that does not cut off the equity of the bill. For a court of equity will compel trustees who have caused the trust estate to be conveyed to themselves in fraud of the rights of the *cestuis que trust* to account as trustees. *Long* v. *Mulford*, 17 Ohio St. 509; *Rammelsberg* v. *Mitchell*, 29 Ohio St. 57; Hill on Trustees, 144; Perry on Trusts, § 181, citing *Middleton* v. *Middleton*, 1 Jac. & Walk. 96; *Reech* v. *Kennegal*, 1 Ves. Sen. 123; *Oldham* v. *Litchfield*, 2 Vernon, 506; *Mestaer* v. *Gillespie*, 11 Ves. 620, 638. See also *Meader* v. *Norton*, 11 Wall. 442, 457; *Cocks* v. *Izard*, 7 Wall. 559; *Slater* v. *Maxwell*, 6 Wall. 268, 276; *James* v. *Railroad Co.*, 6 Wall. 752; *Goodin* v. *Cin. & Whitewater Canal Co.*, 18 Ohio St. 169; *Michoud* v. *Girod*, 4 How. 503.

IV. *As to the defence of innocent purchasers.* This applies only to a defendant who has purchased the legal title in ignorance of the complainant's equitable title. *Vattier* v. *Hinde;* 7 Pet. 252; Langdell Eq. Pl. § 140. The defendants who set up that defence either have not acquired the legal title, or had notice of the equitable title. The probate and record of the will passed title to the devisees in the land devised from the death of the testator wherever situated in the State. *Hall* v. *Ashby*, 9 Ohio, 96; *Carpenter* v. *Denoon*, 29 Ohio St. 379, 395. There can be no defence of innocent purchase in the face of a recorded title. *Dick* v. *Balch*, 8 Pet. 30. See *Nichols* v. *Eaton*, 81 U. S. 716; *Day* v. *Micou*, 18 Wall. 156.

Mr. Harrison for appellees.—I. *As to the Statute of Probate* and the proceedings under it in Ross County.*—1. While the verdict and decree annulling the will remain in force, neither the actual parties to the proceeding in which the verdict and decree were rendered, nor the appellants, who were not born until many years after the contest, can treat them as nullities, nor collaterally impeach them. The object of the suit was, to determine the legal status of the writing produced. All interested persons then *in esse* were parties. The verdict and decree operated upon the entire instrument, the legal status of which was in-

*See *ante*, p. 357.

divisible. The right to make the will and the right to contest it were created and regulated by the same statute. The latter—right to contest—within the time and in the mode prescribed, could not be cut off by any provision in the will itself. The issue in the contest was not an adversary suit. There were strictly no parties. The statute conferred jurisdiction upon the court over the thing itself. The first proceeding under the statute, to prove the will, is *ex parte* and *in rem;* the second, to set aside the probate, is equally so; though in form original, in fact it is in the nature of an appeal. The entirety of the question decided in each court is apparent. Therefore the verdict establishes the will, as a whole, or annuls it as a whole. The court, in controlling the preparation and directing the progress of the contest, must look to the persons interested, whether they are in existence or not, because they are to be affected, consequentially, by the verdict. But neither the question submitted for decision, nor the jury who are to decide it have any direct reference to them. The verdict is not against persons; it is against the thing in contest. The statute prescribed who should be parties to the suit; and limited the time within which it should be brought. The appellants, being born after expiration of the time, could not be made parties; and as the instrument could not be set aside as to living interested persons and remain in force as to unborn executory devisees, it follows that the verdict and decree bind the appellants. See *Singleton* v. *Singleton*, 8 B. Monroe, 340; *Hunt* v. *Acre*, 28 Ala. 580; *Scott* v. *Calvit*, 3 How. (Miss.) 148; *Benoist* v. *Murrin*, 48 Missouri, 48; *Haynes* v. *Haynes*, 33 Ohio St. 598; *Brown* v. *Burdick*, 25 Ohio St. 260; *Meese* v. *Keefe*, 10 Ohio, 362; *Bradford* v. *Andrews*, 20 Ohio St. 208.—2. The case of *Holt* v. *Lamb*, 17 Ohio St. 374, relied upon by opposing counsel, is not in point. The testatrix there devised vested estates to persons in being when the will was made and took effect, and when the will was contested. Aside from this, the ruling is unsound, and in conflict with other decisions of the same court. *Meese* v. *Keefe*, 10 Ohio, 362; *Bradford* v. *Andrews*, 20 Ohio St. 208; *Walker* v. *Walker*, 14 Ohio St. 157, 176; *Brown* v. *Burdick*, 25 Ohio St. 260, 266; *Haynes* v. *Haynes*, 33 Ohio St.

598.—3. Decrees in chancery often bind interests in property devised to unborn persons. *Lorillard* v. *Coster*, 5 Paige, 172; *Palmer* v. *Flower*, L. R. 13 Eq. 250; *Bassuet* v. *Moxon*, L. R. 20 Eq. 182; *Wills* v. *Slade*, 6 Ves. 498; *Cross* v. *De Valle*, 1 Wall. 1. If such a verdict and decree are inoperative as to interests of persons unborn and unascertained when the decree is rendered, then the instrument cannot be set aside as to such interests at all, and the absolute right conferred by the statute to contest the will would be frustrated. The purposes of the legislature would be nullified. The right of alienation might be suspended indefinitely, by the terms of an instrument, adjudged to be a nullity after a trial by jury. The adoption of this theory would in many cases render the administration of estates impracticable.—4. The rule that we contend for is founded on public policy; it is essential to the repose of titles founded on wills; it is necessary for quieting litigation that verdicts and decrees in contested will cases should be binding upon contingent and executory interests of persons not *in esse* and ascertained when the contest takes place. See *Mosier* v. *Harmon*, 29 Ohio St. 220, 255–6; *Walker* v. *Walker*, 14 Ohio St. 157, 175, and the other cases above cited from the Kentucky, Alabama, Mississippi, Missouri, and Georgia reports.—5. It is the duty of the court, in cases in which the validity of a will is contested under the wills act of Ohio, to control the preparation, and direct and control the progress of the proceedings, and look to and protect the interests of unborn persons to whom contingent bequests or devises are made, although it is uncertain whether such persons will ever come into being, and, even if they should, whether such interests will ever vest. And see *Scott* v. *Calvit*, above cited.—6. The rule as to the persons upon whom judgments and decrees in actions *in personam* are binding, is not applicable in a proceeding, under this statute, to contest the validity of a will.—7. The fact that there were no executors in existence when the decree was rendered, does not entitle the appellants to treat it as a nullity; upon the acceptance of their resignations they were *functi officio*. The contestant was not obliged to have executors appointed. To have done so would have been a recogni-

tion of the will. The powers given to the executors were given to the office, not to the persons. An executor is to be considered as holding property devised to him in that character, unless it clearly appear from the face of the will that the testator intended it to be held by him as a special trustee. *State* v. *Nicols*, 10 Gill & Johns. 27; *Perkins* v. *Moore*, 16 Ala. 9; *Steele* v. *Worthington*, 2 Ohio, 182; *Gandolpho* v. *Walker*, 15 Ohio St. 251. If a special trust is cast upon an executor, as executor, the execution of such trust is a duty superadded to his ordinary official duties as executor, and until he qualifies himself and assumes to act in his separate capacity as special trustee, the bond to perform his duties as executor binds him and his sureties to the execution of such trust; for in such cases he acts in the capacity of executor, and does not become a special trustee until he actually qualifies as such. *Perkins* v. *Moore*, 16 Ala. 9; *Newcombe* v. *Williams*, 9 Met. 525; *Dorr* v. *Wainwright*, 13 Pick. 328; *Towne* v. *Ammidown*, 20 Pick. 535; *Felton* v. *Sawyer*, 41 N. H. 202.—8. These executors did not qualify, or assume to act as special trustees. Their trust was to all intents executorial. The will devised the legal title to the lands in contest to them for a limited time—*qua* executors, and not *nominatim*. Upon their qualification, it vested in them as such. Their resignations and the acceptance of them again divested them of it, and the legal title vested in the heirs, until the appointment and qualification of successors. Having ceased to be executors, they did not represent the estate, and were not necessary parties to the suit.—9. It is not requisite in order to sustain, as against the plaintiffs, the verdict annulling "the writing produced" as Duncan McArthur's will, to apply to the case the principle of virtual representation of persons not *in esse* by actual parties to a suit. If it were necessary, that principle could be applied. According to the reasons upon which the doctrine of virtual representation securely rests, the plaintiffs in the present suit were virtually represented in the proceeding to contest the alleged will, by the grandchildren of the decedent who were actual parties to the proceeding. The will devised the lands in controversy to all the grandchildren, whether born or unborn at the death of the testator, as a class,

and the title and possession were, by the will, to vest in every member of the class at one and the same time. Hence, the grandchildren who were in being and actual parties to the contest, stood, when the contest was had, and when it must take place if at all, in precisely the same relation to the alleged will and the estate devised, as the grandchildren who were afterwards born. It follows that the grandchildren who were actual parties must, under the circumstances and from considerations of necessity, be held, for the purposes of the contest, to have virtually represented after-born grandchildren. *Mead* v. *Mitchell*, 17 N. Y. 210; *Baylor's Lessee* v. *Dejarnette*, 13 Gratt. 152; *Faulkner* v. *Davis*, 18 Gratt. 651; *Sohier* v. *Williams*, 1 Curtis, 479; *Gifford* v. *Hort*, 1 Sch. & Lef. 386; *Gaskell* v. *Gaskell*, 6 Sim. 643; *Powell* v. *Wright*, 7 Beav. 444; *Campbell* v. *Watson*, 8 Ohio, 498.—10. When the statute says that "the verdict shall be final between the parties" it means all parties in interest, whether actual present parties or unborn persons represented by acts of parties having identity of interest with them.—11. The order of the court appointing an administrator upon the estate of the decedent, as an intestate estate, and the order settling the final account of the administrator, are conclusive and have universal effect. They cannot be treated as nullities, nor collaterally attacked, by any person. *Jennison* v. *Hapgood*, 7 Pick. 1; *Field* v. *Hitchcock*, 14 Pick. 405, 407; *Clark* v. *Pishon*, 31 Maine, 503; *Record* v. *Howard*, 58 Maine, 225; *Sever* v. *Russel*, 4 Cush. 513.—12. If the complainants are entitled to any relief, their only remedy is by a proper bill in the Court of Common Pleas of Ross County, in the nature of a bill of review, and not by a petition for partition in this Court, treating the entire proceeding by which the pretended will was set aside and annulled, as absolute nullities. *Voorhees* v. *Bank of United States*, 10 Pet. 449; *Grignon Lessee* v. *Astor*, 2 How. 319; *Comstock* v. *Crawford*, 3 Wall. 396; *Cooper* v. *Reynolds*, 10 Wall. 308, 315; *McNitt* v. *Turner*, 16 Wall. 352; *Singleton* v. *Singleton*, 8 B. Monroe, 340.

II. *The supposed devises of the land in controversy would have been held void, even if the pretended will had not been set aside.* 1. The gift of the estate in fee contravenes the statute

of Ohio against perpetuities.* Under the provision of the will it is possible that the estate given might not vest during the lifetime of a person in being when the will was made, nor at the death of such person, nor during the lifetime of the immediate issue or descendant of such person. It is well settled that this possibility makes the entire gift void. From the earliest times the English courts set themselves against perpetuities. First they would allow only limitations to take effect at the end of one life from the testator's death. Then this was enlarged to include two or more lives in being; that being regarded as only the one life of the longest lives. The next step taken by the courts was much debated; but it was finally settled that an executory devise might be made to vest at the end of lives in being and twenty-one years after, to allow for the infancy of the next taker, who, by reason of infancy, could not alienate the estate. *Taylor* v. *Biddal*, 2 Madd. 289. The statute of 10 and 11 William III., c. 16, having provided that children *en ventre sa mere*, born after their father's death, should, for the purposes of the limitations of estates, be deemed to have been born in his lifetime, a further extension of nine or ten months was allowed for the period of gestation. *Goodman* v. *Goodright*, 2 Burr. 873. The next step was to allow a period of nine months for gestation at the beginning of the term, as the life in being during which the term would run might be that of a child *en ventre sa mere*. *Long* v. *Blackall*, 7 T. R. 100.—2. This common-law rule as to perpetuities the legislature regarded as incompatible with republican institutions: this was the mischief which it attempted to remedy by the statute. This and kindred legislation in other States aimed to prevent property from being tied up, and the power of its disposition suspended.—3. As to the interpretation of this statute. It was a restraining and not an enabling act. In *Turley* v. *Turley*, 11 Ohio St. 173, it was held that a devise to children of predeceased children was not in conflict with the statute, and that "immediate descendants" includes all to whom, under the statute of descents, an estate would have

* See *ante*, page 354, note.

descended immediately from the particular person whose descendants they are required by the will to be. In *Harkness* v. *Corning*, 24 Ohio St. 416, it was decided that the statute does not change the nature of the estate in the first donee in tail from an inheritable estate to an estate for life only. Among other results, which, as we contend flowed from these several decisions, were the following: (*a.*) Immediately upon the termination of a particular estate by the death of the person in being at the time of making the will, to whom such particular estate is given, the entire inheritance must immediately vest in the person or persons to whom the estate in remainder, or any future estate by way of executory devise, conditional limitation, etc., is given. (*b.*) Grandchildren or great-grandchildren, or other immediate issue or descendants of persons in being at the time of making the will, may take an estate in remainder, or any future estate, by way of executory devise, &c., provided they are *in esse* when the particular estate given to a person living when the will is made terminates by his death. (*c.*) But grandchildren or great-grandchildren, or other issue or descendants of persons in being at the time of making the will, who are born subsequently to the death of the person in being when the will was made, and to whom a particular estate is given, cannot take. (*d.*) By the common law, estates in remainder, or any future estates by way of executory devise, &c., may be so limited that the vesting of the same can be postponed until after a life or lives in being at the death of the testator and twenty-one years; but under the statute the vesting of such estates cannot be postponed beyond the death of a person or persons in being when the will was made. They cannot, therefore, be so limited as that they will not vest until after the death of a person or persons in being when the will was made, and when and as soon as a person or persons not then in being shall arrive at twenty-one years of age. (*e.*) Under the statute, where estates for life, either legal or equitable, are given to persons in being at the making of the will, and the fee is so given that the persons respectively to whom it is given take the same by descent, and not by purchase, through the tenants for life respectively, the

vesting of the estates in fee cannot be postponed until the death of all the tenants for life; but in such case the estates must vest in the immediate issue or descendants from time to time, and as each tenant for life dies; the issue or descendants of each tenant for life taking in fee such part of, or interest in, the premises as was held by each tenant for life respectively. This statute cannot be evaded by means of a trust, condition, or other device. The limits prescribed to the creation of future estates and interests are the same at law and in equity. *Ould* v. *Washington Hospital*, 95 U. S. 303; *Norfolk* v. *Howard*, 1 Vernon, 163; *Brattle Square Church* v. *Grant*, 3 Gray, 141, 155, and cases there cited. It is equally well settled that the contingency upon the happening of which the estate is to vest, must happen within the time fixed by law. If by possibility, it may happen later, the limitation and the devises creating it are void. *Ould* v. *Washington Hospital*, and *Brattle Square Church* v. *Grant*, both cited above; *Nightingale* v. *Burrell*, 15 Pick. 104, 111; *Sears* v. *Russell*, 8 Gray, 96, 98; *Everitt* v. *Everitt*, 29 Barb. 112; Lewis on Perpetuities, 170; *Amory* v. *Laird*, 5 Selden (9 N. Y.) 403, 415; *Jackson* v. *Billinger*, 18 Johns. 367, 381; *Welsh* v. *Foster*, 12 Mass. 93; *Hone* v. *Van Schaick*, 7 Paige, 221. When a gift includes in one description persons capable and persons incapable, by reason of remoteness, the entire gift is void. *Ker* v. *Dungannon*, 1 Dru. & War. 509. An executory devise transgressing the allowed limits is void as a whole, and not simply for the excess. *Leake* v. *Robinson*, 2 Meriv. 363, 389. It follows, from the settled principles above stated, that if the alleged will of Duncan McArthur by reason of the trusts, conditions, or limitations therein, concerning the real estate in contest, prevented, or might by any possibility have prevented the vesting of the estate, or suspended the free transmission thereof to a period beyond the lives of persons in being at the time of the making of the will, the devises containing such trusts, conditions, or limitations are void; and immediately upon his decease the estate vested absolutely in his heirs at law. We submit that, upon an examination of the several clauses of the will in regard to the lands in contest, it appears beyond doubt that they contain trusts, conditions, and limitations of

such a nature as to prevent the vesting of the estate, or suspend the free transmission thereof to a period beyond the lives of persons in being at the time of the making of the will, and provide for the vesting of the estate in persons other than the "immediate issue or descendants of persons in being at the time of the making of the will." An analytical examination of the clauses of the will shows: 1st. That the lands were devised to the executors in trust. 2d. That the legal estate was in the executors, with right of possession for the lives of the children and until the last and youngest grandchild attained the age of twenty-one years. 3d. That the rents and profits during this time were to go to the children, the minor child or children of a child dying, and such grandchildren as might attain the age of twenty-one, to the exclusion of grandchildren under twenty-one. 4th, and that no vested interest in the remainder was given: that the devise was contingent, and became vested, when the youngest or last grandchild reached twenty-one, in such grandchildren or great-grandchildren as were then in life. The testator intended himself to control the descent of the estate until the death of all his children, and the arrival of his youngest grandchild to the age of twenty-one years. He intended to keep the vast estate in his family for generations. The will must be construed so as to carry out this cardinal idea. There is no distinct gift of the lands to grandchildren unconnected with the actual occurrence, and the time of the occurrence of the events named in the devise of the lands. The disposition actually made by the testator is perfectly manifest, and is plainly inconsistent with the statute of Ohio "to restrict the entailment of real estate," and is void. See *Colton* v. *Fox*, 67 N. Y. 348; *Olney* v. *Hull*, 21 Pick. 311; *Thompson* v. *Luddington*, 104 Mass. 193; *Stephens* v. *Evans*, 30 Indiana, 39; *McBride* v. *Smyth*, 54 Penn. St. 245; *Baylor* v. *Dejarnette*, 13 Gratt. 152. The provision of the will requiring the executor to divide the estate among grandchildren and great-grandchildren living when certain future events occur is incompatible with the idea of a present vesting. *Chittenden* v. *Fairchild*, 41 N. Y. 289. A remainder is contingent when the persons who are to take it are uncertan. *Hawley* v. *James*, 16

Wend. 60, 140. These estates are future estates. There are no words of present gift. See also *Eyre* v. *Marsden*, 2 Keen, 564; *Blease* v. *Burgh*, 2 Beav. 221, 226. If a limitation be to a class, collectively, and a part of these be beyond the limit of remoteness, it is void as to all. *Porter* v. *Fox*, 6 Sim. 485. In this case all of the class are beyond the limits of remoteness tolerated by the statute of Ohio. The devise of the lands to the executors in trust to receive the rents and profits does not save the devise to grandchildren and great-grandchildren living at the expiration of the trust, from the operation of the statute against perpetuities. The trust suspends the power of alienation, and unless its continuance is limited according to law, it is void in its creation. *Boynton* v. *Hoyt*, 1 Denio, 53. Where land is devised upon a trust void as tending to create a perpetuity, the heir is entitled to recover. *Hillyard* v. *Miller*, 10 Penn. St. 326. The contention that the devise creates an estate tail is untenable. The words "children" and "grandchildren" are used in the will as descriptive of persons, or classes of persons, to whom the rents and profits are to be distributed; and "grandchildren" and "child" or "children" of "grandchildren" are further used as descriptive of the persons in whom the fee is to vest. In their proper sense the words "child" and "grandchild" are words of purchase. They are not treated as words of limitation unless necessary to carry out a manifest intent of a testator. The will did not create an estate tail, but an absolute estate in fee simple to vest upon the death of all the testator's children and the arrival of the last or youngest grandchild at the age of twenty-one. Even without the statutes of perpetuities these devises would have been held void in Ohio, where the rules of the common law in this respect have never been recognized. *Bloom* v. *Richards*, 2 Ohio St. 387; *Sergeant* v. *Steinberger*, 2 Ohio, 305; *King* v. *Beck*, 15 Ohio, 559. Counsel for appellants contend that the devise is good under the English rule against perpetuities; but that rule would not be held to prevail in Ohio if the statute had not been enacted. See *Harkness* v. *Corning*, 24 Ohio St. 416. Their proposition that the devise is good under the act of 1811, because the appellants are the immediate issue of persons in being when the

will took effect, is also unsound. The appellants may be the immediate issue; but others of the same class are not, and the devise is of one subject matter to an entire class. When a gift includes in one description persons capable and persons incapable by reason of remoteness, the entire gift is void. *Ker* v. *Dungannon*, 1 Dru. & War. 509; *Candy* v. *Campbell*, 2 Cl. & Fin. 421; *Greenwood* v. *Roberts*, 15 Beav. 92; *Smith* v. *Smith*, L. R. 5 Ch. 342; *Leake* v. *Robinson*, 2 Meriv. 363. And when there is a gift to a class, some of the objects of which are too remote, and some not, effect cannot be given to the latter, separated from the former, but the whole gift is void. *Seaman* v. *Wood*, 22 Beav. 591. The cases of *Lowry* v. *Muldrow*, 8 Rich. Eq. 241, and *Savage* v. *Burnham*, 17 N. Y. 561, relied on by the other side, are not in point to their claim that under the statute the devise is not rendered void by the provision made for the great-grandchildren, because that devise was merely substitutional. We reply to this claim, (1) that the purpose of the will was perpetuity—that a contingency was possible in which the whole estate might have been divided among great-grandchildren; and (2) that the time for vesting of the estate is postponed beyond the time allowed by the act of 1811. That was a restraining, not an enabling act, as explained in the opening of the argument. The statute sets substantially the bounds to the postponement of the vesting, which the common law first set to executory devises.—The grandchildren do not take estates tail under the will. The *cy pres* doctrine has no application to this devise, because, (1) the doctrine is inapplicable when the limitation to the unborn children gives them a fee. *Hale* v. *Pew*, 25 Beav. 335. And (2) the doctrine of *cy pres* is inadmissible where the paramount intention of the testator is to create a perpetuity, and where the doctrine, if applied, would effectuate his purpose in contravention of the declared object of positive law.—The devises were contingent, not only as to the time when the estate should be decided, but as to the persons to take. When the existence of the devisee of a contingent remainder at a particular time makes part of the contingency, or enters into it, the remainder cannot descend. Appellants disregard the distinction between a contingency

depending on the person to take, and a contingent interest. In the latter the representatives may take when the event occurs, though the first taker pointed out may not be in existence. In the former nothing passes until the contingency happens. Where remainders are created in which only persons who survive a particular event are to take, it is obvious that no person who does not survive the event can take, or have any transmissible estate. There is a manifest difference between such remainders and those in which certain defined persons, ascertained without reference to a particular event, are to take on the happening of such event. Here the devise was not to certain defined persons, irrespective of the event; on the contrary, the remainder is limited to persons who were not in being when the will was made, and who cannot be ascertained until the event happens. The futurity here is annexed to the substance of the devise, and not to the time of partition only. 1 Jarman on Wills, 760, 645. The will bears marks of having been prepared by a thoughtful lawyer. The use of the words "when and as soon as" show a purpose of fixing the date when the interest should vest. *Colt* v. *Hubbard*, 33 Conn. 281, 285. See also *Festing* v. *Allen*, 12 M. & W. 279; *Duffield* v. *Duffield*, 1 Dow & Cl. 268, 314; *Augustus* v. *Seabolt*, 3 Met. (Ky.) 155; *Thorndike* v. *Loring*, 15 Gray, 391.

Mr. Herron, in addition to the points presented by *Mr. Harrison* urged as special defences on the part of his client, (1) That he was a bona fide purchaser direct from the heirs at law of Duncan McArthur, after the resignation of the executors, and when the legal title was, as he claimed, vested in the heirs; and that having acquired that title for a valuable consideration paid to the heirs, he had improved and occupied the lands as his home for thirty years before suit brought. As to the effect of these facts he cited *Jerrard* v. *Saunders*, 2 Ves. Jr. 454; *Fitzsimmons* v. *Ogden*, 7 Cranch, 2; *Anketel* v. *Converse*, 17 Ohio St. 11. (2) The staleness of the complainants' claim. They had two claims. The first to the enjoyment of the property left them under the will. That could not occur until the youngest grandchild became of age. The second was

to have the question of the probate of the will settled. That might have been done at an earlier date, as many of the grandchildren were entitled to set up that claim prior to 1858, and their interests were inseparable from those of complainant. See *Bradford* v. *Andrews*, 20 Ohio St. 208, 219.

Mr. McClintick argued from a careful historical review of the legislation of Ohio relating to the proof of wills,* that the proceedings in the Court of Common Pleas for Ross County, setting aside the probate of the will were a bar to the present claim of the complainants. On the question of perpetuities he rested on the arguments of *Mr. Harrison* and *Mr. Herron.*

Mr. Page contended, 1. That the executors were not necessary parties to the suit to vacate the will. The grandchildren of the testator *in esse* at the date of the suit, and parties to it, had the remainder in fee at that time, and were the only parties in existence who had it. The present complainants necessarily could not be made parties; but they occupy the same position as if they had been. The remainder in fee which opened to let them in, was represented in that suit by the only parties who could represent it. The whole legal

* The following Statutes of the Territory and of the State were cited by *Mr. McClintick:*

Territorial act of August 30, 1788, 1 Chase Stat. 96;
Territorial act of June 19, 1795, 1 Chase Stat. 182;
Constitution of 1802, Schedule § 4, 1 Chase Stat. 84;
Same, Art. III. § 5, 1 Chase Stat. 79;
Act of January 5, 1805, 1 Chase Stat. 492;
Act of February 18, 1808, 1 Chase Stat. 571;
Act of February 20, 1808, 1 Chase Stat. 577;
Act of February 10, 1810, 1 Chase Stat. 680;
Act of February 19, 1810, 1 Chase Stat. 685;
Act of February 8, 1812, 2 Chase Stat. 769;
Act of January 25, 1816, 2 Chase Stat. 929;
Act of February 26, 1824, 2 Chase Stat. 1305;
Act of February 18, 1831, 3 Chase Stat. 1785;
Act of March 12, 1831, 3 Chase Stat. 1775;
Act of March 3, 1834, 32 Ohio Laws, 41;
Act of March 16, 1839, 37 Ohio Laws, 57;
Act of March 23, 1840, 38 Ohio Laws, 120.

estate, both in life and in remainder, was vested in the children and grandchildren of the testator in trust, and it is to be presumed that they did their duty in defending the will. The estate now claimed was represented in the suit by parties who had a right to represent it. The claimants, coming into the same estate, must take it as they find it. The general rule requiring all parties to be represented, is confined to parties to the interest involved in the issue. The rule may be dispensed with in case of difficulty or extreme inconvenience. *Hallett* v. *Hallett*, 2 Paige, 15. It is within the discretion of the court to permit a suit to proceed without the appearance of a trustee, when all the *cestuis que trust* are parties; as when a trustee for some reason cannot be compelled to appear. *Walley* v. *Walley*, 1 Vernon, 484; *Moore* v. *Vinten*, 12 Sim. 161. See also *Brookes* v. *Burt*, 1 Beav. 106; *Seddon* v. *Cormel*, 10 Sim. 85. A trustee named in a will who has refused the trust is not a necessary party. *Creed* v. *Creed*, 2 Hogan, 215. And one who was released and never acted ought not to be a party. *Richardson* v. *Hulbert*, 1 Anstr. 65. And when the bill states (as did the bill in Ross County) that there are no executors and none can be had, the defect of their non-appearance, even if it were one, is excused. 2 Maddock Ch. Pract. 178. It is not disputed that had there been acting executors, they should have been made parties; but even if they had been omitted, could any one else have treated the proceedings as void, in a collateral suit? If the objection of defect of parties had been raised at the time, the court might have required the bill to be amended. To raise the objection in another suit after the lapse of thirty-five years raises a different question. For, when neither party raises such an objection, it is competent for the court to go on and settle the rights of the parties before it, without prejudice to those who are not parties. *Lorillard* v. *Coster*, 5 Paige, 172. And in such case, though the omitted parties or their privies in law or estate may object to the judgment, that objection cannot be taken by a third party. Much less can a party to the suit object that his trustee was not a party.—2. That the devise to the executors was *virtute officii*. The trust was annexed to the office, and not to the person of the executors.

Jackson v. *Ferris*, 15 Johns. 346; *Warden* v. *Richards*, 11 Gray, 277; *Miller* v. *Meetch*, 8 Penn. St. 418. An executor, who renounces his office, the renunciation being followed by twenty years of total non-interference with the estate, is deemed to have renounced the trust, which is personal and discretionary. *Beekman* v. *Bonsor*, 23 N. Y. 299. These executors never accepted a trust under this will, distinct from the executorship. When they resigned and their resignations were accepted, their title was extinguished.—3. That the grandchildren not *in esse* were parties by representation to the suit to set aside the will. *Lorillard* v. *Coster*, 5 Paige, 172; *Campbell* v. *Watson*, 8 Ohio, 498; Mitford Pl. 173; 1 Daniel Ch. Pract. 274; *Dursley* v. *Fitzhardinge*, 6 Vesey, 251; *Eagle Fire Insurance Co.* v. *Cammett*, 2 Edw. Ch. 127. See *Faulkner* v. *Davis*, 18 Gratt. 651, 684; *Baylor* v. *Dejarnette*, 13 Gratt. 152; *Knott* v. *Stearns*, 91 U. S. 638; *Sohier* v. *Williams*, 1 Curtis, 479; *Nodine* v. *Greenfield*, 7 Paige, 544; Adams Eq. 315; *Freeman* v. *Freeman*, 9 Heisk. 301; *Mead* v. *Mitchell*, 17 N. Y. 210, 214; *Clemens* v. *Clemens*, 37 Id. 59; *Brevoort* v. *Grace*, 53 Id. 245; *Chism* v. *Keith*, 1 Hun, 589; Calvert on Parties, ch. IV.—4. That executory interests are barred. The interests of the grandchildren were vested. In Ohio future contingent interests, whether a remainder or executory devise, are transmissible by deed or will. *Thompson* v. *Hoop*, 6 Ohio St. 480. Contingent limitations and executory devises to persons not in being may be bound by a decree against a person claiming a vested estate of inheritance. Story Eq. Pl. § 147; Mitford Pl. 174; Calvert on Parties, 51. The English rule is to bring before the court the person entitled to the first estate of inheritance with those claiming prior interests, omitting those who might claim the remainder or reversion after such vested estate of inheritance. It would, therefore, follow as a matter of course from this rule, that contingent limitations and executory devises to persons not in being would in like manner be bound by a decree against the virtual representatives of these remote and contingent interests, the person having the first vested estate of inheritance. *Mead* v. *Mitchell*, 17 N. Y. 214; *Clemens* v. *Clemens*, 37 N. Y. 59;

Brevoort v. *Grace*, 53 N. Y. 245. The English case of *Goodess* v. *Williams*, 2 Yo. & Col. Ch. 596, is opposed to previous English cases, and is in conflict with an unbroken line of American cases.—5. That the grandchildren not *in esse* were properly represented.—6. That the plaintiff was not required to have representatives appointed.—7. That if the court should have appointed executors, it is an error not affecting the jurisdiction.—8. That the defence by guardian *ad litem* was sufficient.—9. The counsel discussed the effect of the verdict and judgment under the Ohio act as to wills.—10. That the proceedings in Ross county cannot be impeached collaterally, because of the omission to appoint executors.

Mr. Justice Gray delivered the opinion of the court.

This case presents three principal questions:

First. Whether the equitable estate in fee, which Duncan McArthur by his will undertook to devise to his grandchildren, children of his five surviving children, was vested or contingent?

Second. Whether the devise of that estate, so far as it is to the present plaintiffs, was void for remoteness?

Third. Whether the decree in 1839, setting aside his will and annulling the probate, is a bar to this suit?

I. The principal provisions of the will of Duncan McArthur, material to the decision of this case, are as follows:

By the fifteenth clause, he directs that his lands in the counties of Ross and Pickaway shall be leased or rented by his executors "until the youngest or last grandchild which I now have, or may hereafter have," the child of either of his five surviving children, Allen C., James McD., Effie, Eliza Ann or Mary, "who may live to be twenty-one years of age, shall arrive at that age." By the sixteenth clause, he directs that, until that time, the income of these lands, and the dividends of all stocks held by him or purchased by his executors, shall be by them annually divided equally among the five children aforesaid, or the issue of any child dying, and among the grandchildren also as they successively come of age.

The seventeenth clause provides as follows: "It is my further will and direction that after the decease of all my children now

living, and when and as soon as the youngest or last grandchild, in the next preceding clause but one of this will designated and described, shall arrive at the age of twenty-one years, all my lands" in question "shall be inherited and equally divided between my grandchildren *per capita*, the lawful issue of my said sons and daughters, Allen C., James McD., Effie, Eliza Ann and Mary, for them and their heirs forever, to have and to hold, or to sell and dispose of the same at their will and pleasure; and in like manner all the stocks belonging to my said estate, whether invested before or after my death, shall at the same time be equally divided among my said grandchildren, share and share alike, *per capita;* but it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children lawfully begotten, such child or children shall take and receive *per stirpes* (to be equally divided between them) the share of my said estate, both real and personal, which the parent of such deceased child or children would have been entitled to have and receive if living at the time of such final distribution." The word "deceased," near the end of this passage, was evidently intended to be prefixed to the word "parent," instead of to the words "child or children," so as to read "deceased parent of such child or children."

By the eighteenth clause, he directs that "in such final distribution of my lands" the executors for the time being shall make deeds of partition "to and in the names of those who may be thus entitled thereto;" and "to enable my executors the more effectually to execute the powers and duties by this will devolved upon them, and to protect my said children and grandchildren against fraud and imposition," he devises the lands to his executors and their successors, "and to their heirs, in trust for the uses and purposes and objects expressed in this my will, and the performance of which is herein above directed and prescribed, to have and to hold the title thereof till such final division or partition thereof, and no longer." By the twenty-fourth clause, he appoints three executors, and directs and requests that if either of them shall die, resign, or refuse to act, the court having probate jurisdiction for the county of

Ross shall appoint a new one instead, to act as an executor with the others, so that there shall always be three executors.

The devise in the eighteenth clause of the title in the lands to the executors and their successors, and their heirs, in trust for the uses and purposes expressed in the will, to have and to hold until the final division or partition, clearly gave them an estate in fee, to last until that time. *Doe* v. *Edlin*, 4 Ad. & El. 582; *Maden* v. *Taylor*, 45 Law Journal (N. S.) Ch. 569 And there can be no doubt that, as contended by the learned counsel for the defendants, the powers conferred and the trusts imposed upon the executors were annexed to their office of executors, and did not make them trustees in another and different capacity. *Colt* v. *Colt*, 111 U. S. 566, 581; *Treadwell* v. *Cordis*, 5 Gray, 341, 358; *Gandolfo* v. *Walker*, 15 Ohio St. 251.

The equitable estate created by the gift in the sixteenth clause of the income to the children and grandchildren, being an estate which must endure for the lives of the children, and might endure throughout the lives of the grandchildren, though subject to be sooner determined in the contingency of the coming of age of the youngest grandchild, was technically an estate for life. 2 Bl. Com. 121.

The nature of the equitable estate in remainder created by the seventeenth clause demands more consideration.

The counsel for some of the defendants contended that it was contingent upon the arrival of the youngest grandchild at twenty-one years of age. In that view, the whole estate in remainder, being dependent upon the termination of the particular estate for life, and vesting at that time and not before, would be in legal effect an equitable contingent remainder to the grandchildren then living, and the issue then living of grandchildren theretofore deceased, as one class.

In behalf of other defendants it was contended that the remainder in fee expectant upon the estate for life vested immediately in the grandchildren living at the death of the testator, opened to let in afterborn grandchildren, and vested in them successively at birth, and would be divested as to the shares of those grandchildren only who should die, leaving children, before the determination of the life estate, by force of the direc-

tion that such children should take those shares. In this view, all the grandchildren took a vested remainder in fee; and the gift over to the children of any deceased grandchild, inasmuch as it did not depend upon any precedent particular estate, but was by way of substitution for the devise in fee to that grandchild, was an executory devise.

For many reasons, not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.

In the will before us, the testator directs the income to be divided annually, in specified and changing proportions, among his five children living at his death and their children, until the youngest grandchild comes of age. He gives no part of the income to children of grandchildren. He gives the fee, when the youngest grandchild comes of age, to the grandchildren and the children of deceased grandchildren. His general intent clearly is to give the income of the estate to the children and grandchildren so long as any grandchild is under age, and the principal to the issue of the five children, whether such issue are his grandchildren or his great-grandchildren.

If all the children and grandchildren should die before any grandchild should come of age, the distribution of the income would necessarily cease. In that event, if any of the grandchildren dying under age should leave children, the effect of holding the remainder to be contingent upon the coming of age of the youngest grandchild would, as that contingency had never happened, cut off the great-grandchildren from any share in the estate, in direct contravention of the general intent of the testator. The more reasonable inference is, that upon the determination of the life estate by the death of all children and grandchildren, for whose benefit it was created, the great-

grandchildren would be immediately entitled to the remainder. *Castle* v. *Eate*, 7 Beav. 296; *Mansfield* v. *Dugard*, Gilb. Eq. 36; *S. C.* 1 Eq. Cas. Ab. 195, pl. 4. Upon that construction, the contingency contemplated must necessarily happen at some time, either by the arrival of the youngest grandchild at twenty-one years of age, or by the death of all the grandchildren under age; and the case would come within the settled rule that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession." *Doe* v. *Considine*, 6 Wall. 458, 476; *Moore* v. *Lyons*, 25 Wend. 119, 144; *Blanchard* v. *Blanchard*, 1 Allen, 223, 227.

The terms in which the testator has expressed his intention likewise point to a vesting of the remainder in all his grandchildren.

The only gift of real estate in remainder to grandchildren is contained in the opening words of the eighteenth clause, by which the testator directs that "after the decease of all my children now living, and when and as soon as the youngest grandchild shall arrive at the age of twenty-one years," the lands "shall be inherited and equally divided between my grandchildren *per capita*, the lawful issue of my said sons and daughters," in fee.

This gift is not to such grandchildren only as shall be living at the expiration of the particular estate; but it is to "my grandchildren *per capita*, the lawful issue of my said sons and daughters," words of description appropriate to designate all such grandchildren.

At the expiration of the particular estate, the lands are to be "inherited and equally divided" among the grandchildren, and "in like manner" the stocks are to be "equally divided" among them. The real estate and the personal property are clearly to go to the same persons and at the same time.

The word "inherited" (which is applied to the real estate only) implies taking immediately from the testator upon his death, as heirs take immediately from their ancestor upon his death. Devises or bequests in remainder, by the use of similar words, though preceded, as in this case, by the word "then," have been often held to be vested from the death of the testator. *Bullock* v. *Downes*, 9 H. L. Cas. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; *Parker* v. *Converse*, 5 Gray, 336; *Dove* v. *Torr*, 128 Mass. 38. The case of *Thorndike* v. *Loring*, 15 Gray, 391, cited for the defendants, is clearly distinguished by the fact that there the bequest of the principal at the expiration of fifty years was confined to "those who would then be my lawful heirs and entitled to my estate if I had then died intestate."

The words "and equally divided *per capita*," while they qualify the effect of the word "inherited" so far as to prevent a taking by the grandchildren *per stirpes* as under the statute of descents, also plainly indicate a vested remainder. Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. For instance, under a devise of an estate, legal or equitable, to the testator's children for life, and to be divided upon or after their death among his grandchildren in fee, the grandchildren living at the death of the testator take a vested remainder at once, subject to open and let in afterborn grandchildren; although the number of grandchildren who will take, and consequently the proportional share of each, cannot of course be ascertained until the determination of the particular estate by the death of their parents. *Doe* v. *Considine*, 6 Wall. 458; *Cropley* v. *Cooper*, 19 Wall. 167; *Dingley* v. *Dingley*, 5 Mass. 535; *Doe* v. *Provoost*, 4 Johns. 61; *Linton* v. *Laycock*, 33 Ohio St. 128; *Doe* v. *Perryn*, 3 T. R. 484; *Randoll* v. *Doe*, 5 Dow, 202. So a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest. *Shattuck* v. *Stedman*, 2 Pick. 468; *Hallifax* v. *Wilson*, 16 Ves. 168; *In*

re Bennett's Trust, 3 K. & J. 280; *Strother* v. *Dutton*, 1 DeG. & Jon. 675.

The remainder, being vested according to the legal meaning of the words of gift, is not to be held contingent by virtue of subsequent provisions of the will, unless those provisions necessarily require it. The subsequent provisions of this will had other objects.

The direction that if any grandchild shall have died before the final division, leaving children, they shall take and receive *per stirpes* the share of the estate, both real and personal, which their parent would have been entitled to have and receive if then living, was evidently intended merely to provide for children of a deceased grandchild, and not to define the nature, as vested or contingent, of the previous general gift to the grandchildren; and its only effect upon that gift is to divest the share of any grandchild deceased leaving issue, and to vest that share in such issue. *Smithers* v. *Willock*, 9 Ves. 233; *Goodier* v. *Johnson*, 18 Ch. D. 441; *Darling* v. *Blanchard*, 109 Mass. 176; 1 Jarman on Wills (4th ed.) 870.

The addition, in the eighteenth clause of the will, of the provisions that any assignment, mortgage or pledge by any grandchild of his share shall be void, and that the executors, in the final partition and distribution, shall convey and pay to the persons entitled under the will, rather tends to show that the testator considered the estate to be vested, and to be in danger of being alienated but for these provisions; and, whatever their legal effect may be, they cannot be construed as making a remainder contingent, which the terms of the previous gift, and the general intent of the testator, as appearing from the whole will, require to be vested. *Hall* v. *Tufts*, 18 Pick. 455.

For these reasons, we are of opinion that the will purports to devise to all the grandchildren *per capita*, children of the five surviving children of the testator, a vested remainder in fee; and to the children *per stirpes* of any grandchildren deceased before the arrival of the youngest grandchild at twenty-one years of age, a similar estate in fee by way executory devise.

II. To come within the rule of the common law against per-

petuities, the estate, legal or equitable, granted or devised, must be one which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards.

In the case at bar, as the youngest grandchild must be in being in the lifetime of his parent, and that parent was born in the testator's lifetime, the devise to the grandchildren, and even the devise over, upon the arrival of the youngest grandchild at twenty-one years of age, to the children of any grandchild deceased before that time, must necessarily take effect, as to every devisee, within a life or lives in being and twenty-one years afterwards, and therefore do not violate the rule of the common law; and it is unnecessary to consider whether that rule is in force in Ohio.

The statute of Ohio of December 17, 1811, in force at the making of this will and at the testator's death, imposed different restrictions upon grants and devises of real estate, by enacting that "no estate in fee simple, fee tail, or any lesser estate, in lands or tenements lying within this State, shall be given or granted by deed or will to any person or persons, but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will." 2 Chase's Statutes, 762.

It was assumed at the argument, and can hardly be doubted, that in this statute the words "the time of making such deed or will," which, as applied to a deed, designate the time both of its execution and of its taking effect, denote, as applied to a will, the time when it takes effect by the death of the testator, and not the date of its formal execution. By the law of England, the question of remoteness depends upon the state of facts at the time of the testator's death, though differing from that existing at the date of the will. *Williams* v. *Teale*, 6 Hare, 239, 251; *Cattlin* v. *Brown*, 11 Hare, 372, 382; Lewis on Perpetuities, Supplt. 53–60, 64; 1 Jarman on Wills, 254.

Under the common-law rule against perpetuities, a devise to a class, some members of which may possibly not take within the

prescribed period, is wholly void. *Leake* v. *Robinson*, 2 Meriv. 363; *Pearks* v. *Moseley*, 5 App. Cas. 714. But that is because, as observed by Sir William Grant, "it is the period of vesting, and not the description of the legatees, that produces the incapacity," and the devise is not "to some individuals who are, and to some who are not, capable of taking." 2 Meriv. 388, 390. The rule of the common law, by which an estate devised must at all events vest within a life or lives in being and twenty-one years afterwards, has reference to time and not to persons. Even the "life or lives in being" have no reference to the persons who are to take, for the testator is allowed to select, as the measure of time, the lives of any persons now in existence; and the "twenty-one years afterwards" are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are twenty-one years in gross, without regard to the life, or to the coming of age, of any person soever. *Cadell* v. *Palmer*, 1 Cl. & Fin. 372; *S. C.* 7 Bligh N. R. 202.

It is doubtful, to say the least, whether the like effect can be attributed to the statute of Ohio, which has no reference to time, and only avoids devises to persons who are not either in being themselves, or the immediate issue or immediate descendants of persons in being, at the time of the making of the will. The devise of their parent's share to the children of any grandchild deceased before the time of division would seem to be valid as to those great-grandchildren whose parent, a grandchild of the testator, was living at the time of his death, because they would be "immediate issue" of a person in being at that time; and valid also to any great-grandchildren, whose parent, though born after the testator's death, had died before their grandparent, a child of the testator, because they would be, if not "immediate issue," certainly "immediate descendants," of that child, who was in being at that time; and invalid as to those great-grandchildren only, whose parent (as in the case of Mrs. Madeira, daughter of the testator's child Mary Trimble), born since the testator's death, died after their grandparent, and who, therefore, by reason of the interposition of the life of their parent, were neither "immediate issue" nor "immediate

descendants" of a person in being when the testator died. See *Stevenson* v. *Evans*, 10 Ohio St. 307; *Turley* v. *Turley*, 11 Ohio St. 173.

But, however that may be, the conclusion, already announced, that the estate in remainder devised by Duncan McArthur was vested in all his grandchildren *per capita*, with an executory devise over of the shares of those only who should die, leaving issue, before the final division, removes all difficulty in the application of the statute to the shares devised to the plaintiffs, grandchildren of the testator; for the devise to grandchildren, immediate issue of persons in being at the making of the will, was clearly not prohibited by the statute; and, even under the English rule, the executory devise over of the shares of deceased grandchildren to their children, if void for remoteness, would not defeat the previous valid devise of a vested remainder to the grandchildren, nor alter the share which each living grandchild would take. *Cattlin* v. *Brown*, 11 Hare, 372; Lord Selborne, in *Pearks* v. *Moseley*, 719, 724, 725; *Goodier* v. *Johnson*, 18 Ch. D. 441.

The necessary conclusion is that these plaintiffs, being grandchildren of the testator, took equitable vested remainders under his will. But until the determination of the particular estate by the death of all the testator's children and the arrival at the age of twenty-one years of the youngest grandchild who reached that age, the legal estate in fee being in the executors, the grandchildren owning the equitable estate in remainder had no right to a conveyance of the legal title. The present bill, filed little more than a year after one of the plaintiffs, who was the youngest grandchild of the testator who lived to the age of twenty-one years, arrived at that age, must therefore be maintained, unless the title of the plaintiffs under the will of their grandfather has been defeated by the decree rendered in 1839, setting aside the will.

III. The proceedings relating to the will of Duncan McArthur were had under the statute of Ohio of February 18, 1831, the material provisions of which are as follows:

By section 7, a will bequeathing or devising any personal property or real estate may be brought by the executors, or by

any person interested therein, before the Court of Common Pleas, and the testimony of the attesting witnesses reduced to writing, and if it shall thereupon appear that the will was duly executed, and that the testator was of full age and of sound mind and memory, and not under any restraint, the court shall order the will, together with the proof so taken, to be recorded. By section 13, the will is to be recorded in every county in which there is any land devised. By section 16, if the executor named in any will dies or refuses to act, or if no executor is named therein, the court may receive the probate of the will and grant letters of administration with the will annexed. The statute also contains the following sections:

"SECT. 20. If any person interested shall, within two years after probate had, appear, and by bill in chancery contest the validity of the will, an issue shall be made up, whether the writing produced be the last will of the testator or testatrix or not; which shall be tried by a jury, whose verdict shall be final between the parties, saving to the court the power of granting a new trial, as in other cases; but if no person appear in that time, the probate shall be forever binding; saving also to infants, married women, and persons absent from the State, or of insane mind or in captivity, the like period after the removing of their respective disabilities."

"SECT. 22. Appeals may be had from the decision of the Court of Common Pleas to the Supreme Court, when any will or other matter relating thereto shall have been contested." 3 Chase's Statutes, 1786–1788.

The forms of procedure, thus prescribed with regard to the original probate of a will and the subsequent setting aside of the probate, are in some respects peculiar, and their effect has been fully defined by decisions of the Supreme Court of Ohio.

The original probate on the testimony of the attesting witnesses, under section 7, is analogous to the probate in England in common form. The subsequent proceeding by bill in equity, under section 20, to contest the validity of the will, is analogous to the probate in solemn form by the executor upon being cited in by the next of kin; and the jurisdiction exercised by the court and jury is virtually that of a court of probate.

Both stages of the proceedings extend to the real estate as well as to the personal property, differing in this respect from the former English probates. Upon the subsequent contest, as upon the original probate, the only issue is will or no will, and the court has not the powers of a court of construction, and has no authority to pass upon the question whether the devises in the will are void for remoteness. *Mears* v. *Mears*, 15 Ohio St. 90.

The form of issue being prescribed by the statute, no answer is necessary, and if one is filed, it cannot be read at the trial of the issue. *Green* v. *Green*, 5 Ohio, 278. The position of the parties on the record, as plaintiffs or defendants, is immaterial; all are actors; and if some of the heirs are made plaintiffs and some defendants, all have an equal right to contest the will. *Runyan* v. *Price*, 15 Ohio St. 1, 6; *Bradford* v. *Andrews*, 20 Ohio St. 208, 220.

The bill in equity is so far in the nature of an appeal from the original probate, that the same issue is to be tried anew. *Haynes* v. *Haynes*, 33 Ohio St. 598, 618. But, strictly speaking, it is an original proceeding on the chancery side of the Court of Common Pleas, and does not, until final decree, vacate or affect the probate. "The statutory contest of a will lacks the essential elements of an appeal. It has not the same parties as in the court below. In the latter, in fact, it is purely *ex parte*, while in the Common Pleas it is *inter partes*." *Bradford* v. *Andrews*, 20 Ohio St. 222. The original probate cannot be impeached, except in the form of proceeding given by the statute. *Swazey* v. *Blackman*, 8 Ohio, 5, 19; *Bailey* v. *Bailey*, 8 Ohio, 239, 246; *Mosier* v. *Harmon*, 29 Ohio St. 220. Even while such a proceeding is pending, and until set aside by the final decree therein, the probate is conclusive evidence of the validity of the will, as against all persons, in a collateral suit. *Brown* v. *Burdick*, 25 Ohio St. 260.

In a proceeding under the statute to contest the validity of a will, it is error to render final judgment upon a demurrer to the answer; because the provision of the statute, requiring an issue to be made up and tried by a jury, is imperative in its terms, and "was deliberately enacted with a view to prevent

a disposition of cases for the contest of wills upon the mere consent or acquiescence of parties in any form." *Walker* v. *Walker*, 14 Ohio St. 157, 176.

If a bill to contest the validity of a will is seasonably filed by an infant heir who is within the saving clause of the statute, and there is no defect of parties defendant, and the instrument is found to be no will, the proper decree is to annul the whole order of probate. *Meese* v. *Keefe*, 10 Ohio, 362. But persons claiming under the will admitted to probate, who are not made defendants to the bill to set it aside, are not bound, or their rights affected, by the decree upon that bill; and may treat it as a nullity, and maintain actions, against any one claiming under it, for lands devised to them by the will as originally admitted to probate. *Holt* v. *Lamb*, 17 Ohio St. 374.

The case of *Holt* v. *Lamb*, just referred to, decided in 1867, has so important a bearing on the case at bar that it will be appropriate to state it with some fulness. Sarah Stevenson devised land to her brother George for life, and after his death to be sold and divided between his four daughters, and appointed him her executor. Upon a bill in chancery filed under the statute against him and another brother by the other brothers and sisters and heirs at law of the testatrix (to which those daughters, the devisees in remainder, were not made parties), alleging that the will was not duly executed and that the testatrix was of unsound mind, and an answer filed by him denying these allegations, the court, in 1826, without framing or submitting any issue to a jury, entered a decree setting aside the will. In 1827, upon a petition for partition between the brothers and sisters of the testatrix, the land was ordered to be sold, and was sold and conveyed to a stranger, who afterwards sold and conveyed it to another person. George died in 1863, and his four daughters with their husbands brought an action against the last purchaser and the heirs at law of the testatrix to recover the land.

That case was elaborately and learnedly argued, and the defence was rested on similar grounds to those taken in the case at bar. It was contended that the suit to contest the validity of the will was a proceeding *in rem;* that the plaintiffs were

not necessary parties to it; that they were parties by representation of George Stevenson, the executor, who appeared and filed an answer in the cause, and defended their interests; that if they should have been made parties, the omission to make them parties did not render the decree void against them, and could be availed of only by applying to the court in which that cause was pending to be made parties, or by proceedings in that court to impeach the decree for irregularity; and that they might not have been within the jurisdiction of the court and subject to its process, and after so great a lapse of time it must be presumed that the court for good reasons declined to order them to be brought in. 17 Ohio St. 381, 382.

But the Supreme Court of Ohio, after observing that it had been expressly decided in *Walker* v. *Walker*, above cited, that the omission of a jury rendered the decree at least voidable on appeal, and that it was unnecessary to determine whether that omission rendered the decree absolutely void, gave judgment in favor of the plaintiffs, upon the ground that, not having been made parties to the bill to set aside the will, their rights under the will as originally admitted to probate were not affected by the decree, and might be asserted in this action. Judge Welch, delivering the opinion of the whole court, said: "But whatever effect may be given to the decree, or to the verdict of a jury in such case, we have no hesitation in saying, that that effect must be confined to 'the parties' in the cause. The words '*the* parties,' in the section quoted, can have no other legitimate meaning than that of parties *to the proceeding*. This is their primary legal meaning, and that such is their import here is quite obvious, from their being used in connection with the subject of a 'bill in chancery,' which, of itself, implies proper parties. That meaning is made still more obvious from the fact, that to give the words any other meaning would do injustice, by depriving persons in interest of a day in court. The meaning cannot be *parties in interest*, because such had been spoken of before as 'persons interested.' And in the subsequent clause, where the effect of the probate is declared, it is said it 'shall be forever binding,' without naming any parties upon whom it is to be so binding. If the same meaning was

intended in both places, why were different forms of expression employed? Why use the words 'between the parties' in the one case, and omit them in the other? It seems to us quite plain that it was because the intention was to *express*, what, in fact, ought to be *implied* in all proceedings in 'chancery,' that none but 'the parties' to the proceeding were to be bound thereby." "The decree setting aside the will, if binding at all, was binding only '*between* the parties;' and it binds those parties by way of *estoppel*. Although the will may be, *in fact*, a lawful, valid will, the parties to the decree are estopped by it from *asserting* or proving it to be such will. But the plaintiffs are not so estopped. As to them, it is a valid and subsisting will. They are still estopped by the *probate* from *denying* that it is such will. It is to them as though the chancery case had never been commenced. Their rights stand wholly unaffected by the proceeding." 17 Ohio St. 385–387.

In *Bradford* v. *Andrews*, above referred to, decided in 1870, it was held that where a proceeding to contest the validity of a will was commenced, within the statutory period of limitation, by some of the heirs only, the right of action was saved to other heirs who were ultimately made parties, and who by their answers joined in the prayer to set aside the will, although they were not brought into the case until after the period of limitation had expired. In the opinion of the court, also delivered by Judge Welch, it was said: "If any person interested appears, and in good faith files his petition for a contest, the statute entitles him to a trial and the verdict of a jury, touching the validity of the will; and that verdict will be binding upon all parties who may be before the court as such at the time of its rendition. The interest of the parties is joint and inseparable. Substantially this is a proceeding *in rem*, and the court cannot take jurisdiction of the subject matter by fractions. The will is indivisible, and the verdict of the jury either establishes it as a whole, or wholly sets it aside. To save the right of action, therefore, to one is necessarily to save it to all. The case belongs to that class of actions where the law is compelled either to hold the rights of all parties in interest to be saved, or all to be barred."

It is contended by the defendants in the present case that this decision is inconsistent with that in *Holt* v. *Lamb*. But we perceive no inconsistency. Apart from the improbability that the court, speaking by the same judge as in *Holt* v. *Lamb*, only three years before, intended to overrule or to cast a doubt upon that case without mentioning it, the observation in the first sentence of the statement relied on, that the "verdict will be binding upon all parties who may be before the court as such at the time of its rendition," as well as the further explicit affirmation, already quoted, that the proceeding to set aside the will "is *inter partes*," clearly shows that the court had no thought of holding that any one, claiming under the will once admitted to probate, was bound by the decree setting it aside, who had not been made a party to the suit in which it was rendered. 20 Ohio St. 219, 222.

In *Reformed Presbyterian Church* v. *Nelson*, 35 Ohio St. 638, decided in 1880, in a proceeding by heirs at law, under the statute, to contest the validity of a will, the executors and all the devisees and legatees were made defendants, except one person to whom the will gave a silver watch; and it was held that the omission to make this legatee a party, before trying the issue and rendering the decree setting aside the will, was error, for which those who had been made defendants and taken part in the trial might obtain a reversal of the decree, although the objection was not taken below. The court said: "It is the duty of the plaintiff, instituting a suit to settle a controversy, to see that the necessary parties are brought before the court." And after referring, without intimating any doubt of the correctness of the decision therein, to *Holt* v. *Lamb*, as a case in which no question arose as to the decree being reversible in error, but the effect of the decree was drawn in question in a collateral suit, and in which it was held that the parties to the suit in which the decree was rendered were bound by the decree, and it was not void as to them, but that as to all other persons in interest the decree was void; the court observed that "as it was held to be void as to some of the persons in interest and binding as to others, in respect to the same property, it would seem to be necessarily erroneous

as to the parties to the suit;" and referred to the decision of the Court of Appeals of Kentucky in *Singleton* v. *Singleton*, 8 B. Monroe, 340, 356, as taking a different view of the effect of such a decree, and holding that the verdict must be binding upon all interested in the will, or not binding upon any, and yet recognizing the absence of a necessary party to the decree to be ground for its reversal on error. 35 Ohio St. 642–644.

The decision of the Supreme Court of Ohio in *Holt* v. *Lamb*, eighteen years ago, recognized by the same court thirteen years afterwards in *Reformed Presbyterian Church* v. *Nelson*, as establishing that under the statute of Ohio a decree setting aside a will was void as against all persons in interest who were not parties to the suit in which it was rendered, and never impugned or doubted in that State, must, upon a question of the construction of a statute of Ohio, the effect of the will of a citizen of Ohio admitted to probate in Ohio, and the title of land in that State, be accepted by this court as conclusive evidence of the law of Ohio, even if a different construction has been given to similar statutes by the courts of other States. *McKeen* v. *Delancy*, 5 Cranch, 22; *Polk* v. *Wendall*, 9 Cranch, 87; *Thatcher* v. *Powell*, 6 Wheat. 119; *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Suydam* v. *Williamson*, 24 How. 427; *Christy* v. *Pridgeon*, 4 Wall. 196; *Williams* v. *Kirtland*, 13 Wall. 306. It is therefore unimportant to consider how far the terms of the statutes of other States, construed by the courts of those States in the cases cited by the defendants, corresponded to those of the statute of Ohio.

The case of *Fraser* v. *Jennison*, 106 U. S. 191, arose under a wholly different statute of the State of Michigan, providing for an ordinary appeal, which vacated the original probate; and the point decided by this court, in accordance with decisions of the Supreme Court of Michigan, was that on such an appeal, although taken by the heirs at law separately, the validity of the will was a single issue, as regarded all the parties who appeared and contested it.

The general rule in equity, in accordance with the fundamental principles of justice, is that all persons interested in the

object of a suit, and whose rights will be directly affected by the decree, must be made parties to the suit. Exceptions to this rule have been admitted, from considerations of necessity or of paramount convenience, when some of the persons interested are out of the jurisdiction, or not in being, or when the persons interested are too numerous to be all brought in. But in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all.

The plaintiffs in the present case, being as yet unborn, could not, of course, have been made actual parties to the suit in which the decree setting aside the will of their grandfather was rendered; and the question remaining to be considered is, whether there was such a virtual representation of their interests, that they are bound by the decree. This question cannot be satisfactorily or intelligibly treated without first recapitulating the facts.

The will was originally admitted to probate on the testimony of the attesting witnesses; letters testamentary were issued to the two surviving executors of the three named in the will, and to Mrs. Coons, a daughter of the testator, appointed by the Court of Probate, pursuant to the provisions of the will, in the place of the one who died before the testator; and the three executors so appointed were qualified and gave bond, and took upon themselves the executorship.

The bill in equity to contest the validity of the will was filed by Allen C. McArthur, one of the five surviving children and heirs at law of the testator, and afterwards the father of these plaintiffs. The defendants in that bill were the testator's four other surviving children and heirs at law, namely, James McD. McArthur, Mrs. Coons, Mrs. Anderson and Mrs. Trimble, and the husbands of Mrs. Anderson and Mrs. Trimble; all the children who had then been born of those four children of the testator, and who were all then under age, namely, three children of James McD. McArthur, one child of Mrs. Coons, one child of Mrs. Anderson, and one child, born pending the suit, of Mrs. Trimble; the son, daughter, and son-in-law of Mrs. Kercheval, a deceased daughter of the testator; the husband and three sons of Mrs. Bourne, another deceased daughter of the

testator; and Samson Mason and Samuel F. Vinton, as devisees in trust of lands not now in question.

The joinder, as defendants in that suit, of Mrs. Kercheval's and Mrs. Bourne's children, and of Mason and Vinton, trustees, is unimportant, and may be laid out of consideration; because the will gave to those children no estate in lands, in fee or for life, legal or equitable; and Mason and Vinton refused to accept their trust, and by answer formally disclaimed all interest in the lands devised to them.

No executor and general trustee under the will was made a defendant in the capacity of executor and trustee. The three executors who had previously qualified and acted had resigned, and their resignations had been accepted by the Court of Probate; two of them a few days before the bill was filed, and the third while it was pending; and no successor of either, and no administrator with the will annexed, was appointed.

The only parties to that suit, then, so far as is material to the question before us, were a son and heir at law of the testator, as complainant, and the other four children and heirs at law, and the grandchildren then in being, each a minor child of one of those four children, as defendants. The bill alleged that these were the only persons specified in the will or having an interest in it, and were the only heirs and personal representatives of the testator. That all the heirs at law were before the court is true, for the five children (with the Kercheval and Bourne grandchildren) were the heirs at law. But, according to the will, the children, as well as the grandchildren, took merely equitable interests. To none of them was any legal title devised. The five present plaintiffs, children of the complainant in that suit, as well as the children afterwards born of the testator's other surviving children, all grandchildren of the testator, and entitled under the will to share with his other grandchildren, were not parties, and, being yet unborn, could not be personally made parties. And although the testator, to secure the interests of all his children and grandchildren, under the will, and, as he declared, to prevent them from being defrauded or imposed upon, had devised the legal title in fee to his executors and their successors, and committed

to them the execution of the trusts which he created, yet no personal representative of the testator, no executor or trustee appointed under the will, and no administrator with the will annexed, was a party to the proceeding at the time of the trial of the issue and the rendering of the final decree setting aside the will and annulling the probate.

The only parties to that proceeding, who were of age and capable of representing themselves, were the heirs at law, interested to set aside the will, and one of whom, afterwards father of the present plaintiffs, filed the bill for that purpose. The guardian *ad litem*, appointed to represent the opposing interest, under the will, of each minor grandchild then in being, was either its parent, interested as an heir at law, and as a party to the suit in his own right, to defeat the will, or was the husband of such a parent and heir at law. Each of the persons so appointed confessed in the answer filed in his own behalf all the allegations of the bill, and in his answer as guardian neither admitted nor denied those allegations. All the appointments of the guardians *ad litem* were made, all the answers were filed, and the issue to the jury was ordered, in that suit, and the resignation of the sole remaining executrix (who was also one of the heirs at law and guardians *ad litem*) was tendered and accepted in the court of probate, on one and the same day, within a week before the verdict and final decree.

The charges, made in the present bill, of actual fraud and conspiracy in procuring that decree, having been denied in the answers, and the plaintiffs, by setting down the case for hearing upon bill and answers, having admitted the truth of all statements of fact in the answers, must be taken to be disproved. Those who took part in obtaining that decree may have thought that they were doing the best thing for all persons interested in the estate. But it is impossible to read the record of that case without being satisfied that the verdict and decree were entered without any real contest, and that the heirs at law, whose interest it was to set aside the will, in fact controlled both sides of the controversy: the attack upon the will, as heirs and as parties in their own right; the defence of the will, as guardians *ad litem* of the only devisees brought before the court.

Opinion of the Court.

The appointment of persons, having adverse interests, to be guardians *ad litem* of the grandchildren then living and made parties defendant, may, so far as those parties were concerned, have been a mere irregularity in the mode of proceeding, for which they could not afterwards collaterally impeach the decree. *Colt* v. *Colt*, 111 U. S. 566. But neither the living grandchildren, nor the guardians appointed to represent them, could represent the estate devised by the testator to his executors in trust for unborn grandchildren and great-grandchildren.

In suits affecting the rights of residuary legatees or of next of kin, the general rule is that all the members of the class must be made parties. *Davoue* v. *Fanning*, 4 Johns. Ch. 199; *Dehart* v. *Dehart*, 2 H. W. Green (N. J.) 471; *Hawkins* v. *Hawkins*, 1 Hare, 543, 545 and note; Calvert on Parties (2d ed.), 49, 237. Where they are numerous, and only some of them, together with the executor and trustee under the will, are made parties, the court, upon being satisfied that it has a sufficient number before it to secure a fair trial of the question at issue, may hear the cause. *Bradwin* v. *Harpur*, Ambler, 374; *Harvey* v. *Harvey*, 4 Beav. 215, and 5 Beav. 134. But it would seem that the decree must be without prejudice to the rights of those who are not made parties, and who do not come in before the decree. *Harvey* v. *Harvey*, 5 Beav. 139; *Willats* v. *Busby*, 5 Beav. 193, 200; *Powell* v. *Wright*, 7 Beav. 444, 450; Calvert on Parties, 72; *Hallett* v. *Hallett*, 2 Paige, 15; Rule 48 in Equity, 1 How. lvi. And where a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record, so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all. *Lanchester* v. *Thompson*, 5 Madd. 4, 13; Calvert on Parties, 44, 169.

In the proceeding to contest the validity of Duncan McArthur's will, on the contrary, so far from the attention of the court being called to any such question, it was positively alleged in the bill, and not contradicted in any of the answers, that those named as parties in the bill were the only persons specified in that will, and the only persons having an interest in it. Under the Ohio statute and decisions, the court had

nothing to do with the construction or the legal effect of the provisions of the will, but had only to try the question of will or no will as between the parties before it, and with no effect upon the rights of those not made parties. The rights of those infant grandchildren who were made defendants, to show cause against the decree, were saved by the express terms of the statute and of the decree itself until their coming of age and for six months afterwards; and no provision was made for the preservation of the rights of after-born grandchildren.

But the graver objection is that at the time of rendering the decree the court had before it no one representing the office of the executors, or the trust estate devised to them.

A trustee who has large powers over the trust estate, and important duties to perform with respect to it, is a necessary party to a suit brought by a stranger to defeat the trust, and often sufficiently represents the beneficiaries. Calvert on Parties, 273; *Kerrison* v. *Stewart*, 93 U. S. 155, 160; *Campbell* v. *Watson*, 8 Ohio, 498. Where such a trustee for a married woman was not made a party, Mr. Justice Miller, delivering the judgment of this court reversing the decree, said: "How the decree can clear the property of this trust without having the trustee before the court it is difficult to see. This was the object of the suit; but how can it be made effectual for that purpose in the absence of the person in whom the title is vested?" *O'Hara* v. *MacConnell*, 93 U. S. 150, 154.

When a will has been once admitted to probate, the estate, so long as the probate remains unrevoked, can only be administered by the executor or by an administrator with the will annexed. The executor is the principal and the necessary representative of the estate vested in him, and of all those interested in it; "the executor," said Lord Hardwicke, "in all cases sustaining the person of the testator, to defend the estate for him, creditors and legatees." *Peacock* v. *Monk*, 1 Ves. Sen. 127, 131. By the settled doctrine of the English ecclesiastical courts, in any proceeding to contest the probate or the rejection of a will, or to compel probate in solemn form, the executor is a necessary party, and, unless fraud or collusion is suggested, the only party to represent the will. The executor, in the words

of Sir John Nicholl, "*prima facie* is to be considered as *pars principalis* or *legitimus contradictor;*" *Wood* v. *Medley*, 1 Hagg. Eccl. 645, 668; and, as observed by Sir Herbert Jenner, "represents and is the protector of the legatees under the will, being specially entrusted by the deceased with the care and management of his property and to see his intentions carried into effect." *Hayle* v. *Hasted*, 1 Curt. Eccl. 236, 240, 241. When there has been a probate in common form and there is no executor, the administrator with the will annexed is the proper party to be cited to prove the will in solemn form or to show cause why an intestacy should not be declared. *Gascoyne* v. *Chandler*, 2 Cas. temp. Lee, 241.

By the devise in fee to these executors, their appointment by the Court of Probate, and their acceptance of the trust, the legal title in the real estate under the will vested in them. The subsequent acceptance by that court of their resignation of the office of executors no doubt discharged them from the performance of the duties of executors and trustees under the will. But the legal title in the real estate, which had once vested in them, could not be divested without a conveyance, or a decree of a court of chancery, or an appointment by the Court of Probate of new executors and trustees in accordance with the will. At common law, a conveyance, sanctioned or ordered by a court of competent jurisdiction, or at least a new appointment pursuant to the instrument by which the trust was created, would be necessary to divest the title of each trustee; and no statute or decision in Ohio, establishing a different rule in this respect, has been brought to our notice. The three executors and trustees who had once accepted and acted as such, therefore, still held the legal title. *In re Van Wyck*, 1 Barb. Ch. 565, 570; *Drury* v. *Natick*, 10 Allen, 169, 183; *Wooldridge* v. *Planters' Bank*, 1 Sneed, 296; 2 Washburn on Real Property (4th ed.) 512, 513. And as holders of that title they were necessary parties to the suit. *Adams* v. *Paynter*, 1 Collyer, 530, 534.

But even if the mere legal title could be deemed, upon the acceptance by the Court of Probate of the resignation of two of the executors and trustees, to have vested in the remaining

one, Mrs. Coons, and upon the acceptance of her resignation to have vested in the heirs at law, the more serious difficulty remains. The heirs did not succeed to the office of executors, and neither Mrs. Coons after her resignation, nor all the heirs, could represent the testator's will, or the trust created by it, or the beneficiaries of that trust. The heirs were not alleged in the bill to be trustees, were not made parties as trustees, did not answer as trustees; but were actors in support of their individual rights only, asserting, one of them by allegations in his bill, and the others by confession in their answers of those allegations, a title adverse to the will and to the trusts created by it.

The resignation of the persons who had been appointed executors and trustees did not dispense with the presence of representatives of the testator and of the trust estate. It was necessary that others should be appointed in their stead to represent the estate devised to the executors in trust for the protection of the *cestuis que trust* designated in the will, and especially the interests of those who might be born in the future, and who could not be otherwise sufficiently represented.

No additional force is given to the decree, rendered without having any such representatives before the court, by the allegation in that bill that no persons could be found whom the court was willing to appoint executors and who were able to give the requisite bonds, or by the allegation in the answer of Mrs. Coons that one reason for her resignation of the office of executrix was the impossibility of procuring suitable associates. Those were wholly irrelevant allegations, which the court, sitting in chancery to try the single issue of the validity of the will, had no authority to pass upon, or to assume to be true. The power and the duty, upon any vacancy in the office of executors or trustees under a will, to appoint new executors or trustees, or administrators with the will annexed, was in the court acting strictly as a court of probate. Statutes of Ohio of March 12, 1831, § 22, and February 18, 1831, §§ 16, 25; 3 Chase's Statutes, 1779, 1787, 1788. The alleged impossibility of finding proper persons to accept the office of executors

affords no more excuse for holding a decree binding upon persons not otherwise represented, than it would for disregarding a will which had been admitted to probate, and settling the estate as if the deceased had died intestate.

Nor can we doubt that the court, in the exercise of the appropriate branch of its jurisdiction, might in its discretion have granted administration limited to the single object of defending the will and the probate against the bill in equity of the heirs. Courts vested with the jurisdiction of granting letters testamentary and of administration have the inherent power of granting a limited administration, whenever it is necessary for the purposes of justice; as, for instance, *durante minore ætate*, while the executor named in the will is under age; *durante absentia*, when he is out of the jurisdiction and therefore has not taken out letters testamentary; or *ad litem*, to defend a suit in chancery while the probate of a will is under contest; and the powers exercised by the English courts in this respect appertain to the courts of like jurisdiction in this country, although not specified in the statutes under which they act. *Davis* v. *Chanter*, 2 Phillips, 545, 550, 551; 1 Williams on Executors (7th ed.) 479, 502, 523, 524; *Griffith* v. *Frazier*, 8 Cranch, 9, 26; *Martin* v. *Dry Dock Co.*, 92 N. Y. 70; *McNairy* v. *Bell*, 6 Yerger, 302; *Jordan* v. *Polk*, 1 Sneed, 429, 434.

These defendants rely on *Andrews* v. *Andrews*, 7 Ohio St. 143, as showing that to a bill in equity by the heirs at law under the Ohio statute to set aside a will which has been admitted to probate, the executors are not necessary parties. But in that case, a will bequeathing the bulk of the testator's property to certain charitable corporations having been set aside upon a bill by the heirs against the executors and the residuary legatees, the only point decided was that the executors were not bound to assume the burden of the defence, or entitled to charge the expense thereof to the estate; and the court, in delivering judgment, said that, in analogy to ordinary cases in chancery, it had been the general, and perhaps uniform, practice to make the executors, as well as legatees and devisees, parties defendant, and that, "granting the propriety, and even the necessity, of the practice," it did not follow that the execu-

tor was therefore bound to take upon himself the burden of the contest. 7 Ohio St. 151. The court thus recognized, what is indeed self-evident, that the question whether the executor is bound to make an active defence at the expense of the estate is wholly different from the question whether he must be made a party, and so have an opportunity to defend the interests which he represents. In later cases in that State, the practice of making the executor a party has been followed, and it has never been intimated that his presence could be dispensed with, although he has been held not to be of himself a sufficient representative of the devisees and legatees to make the decree binding on them. *Holt* v. *Lamb*, 17 Ohio St. 374, and *Reformed Presbyterian Church* v. *Nelson*, 35 Ohio St. 638, already cited. But costs in probate cases generally rest in the discretion of the court, and are often not allowed even to the prevailing party. *Summerell* v. *Clements*, 32 Law Journal (Prob.) 33 and note; *Nichols* v. *Binns*, 1 Sw. & Tr. 239; *Mitchell* v. *Gard*, 3 Sw. & Tr. 275; *Davies* v. *Gregory*, L. R. 3 P. & D. 28; *Mumper's Appeal*, 3 W. & S. 441; *Chapin* v. *Miner*, 112 Mass. 269. In *Andrews* v. *Andrews*, no trust was created by the will; but the bequest was outright to existing corporations, themselves parties to the suit, and capable of representing their own interests; and under such circumstances there would seem to have been no reason why the executor should have incurred any expense in the matter. *Dyce Sombre* v. *Troup*, Deane, 22, 119, 120; *S. C.* on appeal, *nom. Prinsep* v. *Dyce Sombre*, 10 Moore P. C. 232, 301–305.

The cases in courts of general chancery jurisdiction, cited in behalf of the defendants, are clearly distinguishable from the case before us, and naturally range themselves in several classes.

Some of them were of mere changes of investment, leaving undiminished the interests of all parties in the property in its new form. Such were *Sohier* v. *Williams*, 1 Curtis, 479; *Faulkner* v. *Davis*, 18 Gratt. 651; and *Knotts* v. *Stearns*, 91 U. S. 638. To the same class belong suits for partition, which are either for a division in severalty of lands before held in common, or else for a sale of the whole land, and a division or in-

vestment of the proceeds for the benefit of those who, but for the sale, would have had interests in the land. In the case of a strict partition, by division of the land itself, it is sufficient to make the present owner, or, in some cases, the tenant for life of each share, a party, because the interest of those who come after him is not otherwise affected than by being changed from an estate in common to an estate in severalty. *Wills* v. *Slade*, 6 Ves. 498; *Gaskell* v. *Gaskell*, 6 Sim. 643; *Clemens* v. *Clemens*, 37 N. Y. 59; Calvert on Parties, 60, 259. In the case of a partition by sale of the land, and a division or investment of the proceeds according to the interests in the several shares, the interests of all persons in the proceeds correspond to their respective interests in the land, and are secured by the decree of sale. *Mead* v. *Mitchell*, 17 N. Y. 210; *Basnett* v. *Moxon*, L. R. 20 Eq. 182. But a decree for partition of either kind, which cuts off remaindermen, not then *in esse*, from having, when they come into being, any interest in either land or proceeds, does not bind them. *Monarque* v. *Monarque*, 80 N. Y. 320; *Downin* v. *Sprecher*, 35 Maryland, 474.

Another class of cases is that of creditors, who are entitled to present payment of their debts, whoever may be the future owner of the estate. For instance, in a bill to enforce a debt charged upon real estate devised to one for life, with contingent remainder to his unborn son, the executor and the tenant for life are sufficient parties, because, as was said long ago by Lord Hardwicke, if there is no one in whom the estate of inheritance is vested, "it is impossible to say the creditors are to remain unpaid and the trust not to be executed until a son is born. If there is no first son in being, the court must take the facts as they stand." *Finch* v. *Finch*, 2 Ves. Sen. 491; *Baylor* v. *Dejarnette*, 13 Gratt. 152, 168. See also *Goodchild* v. *Terrett*, 5 Beav. 398.

In some other cases, when all the interests are legal and not equitable, the owner of the first estate of freehold, representing the whole estate, and identified in interest with all who come after him, sufficiently represents those yet unborn. In the case of an estate tail, for instance, Lord Redesdale held it to be sufficient, in order to bind contingent remaindermen, to bring

before the court the first tenant in tail (although an infant, incapable at law of barring remaindermen), and if no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life. But the reason assigned by that great master of equity pleading was, "that where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive." *Giffard* v. *Hort*, 1 Sch. & Lef. 386, 408; Calvert on Parties, 55–60. The necessity of the case being the only reason for this, it follows that where the successive estates are equitable, and supported by a legal estate devised in trust, the trustees also are necessary parties. *Hopkins* v. *Hopkins*, West Ch. 606, 619; *S. C.* 1 Atk. 581, 590; *Cholmondeley* v. *Clinton*, 2 Jacob & Walker, 1, 133; *Mullins* v. *Townsend*, 5 Bligh N. R. 567, 591; *S. C.* 2 Dow & Cl. 430, 438; *Ex parte Dering*, 12 Sim. 400; Calvert on Parties, 253, 327.

So in the case of a bill in equity for the construction of a will, the court, from necessity, in order to protect the trustee and to give proper instructions as to the execution of the trusts, is sometimes obliged to settle the validity and effect of contingent limitations even to persons not in being. But, as was said by Mr. Justice Grier in *Cross* v. *De Valle*, 1 Wall. 1, 16, "It is this necessity which compels the court to make such cases exceptions to the general rule;" and, as Chancellor Walworth observed in *Lorillard* v. *Coster*, 5 Paige, 172, 215, there cited, "the executors and trustees must be considered as the legal representatives of the rights of persons not yet *in esse*." And they are necessary parties. *Nonnelay* v. *Balls*, 6 Jur. 550. In *Palmer* v. *Flower*, L. R. 13 Eq. 250, cited for the defendants, in which the court construed a will without bringing in a child born pending the suit, who had like interests with parties already before the court, the trustee was a party.

In the cases in which bills in equity, without an executor or administrator being made a party, have been maintained while the probate or the administration was being contested in the ecclesiastical court, the court of chancery exercised a jurisdic-

tion, concurrent with that of the ecclesiastical courts in appointing special administrators, for the simple purpose of preserving the property until there was some person entitled to receive it. *Montgomery* v. *Clark*, 2 Atk. 378; *King* v. *King*, 6 Ves. 172; *Atkinson* v. *Henshaw*, 2 Ves. & B. 85; *Watkins* v. *Brent*, 1 Myl. & Cr. 97; *Whitworth* v. *Whyddon*, 2 Macn. & Gord. 52; Statute of Ohio of March 12, 1831, § 8, 3 Chase's Statutes, 1777. Under like circumstances, a bill of discovery of real assets can be maintained only to preserve a debt. *Conway* v. *Stroude*, Freem. Ch. 188; *Plunket* v. *Penson*, 2 Atk. 51.

In a suit in which a general administration of the assets of a deceased person is necessary to the relief prayed, an allegation that a suit is pending in the ecclesiastical court for a grant of administration may prevent the bill from being held bad on demurrer; because in equity it is sufficient if administration is obtained at any time after bill filed and before a hearing upon the merits. *Penny* v. *Watts*, 2 Phillips, 149, 154; *Fell* v. *Lutwidge*, Barnard. Ch. 319, 320; *Humphreys* v. *Humphreys*, 3 P. Wms. 349, 351; *Simons* v. *Milman*, 2 Sim. 241; *Beardmore* v. *Gregory*, 2 Hem. & Mil. 491. But it has been uniformly held that such a suit cannot proceed to a final decree, even when the executor is out of the jurisdiction, or no executor has been appointed, until an appointment of a personal representative has been made within the jurisdiction, by the competent court; and it appears to be settled in England that this must be a general administrator, unless the court of probate, upon application made to it for administration, insists on appointing an administrator *ad litem* only. Mitford Pl. (4th ed.) 177, 178; *Tyler* v. *Bell*, 1 Keen, 826, and 2 Myl. & Cr. 89; *Green* v. *Lane*, 16 Jur. 1061; *Devaynes* v. *Robinson*, 24 Beav. 86, 98; *Cary* v. *Hills*, L. R. 15 Eq. 79; *Rowsell* v. *Morris*, L. R. 17 Eq. 20; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294.

In England, while the probate of wills in the ecclesiastical court was conclusive as to the personal estate only, a court of chancery, upon a bill by creditors for the sale of real estate for the payment of debts, or by beneficiaries to enforce trusts created by the will, might indeed render a decree as between

the parties before it; and sometimes, as incident to such decree, would declare that, as between them, the will was established. But no decree establishing the will in the absence of the heir at law, even if out of the jurisdiction or not to be found, could bind him. *French* v. *Baron*, 2 Atk. 120; *S. C.* 1 Dick. 138; *Banister* v. *Way*, 2 Dick. 599; *Smith* v. *Hibernian Mining Co.*, 1 Sch. & Lef. 238, 241; *Fordham* v. *Rolfe*, Tamlyn, 1, 3, and note; *Waterton* v. *Croft*, 6 Sim. 431; Mitford Pl. 173; Calvert on Parties, 218–220; 1 Maddock Ch. Pract. 604; Story Eq. Pl. § 87; Rule 50 in Equity, 1 How. lvi.

Executors and trustees, appointed by the testator to perform the trusts of the will and to protect the interests of his beneficiaries, are as necessary parties to a proceeding to annul a probate, as the heirs at law are to a suit to establish the validity of a will. And upon a review of the cases no precedent has been found, either in a court of probate or in a court of chancery, in which a decree disallowing a will, rendered in a suit brought to set it aside, or to assert an adverse title in the estate, without making such executors, or an administrator with the will annexed, a party to the suit, has been held binding upon persons not before the court.

As under the statute of Ohio, as construed by the Supreme Court of that State, a decree annulling the probate of a will is not merely irregular and erroneous, but absolutely void, as against persons interested in the will and not parties to the decree, and as these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that that decree is no bar to the assertion of their rights under the will. To extend the doctrine of constructive and virtual representation, adopted by courts of equity on considerations of sound policy and practical necessity, to a decree like this, in which it is apparent that there was no real representation of the interests of these plaintiffs, would be to confess that the court is powerless to do justice to suitors who have never before had a hearing.

The subsequent partition among the heirs at law, and the conveyances by them to third persons for valuable consideration, cannot affect the title of these plaintiffs. All the facts

upon which that title depends appeared of record in judicial proceedings, of which all persons, whether claiming under or adversely to the will, were bound to take notice. The will and the original probate thereof were of record in the county in which the probate was granted. The will as there recorded showed the estate devised to these plaintiffs and to the executors in trust for them. The recording of the will and probate in any other county in which there was land devised was required for the purpose of evidence only, and not to give effect to the probate. *Hall* v. *Ashby*, 9 Ohio, 96, 99; *Carpenter* v. *Denoon*, 29 Ohio St. 379, 395. The record of the decree setting aside the will showed that neither these plaintiffs, nor any executors or successors of executors in the trust, were parties to the suit; and consequently that the plaintiffs' title under the will, as originally admitted to probate, was not affected by that decree. The subsequent purchasers must therefore look to their vendors, and have no equity as against these plaintiffs. Even a purchaser of land sold under a decree in equity, though he is not affected by mere irregularity in the mode of proceeding against the parties to the suit in which the decree is rendered, yet, as has been observed by Lord Redesdale, and repeated by the Supreme Court of Ohio, is to see that all proper parties to be bound are before the court, and that taking the conveyance he takes a title that cannot be impeached *aliunde*. *Bennett* v. *Hamill*, 2 Sch. & Lef. 566, 577; *Massie* v. *Donaldson*, 8 Ohio, 377, 381.

The present suit does not seek to annul or impeach a decree of a State court granting or refusing probate of a will, but to assert the title of the plaintiffs under a probate granted according to the law of the State, and which, by that law, stands unaffected, as to them, by the subsequent proceedings between other parties, and conclusively establishes their title. The case thus avoids the difficulties considered in *Ellis* v. *Davis*, 109 U. S. 485, and cases there cited.

The decree of the Circuit Court must therefore be reversed, and the case remanded for further proceedings in conformity with this opinion.

Dissenting Opinion: Waite, C. J., Harlan, J.

MR. CHIEF JUSTICE WAITE (with whom MR. JUSTICE HARLAN concurred), dissenting.

Mr. Justice Harlan and myself are unable to agree to this judgment. In our opinion the decree of the Ross County Court of Common Pleas, setting aside the will of Duncan McArthur, is binding on the complainants in this case. The devise of the property in dispute was in its legal effect to a class of persons, that is to say, to the grandchildren of the testator, the lawful issue of his five surviving children, when the youngest or last grandchild should arrive at the age of twenty-one years. If a grandchild died before the division of the estate, leaving a child or children, his or her share was to go to his or her child or children. All the children of the testator, and all the grandchildren in being when the decree was rendered, were parties to the suit. Thus it appears that at the time of the decree all persons then in life of the class of devisees to which the complainants belong were in court and subject to its jurisdiction.

This court now decides that these grandchildren, living at the death of the testator, took in equity a vested remainder at once, subject to open and let in afterborn grandchildren. Such being the case, it seems to us that the grandchildren in whom such estate vested represented those to be born afterwards for all the purposes of a contest of the will under the Ohio statute governing that proceeding. At most, the executors and the executrix held only the naked legal title. The equitable title was in the grandchildren. Under these circumstances the failure to cause new executors to be appointed after the resignation of those who had legally qualified, and to bring them in as parties, is not, in our opinion, fatal to the decree. The entire equitable estate was represented by the grandchildren in being, and whatever is sufficient to bind them must, as we think, bind also those of the same class of devisees with themselves who were afterwards born.

The devise of the legal title was to the "executors and the successors of them." The two executors who qualified resigned their offices, and their resignations were accepted, before the suit was begun. Mrs. Coons, the executrix, did not resign until afterwards, and she was made a party to the suit both in her

representative and individual capacity. Before her resignation, and before the suit was begun, she had *succeeded* to all the rights of the executors in the property. She was the *successor* of the executors who had resigned, and as such alone represented the legal title. She continued a party to the suit until the final decree. It is difficult to see, therefore, why the naked legal title, which was all the executors took under the will, was not represented in the suit during the whole course of the proceeding.

But whether this be so or not is to our minds a matter of no importance. The suit was brought to contest the will. The grandchildren of the testator, the lawful issue of his five enumerated children, formed one class of beneficiaries provided for in the will. As a class, their interests were opposed to the contestants. Those of the class who were in being took the title as well for themselves as for those who should be afterwards born. The interests of those in being and those born afterwards were in all respects the same. It would seem, therefore, that whatever bound those who held the title should bind all those not then in being for whom they held it. Otherwise, as in Ohio, no suit can be brought to contest a will except within two years after probate, it is difficult to see how a will can be contested there when the devise is to a class of persons which may not be full until after that period has elapsed. It is no part of the duty of executors to defend a will against a contest. That is left to the devisees or those interested in sustaining the will. As this, in our opinion, disposes of the case, we have deemed it unnecessary to refer specially to any of the other questions which were presented for argument.

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

Statement of Facts.

HYATT & Others *v.* VINCENNES NATIONAL BANK, & Another.

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

Submitted January 27, 1885.—Decided March 2, 1885.

In 1874, B conveyed to H, for a term of 50 years, all the mineral coal upon and under a described tract of land, in Knox County, Indiana, with the exclusive right to enter on the land to dig for the coal, and remove it, and to occupy with constructions and buildings, as might be necessary and useful for the full development and enjoyment of the advantages of the coal, H to have the right to remove all buildings or fixtures placed on the land, when the agreement should expire, and to pay a fixed royalty for the coal mined. Under a judgment against H, the sheriff of Knox County sold, on execution, to the judgment creditor, at the court-house door, in that county, in the manner prescribed by statute for the sale of real estate, the interest of H in the term of years, and certain buildings and articles belonging to him, which were a part of the structures and machinery for operating a coal mine on the land, and which were firmly attached to the land. In a suit in equity brought by the purchaser against another judgment creditor and the sheriff, to enjoin interference with the property so purchased: *Held*, That, under the Revised Statutes of Indiana, of 1852, 2 Rev. Stat., part 2, chap. 1, Act of June 18, 1852, vol. 2 of Davis' edition of 1876, art. 24, sec. 526, p. 232, and art. 22, secs. 463, 466 and 467 (as amended February 2, 1855), pp. 215, 217, the sale of the property as real estate was valid.

The Vincennes National Bank, of Vincennes, Indiana, and the Washington National Bank, of Washington, Indiana, having severally recovered judgments against William Helphenstine and others, composing the firm of William Helphenstine & Co., issued executions thereon, under which, and under an execution on another judgment, the sheriff of Knox County, Indiana, at the court-house door, in Vincennes, in that county, on a notice advertised for three weeks successively in a weekly newspaper, and notices posted as required by law for twenty days, offered at public sale the rents and profits, for a term not exceeding seven years, of certain real estate and chattels real on which he had levied, and, having received no bid for such rents and profits, exposed to public sale the fee simple of the

Statement of Facts.

real estate and chattels real and the improvements thereon, to wit, "one engine and boiler and hoisting-machine, steam pump, Fairbank's railroad scales, wagon scales, four screens, blacksmith's shop, one office building, one engine-building and dump-house, one stable, one lime-house, two dwelling-houses, track in coal mine, railroad track, switches, and all fixtures belonging to the coal mine on said real estate and leasehold." The levy and sale included the interest of the judgment debtors for the residue of terms of years unexpired under certain mining leases of real estate, embracing that covered by the Bunting agreement hereinafter mentioned. The two banks became the purchasers, at the sale, on June 9, 1877, and received a certificate, which stated that they would be entitled to a deed unless the property should be redeemed within one year from the date of the sale.

On the 25th of December, 1877, they filed a bill in equity, in the Circuit Court of the United States for the District of Indiana, against the members of the firm of William Helphenstine & Co., and the members of the firm of Hyatt, Levings & Co. The latter were judgment creditors of William Helphenstine & Co. The object of the suit was to restrain interference with the purchased property. The bill was afterwards amended, by making the sheriff a defendant, and by alleging that Hyatt, Levings & Co. had caused a levy to be made, under an execution on their judgment, on iron rails and other property, which Helphenstine had detached, and on articles which constituted a part of the machinery for operating the mine, and which were firmly attached to the real estate and leasehold, and were part of the property so purchased by the plaintiffs.

The question in the case arose in respect to an agreement or lease in writing, executed by one Bunting and his wife and William Helphenstine & Co., in July, 1874, by which the former conveyed to the latter, their heirs, successors and assigns, for a term of fifty years, "all the mineral coal, iron ore, fire and potter's clay, limestone, building stone, and other minerals, upon and under the farm or tract of land" described, with the exclusive right to enter on the land to dig for the articles named, and, when found, to remove the same from

the land, "together with all rights and privileges incident to mining and securing the minerals aforesaid, including the right of ingress and egress, and to dig, bore, mine, explore and occupy with constructions and buildings, as may be necessary and useful for the full development and enjoyment of the advantages of said coal and other minerals as aforesaid." The lessees were given "the right to remove all buildings or fixtures placed on said land when said agreement has been forfeited or may have expired;" and they were to pay fixed royalties for the articles mined and removed.

The answers of Helphenstine & Co., and of Hyatt, Levings & Co., averred that the property in question was personal property, situated fifteen miles distant from the court-house of the county, and was used in and about the operation of the mine under the mining contract.

Before the hearing the parties stipulated in writing, "that the plaintiffs are entitled to a decree as prayed for, unless the property sold should have been sold as personal property, as provided for by the statutes of the State of Indiana; that the sheriff's sale was made at the court-house door, in the city of Vincennes, in Knox County, and more than twelve miles from the property." The Circuit Court entered a decree, that, by virtue of their purchase, and the certificate thereof, the plaintiffs became the equitable owners, subject to the right of redemption, "of the real estate, fixtures, machinery, and chattels real," which the decree went on to describe; and of the right, title and interest of William Helphenstine & Co., being the residue of terms of years unexpired under certain mining leases of specified real estate, including that covered by the agreement with the Buntings; that on said land and leaseholds were situate and sold, as aforesaid, to the plaintiffs, the chattels real before described as sold to them; and that the sheriff had levied on property which, at the time of the sale to the plaintiffs, was annexed to and constituted part of said real estate and chattels real, and was part of the property sold to the plaintiffs, and intended to sell it. The decree enjoined the defendants from selling the property so levied on. Subsequently the defendants moved to modify the decree by striking

out so much as enjoined the sheriff from selling the machinery, buildings, fixtures and improvements situate on the premises held under the agreement with the Buntings, because they were personal property when levied on under the execution of the plaintiffs, and the sale was void because they were not sold as personal property but as real property, and the plaintiffs acquired no title under the sale made at the court-house door. The motion was overruled. The defendants appealed to this court, setting forth, in their petition of appeal, that they appealed from that part of the decree which related to the machinery, buildings, fixtures and improvements situated on the Bunting premises and held under the Bunting agreement, on the ground that it was personal property and not real estate, and was not sold as personal property, in the presence of the officer making the sale.

Mr. Addison C. Harris, *Mr. William H. Calkins* and *Mr. William Armstrong* for appellants.—In Indiana, if the officer making a sale under execution, violates any requirement of the statute, the sale is void. And if the plaintiff is the purchaser he is chargeable with notice of all irregularities. *Doe* v. *Collins*, 1 Ind. 24; *Hamilton* v. *Burch*, 28 Ind. 233; *Piel* v. *Brayer*, 30 Ind. 332; *Read* v. *Carter*, 1 Blackford, 410; *Davis* v. *Campbell*, 12 Ind. 192; *Lachley* v. *Cassell*, 23 Ind. 600; *Whishuand* v. *Small*, 65 Ind. 120. If the interest of Helphenstine & Co. under the lease was real estate, we concede that the defendants in error acquired title by the sale. If it was not real estate, they acquired no title. The lease contains no words of inheritance. It simply gives a right of entry, to search for coal, to mine it if found, and to appropriate the produce on payment of the stipulated rent. The lessees acquired no property in the coal until its severance from the land. *Knight* v. *Indiana Coal & Iron Co.*, 47 Ind. 105; *McDowell* v. *Hendrix*, 67 Ind. 513. In Indiana a leasehold is personal property. In 1821 the Supreme Court held that a term of years on the death of a lessee, passed to his personal representative. *Duchane* v. *Goodtitle*, 1 Blackford, 117. In 1842 it was decided that under an act authorizing an execution from a justice's court to become

a lien on personal property, a sale of a term of years by a constable was valid. *Barr* v. *Doe*, 6 Blackford, 335. In 1860 it was again decided that a lease for a term of years is personal property. *Cade* v. *Brownlee*, 15 Ind. 369. See also *Meni* v. *Rathbone*, 21 Ind. 454, decided in 1863; *Smith* v. *Dodds*, 35 Ind. 452, decided in 1871; and *Schee* v. *Wiseman*, 79 Ind. 389. The latter case related to a lease of a mining estate for a term of twenty years. The court say, "The leasehold estate was personal property." See also *McCarty* v. *Burnett*, 84 Ind. 22, 26, decided in 1882. So things set up for purposes of trade, under an agreement that they may be removed, are personal property. *Cromie* v. *Hoover*, 40 Ind. 49, 56; *Young* v. *Baxter*, 55 Ind. 188, 192; *McCarty* v. *Burnett*, 84 Ind. 22. It would seem to follow, without further discussion, that the mining fixtures in dispute were personal property, and that the sale of them as real estate was void. The answer made to this is: That the statutes of Indiana, then in force, regulating sales on execution, direct this class of personal property to be sold as real estate. If this is correct, and this leasehold was real estate, the owner was entitled to keep possession for one year with a right of redemption during that time. In construing a Michigan statute, similar to the Indiana law, in a case where a term of years had been sold on execution as real estate, the Supreme Court of that State said: "A sale on execution is designed to produce the best price which can be obtained; and a sale on condition that no title shall vest for fifteen months, would, under ordinary circumstances, render a lease nearly valueless, besides involving the danger of forfeiture. No bidder would give for the shortened term the value of the full term." *Buhl* v. *Kenyon*, 11 Mich. 249. A judgment lien is a creature of statute, and may be imposed upon personal property as well as real estate. *Brown* v. *Clarke*, 4 How. 4, 12. But when imposed, sale under execution must be made in accordance with the statutory regulations imposed on that class of property.— Further reference is made to § 526 of the Code, which says, "The following real estate shall be liable . . . to be sold on execution . . . '5th all chattels real of the judgment debtor.'" But this does not enact that chattels real shall be

advertised in the same manner and sold at the same place as real estate. It declares that terms of years were still subject to attachment and execution. This was re-enacting the law, before in force, by which they could be taken and sold under a common-law writ.

Mr. F. W. Viehe for appellees.

Mr. Justice Blatchford delivered the opinion of the court. He recited the facts as above stated, and continued:

The only question for decision is, by the stipulation of the parties, whether the property in question should have been sold in the manner in which personal property was required by the statute of Indiana to be sold.

The statute in force at the time, in regard to the sale of personal property on execution, 2 Rev. Stat. of Indiana, of 1852, part 2, ch. 1, act of June 18, 1852, art. 22, §§ 468, 469, vol. 2 of Davis' edition of 1876, p. 218, provided as follows: "Sec. 468. Previous notice of the time and place of the sale of any personal property on execution shall be given for ten days successively, by posting up written notices thereof in at least three of the most public places in the township where the sale is to be made. Sec. 469. Personal property shall not be sold unless the same shall be present and subject to the view of those attending the sale; and it shall be sold at public auction in such lots and parcels as shall be calculated to bring the highest price."

The Revised Statutes of Indiana, of 1852, in force at the time, in regard to the sale of real estate on execution, 2 Rev. Stat., part 2, ch. 1, act of June 18, 1852, vol. 2 of Davis' edition of 1876, provided as follows, Art. 24, § 526, p. 232: "Sec. 526. The following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same, or for whose use the same is holden, viz.: *First.* All lands of the judgment debtor, whether in possession, reversion or remainder. *Second.* Lands fraudulently conveyed with intent to delay or defraud creditors. *Third.* All rights of redeeming mortgaged lands; also, all

lands held by virtue of any land-office certificate. *Fourth.* Lands, and any estate, or interest therein, holden by any one in trust for, or to the use of, another. *Fifth.* All chattels real of the judgment debtor." Art. 22, § 463, p. 215: "Sec. 463. The estate or interest of the judgment debtor in any real estate shall not be sold on execution, until the rents and profits thereof, for a term not exceeding seven years, shall have been first offered for sale at public auction; but, if the same shall not sell for a sum sufficient to satisfy the execution, then the estate or interest of the judgment debtor shall be sold by virtue of the execution." Art. 22, § 466, p. 217: "Sec. 466. Real estate, taken by virtue of any execution, shall be sold at public auction at the door of the court house of the county in which the same is situated; and, if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division." Art. 22, § 467, as amended February 2, 1855, p 217: "Sec. 467. The time and place of making sale of real estate, on execution, shall be publicly advertised by the sheriff, for at least twenty days, successively, next before the day of sale, by posting up written or printed notices thereof, in three public places in the township in which the real estate is situated, and a like advertisement at the door of the court-house of the county; and also by advertising the same, for three weeks successively, in a newspaper printed nearest to the real estate, if any such newspaper be printed within the jurisdiction of the sheriff."

In the rules prescribed by the act, Art. 48, § 797, p. 313, vol. 2 of Davis' edition of 1876, for its construction, it is enacted, that such rules shall be observed, "when consistent with the context." Among those rules are these—that "the word 'land,' and the phrases 'real estate,' and 'real property,' include lands, tenements and hereditaments;" and that "the phase 'personal property' includes goods, chattels, evidences of debt, and things in action." But no definition or construction is given of the phrase "chattels real."

The Revised Statutes of Indiana, of 1843, act of February 11,

1843, part 2 chap. 29, Art. 1, § 1, provided as follows: "Section 1. When, by any law of this State, real estate is authorized or directed to be sold by virtue of any execution, the same shall be construed to mean and include, 1. All the lands, tenements, and hereditaments of the judgment debtor, whether in possession, reversion or remainder. 2. Lands, tenements, and hereditaments fraudulently conveyed with intent to defeat, delay, or defraud creditors. 3. All rights of redeeming mortgaged lands, tenements, or hereditaments, and also all lands held by virtue of any land-office certificate. 4. Lands, tenements, and hereditaments, and any estate or interest therein, holden by any one in trust for, or to the use of, another, on execution issued on any judgment against the person to whose use, or for whose benefit, the same are holden." The provisions of these four clauses were substantially retained in the Revision of 1852, and the provision as to "chattels real of the judgment debtor" was added as a 5th clause. Although, by the Revised Statutes of 1843, part 2, chap. 29, Art. 1, § 3, p. 454, judgments were made a lien on real estate and chattels real of the judgment debtor, which provision is contained in the Revision of 1852, part 2, chap. 1, Art. 24, § 527, of vol. 2 of Davis' edition of 1876, chattels real were not specifically made liable to sale on execution as real estate, till 1852, when the 5th clause was added.

That clause must be interpreted according to the accepted meaning of the words, "chattels real." Blackstone defines chattels real, according to Sir Edward Coke, 1 Inst. 118, to be such as concern, or savor of, the realty, as terms for years of land, and says they are called real chattels, as being interests issuing out of, or annexed to, real estates, of which they have one quality, viz., immobility, which denominates them *real*, but want the other, viz., a sufficient legal indeterminate duration, which want it is that constitutes them *chattels*. 2 Bl. Comm. 386. Chancellor Kent says, 2 Kent, 342: "Chattels real are interests annexed to or concerning the realty, as a lease for years of land; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person."

The interest of the judgment debtors in this case in the land covered by the Bunting agreement was a chattel real; and as the dispute here relates to machinery, buildings, fixtures and improvements situated on the Bunting premises, and held under the Bunting agreement, it follows that that property had impressed on it, by the statute, for the purposes of a sale on execution, the character of a chattel real, and became, for those purposes, real estate, and, therefore, was not required to be sold as personal property, present and subject to the view of those attending the sale, but was properly sold as real estate, at the door of the county court house.

The estate for years, or the interest in the land, could not be subject to view. The machinery, buildings, fixtures and improvements were created under the privilege given by the agreement to occupy the land with constructions and buildings for mining coal and other minerals, and, although Helphenstine & Co. had the right to remove the buildings and fixtures at the expiration of the agreement, yet, so long as they were held under the agreement, on the premises, and were of the character referred to, they followed the term for years and partook of its character.

In *Barr* v. *Doe*, 6 Blackford, 335, in 1843, it was held that a parol lease for three years was a chattel interest, and could be sold as a chattel, on an execution issued by a justice of the peace. But that decision does not apply to the statute now under consideration, and no case is cited or found in the courts of Indiana, which holds to the contrary of the views above expressed. Indeed, in the Revised Statutes of 1843, part 3, ch. 47, § 347, p. 992, form No. 10, the form prescribed for an execution by a justice of the peace was against "goods and chattels," while in the Revision of 1852, vol. 2 of Davis' edition of 1876, part 5, ch. 127, form No. 4, the form runs against "goods" only.

The case of *Buhl* v. *Kenyon*, 11 Mich. 249, is cited for the appellants. It was there held, that an estate for years in land was to be sold, on execution, as personal estate, and that a sale of it in accordance with the statutory provisions for the sale of real estate was void. The court proceeded on the ground that, as the statute of Michigan provided that the words "real

estate, . . . when not inconsistent with the manifest intention of the legislature, . . . shall be construed to include lands, tenements, and real estate, and all rights thereto, and interests therein;" and also provided that "all the real estate of a debtor, whether in possession, reversion or remainder, including lands fraudulently conveyed, with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, and may be sold on execution as hereinafter provided;" and also enacted, that "all chattels, real or personal, and all other goods liable to execution by the common law, may be taken and sold thereon, except as is otherwise provided by law;" and, as a leasehold interest of the kind in question was a chattel interest, and was by the last named provision classed among personal property, it was not within the law applicable to the sale of lands on execution. In the present case, a chattel real is distinctly classed, by § 526, among "real estate liable to be sold on execution," and must, therefore, be sold in the manner in which § 466 directs that "real estate taken by virtue of any execution shall be sold."

The point decided in *Meni* v. *Rathbone*, 21 Ind. 454, 467, was, that a lease for years, acquired by a wife during coverture, became the property of her husband, when reduced to possession by him, and, being a chattel, was personal property, under the definition before referred to, and subject to the husband's debts, and, being a chattel real, a judgment against the husband was, by the statute of 1852, a lien upon it.

The motion made in the Circuit Court to modify the decree was based on the idea, that, while the term for years might be a chattel real, the machinery, buildings, fixtures and improvements placed on the land should have been sold as personal property. As the statute requires that real estate "shall" be sold at the door of the court house, the visible property could not be sold there in view of the persons attending the sale of the real estate, unless it was first severed from the land; and to have so treated it would, doubtless, have rendered not only it but the term of years worthless, as vendible articles. No such result could have been contemplated by the law-makers,

and none such can be allowed, if another reasonable and consistent construction is to be found.

It is not necessary or proper to consider any question involved in any right of redemption. Nor is it intended to decide anything as to the status of any of the property, aside from the lawfulness of the manner of its sale, under the statute in regard to such sale.

The decree of the Circuit Court is

Affirmed.

UNITED STATES *v.* JORDAN.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 26, 1885.—Decided March 2, 1885.

Under the act of Congress of July 29, 1882, 22 Stat. 723, ch. 359, providing for the refunding to the persons therein named of the amount of taxes assessed upon and collected from them contrary to the provisions of the regulations therein mentioned, "that is to say, to" each of such persons the sum set opposite his name, each of them is entitled to be paid the whole of that sum, and no discretion is vested in the Secretary of the Treasury, or in any court, to determine whether the sum specified was or was not the amount of a tax assessed contrary to the provisions of such regulations.

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

Mr. Assistant Attorney-General Maury for appellant.

Mr. Charles F. Benjamin for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

On the 29th of July, 1882, an act of Congress was passed, 22 Stat. 723, ch. 359, providing "that the Secretary of the Treasury, be, and he is hereby, authorized and directed to remit, refund and pay back, out of any moneys in the treasury not otherwise appropriated, to the following named citizens of

Tennessee, or the legal representatives of such as are deceased, the amount of taxes assessed upon and collected from the said named persons contrary to the provisions of the regulations issued by the Secretary of the Treasury, under date of June twenty-first, eighteen hundred and sixty-five, and published in special circular numbered sixteen, from the Internal Revenue office, of that date, said refunding having been recommended by the Secretary of the Treasury, under date of June nineteenth, eighteen hundred and seventy-three, that is to say, to"—followed by the names of 81 persons, and the specification of a sum of money opposite each name, and, among them, this: "to Edward L. Jordan, two thousand two hundred and ninety dollars; . . . all of Rutherford County, Tennessee; . . . said persons, and each of them having filed their claims in the office of the Commissioner of Internal Revenue prior to the sixth of June, eighteen hundred and seventy-three."

Afterwards, and on the 6th of September, 1882, the acting Commissioner of Internal Revenue transmitted to the Secretary of the Treasury, for his action, the claim of Edward L. Jordan, to be paid $2,290, under the act. On that letter, under date of September 11, 1882, the acting Secretary of the Treasury indorsed an order directing that Jordan be paid that sum. He was paid one-half of it, $1,145, on November 2, 1882, but payment of anything more was refused. On the 1st of December, 1882, he brought a suit against the United States, in the Court of Claims, to recover the remaining $1,145. On December 7, 1882, the Secretary of the Treasury indorsed on the order of September 11, 1882, the following: "The foregoing order of September 11, 1882, is construed to mean only that such sums shall be refunded or paid as were collected from the persons within named contrary to the provisions of the regulations issued by the Secretary of the Treasury under date of June 21, 1865, mentioned in said act, and effect is to be given to said order accordingly." The Court of Claims gave judgment for the claimant for $1,145, 19 C. Cl. 108, and the United States have appealed.

At the request of the counsel for the defendants, the court found the following facts:

"Claimant resided in the second collection district of Tennessee, in Rutherford County. May 5, 1864, an internal revenue assessor was first appointed for this district.

August 30, 1864, an assessment division of the district, comprising Rutherford County, was first established.

June 6, 1865, the claimant paid the collector of this district $1,145, as annual income tax for the year 1863, under the requirements of the act of July 1, 1862, chapter 119, 12 Stat. 473, 474, and $1,145 as the special 5 per cent. war income tax for the year 1863, under the requirements of the joint resolution of July 4, 1864, No. 77, 13 Stat. 417.

June 21, 1865, the Secretary of the Treasury issued Special Circular No. 16, containing the following among other regulations:

'Section 46 of the internal revenue act approved June 30, 1864, 13 Stat. 240, provides that whenever the authority of the United States shall have been re-established in any State where the execution of the laws had previously been impossible, the provisions of the act shall be put in force in such State, with such modification of inapplicable regulations in regard to assessment, levy, time, and manner of collection as may be directed by the Department.

Without waiving in any degree the rights of the government in respect to taxes that have heretofore accrued, or assuming to exonerate the tax-payer from his legal responsibility for such taxes, the Department does not deem it advisable to insist at present upon their payment, so far as they were payable prior to the establishment of a collection district embracing the territory in which the tax-payer resides.

But assessors in the several collection districts recently established in the States lately in insurrection are directed to require returns and to make assessments for the several classes of taxes for the appropriate legal period preceding the first regular day on which a tax becomes due after the establishment of the district. . . .

In the States of Virginia, Tennessee, and Louisiana, collection districts were some time since established, with such boundaries as to include territory in which it has but recently become

possible to enforce the laws of the United States. In those districts the rule laid down above will be so modified as to require the assessment and collection of the first taxes which become due after the establishment of assessment divisions in the particular locality. . . .'

June 19, 1873, the Secretary of the Treasury addressed to the Commissioner of Internal Revenue the following letter, which is referred to in the act of Congress:

'TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
WASHINGTON, *June* 19, 1873.

SIR: I have considered the claim of William Gosling and others, applicants for refunding taxes alleged to have been illegally collected, included in schedule No. 243, from your office, and am of opinion, that, under the existing laws, the taxes paid by these parties were legally paid and should not be refunded. But I fully recognize the hardship of the case, and desire that such claimants may receive relief from Congress.

I have, therefore, to suggest, that you will, in your next annual report, or on any other occasion which you may deem more fitting, recommend the passage of a special act authorizing the refunding of all taxes paid by residents of the insurrectionary States, which, under Department Circular of June 21st, 1865, should not have been collected, such refunding to be made whether the tax in question was collected before or after the issue of the circular.

I am, very respectfully,

WILLIAM A. RICHARDSON,
Secretary of the Treasury.'"

It is stated in the brief for the United States, that the payment of the $1,145 was refused, by the accounting officers of the Treasury, on the ground that the statute authorized payment of only "so much of the sum named as might be determined at the Treasury to represent the amount of taxes assessed and collected contrary to the regulations of the Secretary of the Treasury named in the act," and that the sum paid to the claimant was the sum total of the taxes that had been improp-

erly collected from him. From the published decision of the First Comptroller in the case, 3 Lawrence's Dec. 274, the ground of refusal appears to have been the one above stated, and the opinion of the Court of Claims in this case shows that such ground was urged before that court, and rejected.

The view taken by the Treasury officers was, that the annual income tax of $1,145, for the year 1863, under the act of July 1, 1862, became, by the statute, due and payable May 1, 1864, before the assessment division which comprised Rutherford County was established, and, under the Treasury regulations of June 21, 1865, in Circular No. 16, which required the collection only of "the first taxes which became due after the establishment of assessment divisions," that sum of $1,145 was collected contrary to the provisions of those regulations, and was to be refunded, although it was collected before the date of the circular. But the Treasury officers decided that the $1,145 paid for the special income tax under the joint resolution of July 4, 1864, and which, by law, did not become due till October 1, 1864, after the establishment of such assessment division, was not collected contrary to the provisions of those regulations, and was not to be refunded.

The Court of Claims held that the statute did not admit of that interpretation, nor leave open any question for the court or for the accounting officers of the Treasury, except the identity of the claimants with the persons named in it; and that its language, taken together, was too clear to admit of doubt, that Congress undertook, as it had a right to do, to determine not only what particular citizens of Tennessee by name should have relief, but also the exact amount which should be paid to each one of them. We concur in this view. The act authorizes and directs the Secretary of the Treasury to pay to the several persons named the respective sums named. Although the act speaks of the sums as being "the amount of taxes assessed upon and collected from the said named persons contrary to the provisions of the regulations" named, there is no indication of any intention to submit to any one the determination of the question whether the taxes in any case were collected contrary to the provisions of such regulations, or of the question how

those provisions are to be construed. On the contrary, the clear import of the statute is that Congress itself determines that the amounts named were collected contrary to the provisions of the regulations. The statement in the statute that the refunding had been recommended by the Secretary of the Treasury under date of June 19, 1873, refers to the letter of that date, set forth in the findings, which recommends the passage of an act to refund all taxes which, under the circular of June 21, 1865, "should not have been collected, such refunding to be made whether the tax in question was collected before or after the issue of the circular." The claimant's two income taxes were both of them paid before the circular was issued. In one sense, therefore, they were not collected "contrary to the provisions of the regulations;" and, in that sense, it was wrong to refund anything to the claimant, under the language of the act. But with the specification, in the act, of the name and the amount, no such construction can be given to it as would prevent the refunding of anything because the whole amount had been paid before the issuing of the regulations; and, if anything is to be paid, the whole must be. If there is discretion confided to any officer or court to inquire whether the claimant's taxes were collected contrary to the regulations, there would be like discretion to inquire whether such taxes were embraced in the letter of June 19, 1873, and whether the claimant had filed his claim before June 6, 1873. No such construction is applicable to a statute of this character.

It is not an improper inference, from the language of the statute, that Congress intended to refund the taxes covered by the recommendation of the Secretary of the Treasury, in his letter of June 19, 1873. That letter covers taxes described as those which, under the circular, "should not have been collected," though collected before it was issued. Congress may, therefore, have included some taxes collected before the circular was issued, but which it thought should not have been, or ought not to have been, collected, in the sense intended by the Secretary.

The judgment of the Court of Claims is *Affirmed.*

Statement of Facts.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* CRANE.

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

Submitted January 28, 1885.—Decided March 2, 1885.

The D. & M. Railroad Company, an Iowa Corporation, received from a township in Iowa, in consideration of its agreement to construct and maintain a railroad to a city in the township, the proceeds of a special tax and a conveyance of a large amount of swamp lands. It constructed the railroad, and, after operating it for a time, leased it to the C. & N. Railway Company, an Illinois corporation. The latter company changed the line and made it avoid the city, constructing a branch to the latter. A tax-payer and resident in the township, on behalf of himself and all other resident voters, tax-payers and property holders, commenced suit in a State court of Iowa against both companies, praying for a peremptory writ of mandamus to compel the reconstruction and operation of the old line. To this the defendants filed a joint demurrer, and a joint answer, setting out further matter in defence. On motion of the Illinois company the suit was removed to the Circuit Court of the United States, as a controversy wholly between it and citizens of Iowa, in which the Iowa company had no interest. Act of March 3, 1875, § 2, 18 Stat. 471. *Held*, That the Iowa corporation was a necessary party for the determination of the controversy, and the removal was improperly made.

An act authorizing a railroad company to lease its railroad to another corporation, and requiring the corporation lessee to be liable in the same manner as though the railway belonged to it, imposes a liability as to the leased property upon the company lessee while operating it; but does not discharge the company lessor from its corporate liabilities.

This was a suit begun in the Circuit Court of the State of Iowa for Polk County by the defendant in error, described in the petition as a resident, tax-payer and property-holder of Polk City, Madison Township in that county, suing for himself and all other resident voters, tax-payers and property-holders of that city and township. The defendants were the Des Moines and Minneapolis Railroad Company, a corporation organized and existing under the laws of Iowa, and the plaintiff in error, the Chicago and Northwestern Railway Company, a corporation organized and existing by virtue of the laws of Illinois, doing business and operating a railroad within the State of Iowa.

Statement of Facts.

It was set out in the petition that the object of the Des Moines and Minneapolis Railroad Company was to construct and operate a line of railroad from the city of Des Moines, in Polk County, Iowa, to the State line in the direction of Minnesota; that prior to August, 1870, that corporation had surveyed and located the line of its road from the city of Des Moines, in Polk County, through said county *via* Polk City, in Madison Township, and was proceeding to construct the same; that, to aid it in the construction of its road as thus located, a special tax of three per cent. on the taxable property in Madison Township, under the existing assessment of said property, was voted to said company upon the condition that its railroad should be constructed and operated from the city of Des Moines, in Polk County, *via* Polk City, to Ames, in Story County; that the company did construct its railroad accordingly, and operated the same, making Polk City a station on its main and continuous line between said points, and thereupon the said tax was levied, collected and paid to the company in accordance with the vote, and amounted to about $17,000; that in 1874, Polk County, through its board of supervisors and according to law, conveyed to said company all the swamp lands of said county, amounting to about fifteen thousand acres, on the same condition, that the railroad should be constructed and operated from the city of Des Moines through Polk County *via* Polk City, and that said company accepted the grant; and that many citizens of Polk City and Madison Township subscribed and paid for stock in said company upon the same condition.

It was further alleged in the petition that said railroad was constructed and operated on the original line through Polk City, which was the largest and most important station on the railroad between Des Moines and Ames; that in the year 1879 the defendant, the Chicago and Northwestern Railway Company, leased the said line of railroad and came into possession of all the franchises and privileges of the Des Moines and Minnesota Railroad Company, and has changed the line and location of said railroad, and has built and is now operating its main line of road about two miles east of Polk City, on an entirely

different line from that upon which it was originally constructed, and in violation of its obligations and duty, contrary to the terms and conditions upon which the said taxes were voted, the said swamp lands conveyed, and said stock subscriptions made, and to the damage and injury of the citizens and property-owners in Polk City.

The prayer of the petition was as follows:

"Wherefore plaintiff demands that defendants be required to reconstruct and operate the main line of said railroad upon the line originally constructed, running from the city of Des Moines, in Polk County, Iowa, north, *via* Polk City, to Ames, in Story County, Iowa, making Polk City a station on the said main and continuous line of railroad from the city of Des Moines, Iowa, to Ames, Iowa, and that the same be constructed and operated in full compliance with the terms and conditions upon which the taxes were voted and paid, swamp lands conveyed, and subscriptions paid as aforesaid, and prays a peremptory writ of mandamus, commanding the said defendants to forthwith comply with the above demands, and for such other remedy and relief as may be lawful and proper in the premises."

To this petition there was filed a joint demurrer, and also a joint answer, on June 8, 1883. In the answer, among other things, the following matter of defence was set out:

"And for further answer and defence to plaintiff's petition defendants say: About the year 1879 the Chicago and Northwestern Railway Company leased the Des Moines and Minneapolis Railroad, then constructed and in operation from the city of Des Moines *via* Polk City to Ames, and thence north to Story City, in Story County, a distance of about (58) fifty-eight miles, and during the said year the Chicago and Northwestern Railway Company became the owner of all the stock, franchises, and privileges of the Des Moines and Minneapolis Railroad Company, and has ever since and now owns, holds, and controls the same, and operates said railway as a part of the system of the Chicago and Northwestern Railway Company.

"At the time of the construction of said railway and the acquisition of the same by the Chicago and Northwestern Rail-

way Company said railroad between Des Moines and Story City was a narrow-gauge road, and during the years 1880 and 1881 the defendant, the Chicago and Northwestern Railway Company, changed the gauge to a standard gauge, relaid the same with new steel rails and ties, making the same a first-class road.

"The narrow-gauge road was not a first-class road in any respect, very little grading having been done, and running mainly over the top of the ground, with the surface nearly in its natural and native condition, there being very few cuts and very few fills, and the road, as a whole, as it then existed, was of very little benefit to any towns along it or to the company which owned it, and the road was wholly unable to earn operating expenses and a reasonable interest upon its cost.

"The Chicago and Northwestern Railway Company extended the line from Story City to Jewell Junction, and thence north through Webster City, Eagle Grove, Algona, and to the State line north at Elmore, where the same connects with a through line, now controlled and operated by the Chicago and Northwestern Railway Company, known as the Chicago, Minneapolis, St. Paul and Omaha Railroad, thus making a through and continuous line, and very direct from the city of Des Moines to the cities of Minneapolis and St. Paul. The said road is built and constructed as a first-class road, with steel rails and easy gradients, and is capable of and is doing a large amount of through business and traffic.

"These defendants say that, with a view to making such a first-class road, it becomes absolutely essential and necessary to change the line so the same should run about two miles or two miles and a half east of Polk City, in order to avoid a very heavy grade of about 85 feet to the mile for three miles, going down into Polk City, and about the same distance and grade going out of it.

"The grade is not only very heavy, but the curves necessarily very great, and an engine capable of hauling 25 to 30 cars on the present line as constructed east of Polk City could only haul, at most, ten to twelve cars over the line *via* Polk City.

"In view of this condition of affairs and the impracticability

of operating the road through Polk City, the Chicago and Northwestern Railway Company, in the summer of 1880, made overtures to the people of Polk City to change the line to its present location.

"After many conferences and public meetings in the town of Polk City, the citizens of said town agreed with the Chicago and Northwestern Railway Company, that if said company would build a broad-gauge road from a point about two miles northeast of Polk City into the town, and change the location of their depot to a point more convenient for the citizens of Polk City to do business, both as to passengers and freight; to run two passenger trains from the main line to Polk City on their way from Des Moines to Ames, two mixed passenger and freight trains each day; move all freight promptly, with no greater charge for freight or passengers than if Polk City were on the main line; would also build and maintain good and sufficient stock yards in the vicinity of the depot in Polk City, to accommodate all shippers, &c.; would transport free all the material from Chicago, or any other point west of that place, to build a bridge over the Des Moines River; would pay the sum of $1,000 in money towards the building of said bridge, besides such transportation; and if the company would further perform, all and singular, the stipulations and agreements set out in a certain contract made between the citizens and tax-payers of Polk City and Polk County and the Chicago and Northwestern Railway Company, dated on the 2d day of September, 1880, as shown by a copy of said contract hereto annexed and made a part of this answer, then and in that case it should be lawful and proper for the defendants to change such line of railway and take up the narrow-gauge running into Polk City.

"Said contract was made and signed by thirty-five of the principal tax-payers and residents and business men of Polk City and Madison Township, as appears by the said copy annexed.

"In pursuance of the said contract the main line of the defendant's road was changed, as alleged in plaintiff's petition, at an expense to defendant of $15,000, and as herein admitted, and the narrow-gauge track, from a point about three miles

south of Polk City to a point about two miles northeast thereof, was then and there, during the year 1881, taken up and a broad-gauge built into said Polk City, as provided by said agreement, and from that time hitherto and, now, the defendant, the Chicago and Northwestern Railway, has operated a broad-gauge road into Polk City, in all respects in accordance with the contract herein referred to.

"And these defendants aver that said contract was made publicly, and the said plaintiff, Emanuel H. Crane, and all other citizens of Polk City and Madison Township and the county of Polk, in the State of Iowa, were each and all well acquainted and had knowledge of the said contract, and all that has been done thereunder, and acquiesced and consented thereto and therein.

"And defendants aver that the citizens of Polk City and of Madison Township and Polk County, acquiesced and made no objections to the taking up of said narrow-gauge track, and the laying down of the broad gauge, and the building of the new depot and stock-yards.

"And these defendants further say that by reason of the said contract, and in compliance with the conditions of the same by the Chicago and Northwestern Railway Company, the citizens, voters, and tax-payers of Madison Township and Polk City and Polk County, have been greatly benefited, and the town of Polk City placed upon a through line of railway, much more advantageous to them in all business respects than the narrow-gauge railway as built and located through their town.

"The defendants further state that the Chicago and Northwestern Railway Company has become and is the sole owner of the stock and road and franchises of the Des Moines and Minneapolis Railroad Company, and that the latter-named company has no longer any interest therein, and has no interest in the subject of litigation mentioned in the plaintiff's petition; that in case any relief can or may be granted to the plaintiff or any other person, the Chicago and Northwestern Railway Company will be solely liable to perform and execute any and all orders of the court in respect thereto, and that said Chicago and Northwestern Railway Company is entirely solvent, and able

to respond to any judgment or decree which may be rendered in behalf of the plaintiff in this suit.

"Wherefore defendants say that the plaintiff, the town of Polk City, and Madison Township, and the county of Polk, are each and all forever estopped, by reason of the matters hereinbefore stated, to claim or demand the relief prayed by the plaintiff, or any relief whatever, by reason of the change of the line of railways hereinbefore set forth."

On the same day, June 8, 1883, the Chicago and Northwestern Railway Company filed its petition for the removal of the cause to the Circuit Court of the United States. After setting out that the matter and amount in dispute, exclusive of costs, exceeded the sum or value of $500, and that the petitioner was a corporation and citizen of Illinois, the petition proceeded as follows:

"That your petitioner's co-defendant, the Des Moines and Minneapolis Railway Company, is merely a nominal party in this suit, for the reason that your petitioner is the owner of all the stock and franchises of the Des Moines and Minneapolis Railway Company, and is the lessee of said railway in perpetuity, charged with the duty of operating said railway, and subject to the payment of all claims or demands of every nature and kind made against said Des Moines and Minneapolis Railway Company, and your petitioner will be solely liable to obey any order made in this cause, and to perform any judgment rendered; that the controversy in this case is wholly between the plaintiff and the defendant, the Chicago and Northwestern Railway Company, who are citizens of different States, and which controversy can be fully determined as between them without the presence of the Des Moines and Minneapolis Railway Company; that your petitioner is the only defendant actually interested in such controversy; that the plaintiff, Emanuel H. Crane, was at and before the time of bringing this suit, and at all times since has been, and still is, a citizen of the State of Iowa and a resident thereof."

The accompanying bond was approved by the State court, and the petition for removal of the cause granted, and thereupon a motion to remand the cause, made in the Circuit Court

of the United States on October 30, 1883, was granted on May 24, 1884, and the cause remanded.

To reverse that order and judgment this writ of error was prosecuted.

Mr. N. M. Hubbard for plaintiff in error.—It is averred and shown in the answer that the Chicago and Northwestern Railway Company owned a connecting line and leased the Des Moines and Minneapolis road under and by virtue of the statute above quoted. The fact of the leasing of the road and transferring of all the franchises and possession to the Chicago and Northwestern Railway Company is alleged in plaintiff's petition as well as by defendants, and this shows that the Minneapolis company is unable to respond to a mandamus. High, Extraordinary Remedies, § 484; *Mitchell* v. *Speer*, 39 Geo. 56; *Dodd* v. *Miller*, 14 Ind. 433; *Rice* v. *Walker*, 44 Iowa, 458. The substantive ground of action for the plaintiff for his mandamus is, that the defendants are violating an implied contract to operate the narrow-gauge road, because Polk City and Madison township gave a three per cent. tax and the swamp land, on condition that the road should be built and operated through Polk City. But mere contract obligations cannot be enforced by mandamus. High, Extraordinary Remedies, § 321; *State* v. *Turnpike Co.*, 16 Ohio St. 308; *Queen* v. *Hull & Selby Railway Co.*, 6 Q. B. 70. At the common law, the mandamus proceeding was not an action proper, nor was it a writ of right, but a prerogative writ obtained on an information under oath showing good cause for its issuance. Under the Code of Iowa, however, mandamus is an ordinary action at law, triable as nearly as may be like an ordinary action for the recovery of damages, and is not triable *de novo* in the Supreme Court like an equitable action. *Dove* v. *Independent School District of Keokuk*, 41 Iowa, 689. The statute on this subject is, Code, § 3379: "The pleadings and other proceedings in any action in which a mandamus is claimed shall be the same in all respects as nearly as may be, and costs shall be recovered by either party, as in an ordinary action for the recovery of damages." The definition given of

an action of mandamus by our statute is contained in § 3373, as follows: "The action of mandamus is one brought in a court of competent jurisdiction, to obtain an order of such court commanding an inferior tribunal, board, corporation, or person, to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station."

Mr. C. H. Gatch for appellee.

Mr. Justice Matthews delivered the opinion of the court. He recited the facts as above stated, and continued:

The right of removal from the State court, which is contested in this case, is founded on the last clause of the second section of the act of March 3, 1875, 18 Stat. 470, Richardson's Supplement, 173: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

It is accordingly argued in its support that the sole and real controversy disclosed by the pleadings is between the plaintiff below and the plaintiff in error, to which the Des Moines and Minneapolis Railroad Company is a merely nominal party.

The action, it is said, is brought in pursuance of § 3373 of the Iowa Code, which is as follows:

"The action of mandamus is one brought in a court of competent jurisdiction to obtain an order of such court commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station."

And by § 3379, it is further provided, that "the pleadings and other proceedings in any action in which a mandamus is claimed, shall be the same in all respects as nearly as may be, and costs shall be recovered by either party as in an ordinary action for the recovery of damages."

Opinion of the Court.

It is also declared, in § 3375, that "the plaintiff in any action, except those brought for the recovery of specific real or personal property, may also, as an auxiliary relief, have an order of mandamus to compel the performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance."

The proposition that the Des Moines and Minneapolis Railroad Company is a merely nominal and not a real and substantial party to the controversy, is maintained on two grounds:

1. That the relief sought against it rests upon the force of the alleged agreements in reference to the location of its line, which constitute the conditions of the taxes voted, lands granted, and stock subscriptions paid to it, and that mandamus will not lie for the purpose of enforcing the specific performance of personal contracts. 2. And that the Des Moines and Minneapolis Railroad Company is not only exonerated but disabled from the performance of the duty sought to be enforced against it, if for such it were amenable to the process of mandamus, by virtue of the lease of its road, property and franchises to the plaintiff in error, that lease being authorized by § 1300 of the Code of Iowa, as follows:

"Any such corporation may sell or lease its railway property and franchises, or make joint running arrangements with any corporation owning or operating any connecting railway, and the corporation operating the railway of another shall, in all respects, be liable in the same manner and extent as though such railway belonged to it, subject to the laws of this State."

But to sustain the first point, it is necessary to decide the controversy in favor of the Des Moines and Minneapolis Railroad Company, one of the defendants sought to be charged, upon its merits. That necessarily affirms that such a controversy exists; and that, in its turn, proves that the Circuit Court did not err in holding that it had no jurisdiction to entertain it.

It may be a question whether the remedy by mandamus is not larger and more extensive under the Iowa Code than the plaintiff in error admits. And, at any rate, we cannot strike from the record parts of the plaintiff's case as immaterial without assuming the point to be proved, that we have a right to consider its merits at all, for whether they are material may be the substance of the controversy. It may well be that the scope of the plaintiff's case includes the claim that the railway company, having, on the faith of the alleged agreements, made a location of its line, exhausted its corporate power in reference to its establishment; or that, even if it still had corporate discretion to change it, the circumstances alleged, including the agreements made on condition of its original location, may not have created a corporate duty enforceable by mandamus, to maintain and permanently operate it. These are questions, certainly, which the plaintiff in the action has the right to raise and have tried in any court of his own selection, having proper jurisdiction; and they raise a controversy with the Des Moines and Minneapolis Railroad Company, to which it is a necessary party, unless it is relieved from it by the substitution, in its place, of its lessee, by the law under which it transferred its property and franchises to the plaintiff in error.

But that section of the statute already quoted has no such effect. It does not discharge the lessor company from any of its corporate liabilities. It merely imposes a liability upon the lessee while operating it. And if this liability extends, as is claimed, to obligations of the lessor antecedent to the lease, such as that sought to be enforced in the present proceeding, there is nothing in the statute to exclude the idea that it is a joint liability, enforceable against both.

If it be said that the liability is that of the lessor, but that it is disabled by the lease from its performance, and that that duty is cast by the lease and the law upon the lessee, then the necessity for a joinder in the action is still more apparent. For to obtain a judgment against the plaintiff in error, requiring it to perform a duty devolved upon it merely because it has assumed under the law to perform the duties of another, makes it necessary, upon well-settled rules of pleading, also to obtain

Statement of Facts.

a judgment against the latter to declare and determine with conclusive force the existence and limits of the duty to be enforced against its guarantor and substitute.

In any view we are justified in taking of the nature of the controversy disclosed by the pleadings in this proceeding, we conclude that both the original defendants are necessary parties to its determination, and that, consequently, the plaintiff in error was not entitled to remove the suit from the jurisdiction of the State court.

The judgment of the Circuit Court is accordingly

Affirmed.

PRENTICE *v.* STEARNS.

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

Submitted January 9, 1885.—Decided March 2, 1885.

In the absence of a bill of exceptions, setting forth evidence, no error can be assigned in respect to facts found by the court when the parties waive a trial by jury.

In a suit at law to recover possession of real estate the court cannot take note of facts, which, in equity, might afford ground for relieving the plaintiff, by reforming the description in his deed.

A deed from an Indian chief to A, in 1856, of a tract described by metes and bounds, and further as "*being the land set off to the Indian Chief 'Buffalo' at the Indian Treaty of September* 30, 1854, *and was afterwards disposed of by said Buffalo to said A, and is now recorded with the government documents,*" does not convey the equitable interest of the chief in another tract described by different metes and bounds, granted to the said chief by a subsequent patent in 1858, in conformity with the said treaty, in such manner that an action at law may be maintained by A or his grantee for recovering possession of the same.

This was an action at law to recover possession of real estate and damages for its detention, the plaintiff in error being plaintiff below, and a citizen of Ohio, the defendant being a citizen of Minnesota.

Statement of Facts.

The real estate in controversy was described in the complaint as an undivided one-half of real estate situated in the county of St. Louis and State of Minnesota, viz.: Lot eighty-two (82) and the east half (E. ½) of lot eighty-four (84), in block two (2), in Duluth proper, 3d division, according to the recorded plat thereof on file in the office of the register of deeds of St. Louis County, State of Minnesota.

The question was upon the plaintiff's title.

The action was tried by the court, the intervention of a jury having been waived by the parties, and the findings of fact and conclusions of law were separately stated.

The facts found were as follows:

1. That the treaty made and concluded on the 30th day of September, A.D. 1854, between the United States and the Chippewa Indians, of Lake Superior and the Mississippi, whereby said Indians ceded to the United States certain territory lying adjacent to the head waters of Lake Superior, contained the following provision, viz.: "And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct."

2. That said treaty was ratified, pursuant to a resolution of the United States Senate passed on the 10th day of January, 1855, by the President of the United States on the 29th day of January, 1855.

3. That the said Chief Buffalo, pursuant to said provision of said treaty, and on the day of the date thereof, to wit, September 30, 1854, by an instrument of writing, executed by him and filed in the office of the United States Commissioner of Indian Affairs at Washington, D. C., selected the land to be conveyed thereunder by the United States, and appointed the persons to whom it was to be conveyed, as follows, viz.: After reciting the foregoing provision of said treaty, "I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of

Statement of Facts.

St. Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point, and I direct that patents be issued for the same, according to the above-recited provision, to Shaw-Braw-Skung, or Benjamin Armstrong, my adopted son; to Matthew May-Dway-Gwon, my nephew: to Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, his sons, one-quarter section to each." That the land Buffalo had in view and intended in such designation is not included, nor any part thereof, in the patents subsequently issued by the United States to the relatives of said Buffalo named above, which patents are hereinafter referred to.

4. That said Matthew, Joseph, and Antoine, under date of September 17, 1855, executed and delivered to said Armstrong an instrument assigning to him their right, title, and interest under said appointment and selection of Chief Buffalo.

5. That said Benjamin G. Armstrong and wife, on September 11, 1856, made, executed, acknowledged, and delivered to the plaintiff herein, a deed of conveyance, a copy of which is hereto attached, marked exhibit "B," and made a part of these findings. That a large portion of the land embraced within the courses and distances of said deed is covered by water, and that portion which is not covered by water in said description is land which Chief Buffalo had in view and intended to embrace in his selection as aforesaid, but does not embrace the land involved in this suit.

6. That said deed from Armstrong to plaintiff was duly recorded in the County of St. Louis, Territory of Minnesota, on the 4th day of November, A.D. 1856.

7. That the piece or parcel of land, the title to which is involved in this action, is situated in said County of St. Louis, Territory (now State) of Minnesota.

8. That the said Benjamin G. Armstrong and wife, on the 27th day of August, 1872, executed and delivered to the plaintiff the confirmatory deed, a copy of which is hereto attached and marked exhibit "C," and made a part of these findings, which deed was duly recorded in the County of St. Louis, State of Minnesota, September 2, 1872.

9. That the tract of land which Chief Buffalo had designated

as his selection on the day of the treaty did not correspond with the section lines when the land came to be surveyed into sections, and the United States Land Department decided that the Buffalo designation of the land was too indefinite to enable patents to be issued therefor, and furthermore the land thus designated by Buffalo, was found to be occupied by, and was thereby claimed by certain Indian traders under said treaty, and after a lengthy correspondence and investigation in respect thereto by the Interior and Indian Departments, the matter was finally adjusted by said relatives withdrawing their claim to the land so designated by Buffalo and consenting to accept other land in lieu thereof to be selected by the Indian Department; whereupon the Commissioner of Indian Affairs by its agent, and by the direction of the said Interior Department, and with the approval of the President, and assent of the said relatives named as aforesaid by said Buffalo, selected certain other lands aggregating 682 acres and situated in four different government sections, as shown by diagram hereto attached and marked exhibit "D," and apportioned the same among said relatives. A copy of the report of the Secretary of the Interior to the President upon the final selection of said land is hereto attached, marked exhibit "E," and made a part of these findings. That on the 23d day of October, 1858, patents for the land so apportioned were duly issued to them by the United States, one of which patents was issued to said Armstrong and a copy of which is hereto attached and marked exhibit "F." That the land involved in this suit is a part of the land embraced in said patent to said Armstrong.

10. That the chief, Buffalo, died in the month of October, 1855, and before the land conveyed by the government to his appointees under said provision of said treaty was finally selected, and without any action on his part under said provision of said treaty subsequent to the appointment of the persons to whom the land was to be conveyed and the conditional selection of the land on the 30th of September, 1854, as aforesaid.

11. That the United States government surveys of the lands ceded by said treaty of September 30, 1854, to the United States had not been made at the date of the said deed from

Armstrong to plaintiff, and were not made until the year following the date thereof.

12. That said Armstrong and wife by warranty deed duly executed and recorded, dated October 22, 1859, conveyed an undivided half of the lands conveyed to him and the other appointees of Chief Buffalo aforesaid, by the United States by said patent of October 23, 1858, to Daniel S. Cash and James H. Kelly.

13. That after said patents were issued to said appointees as aforesaid, the said Matthew, Joseph and Antoine, on March 13, 1859, executed deeds of conveyance of the land which had been so patented to them respectively, to the said Armstrong; which deeds were duly recorded in said St. Louis County, May 17, 1859; and that the said Armstrong and wife, on the 31st day of August, 1864, for a valuable consideration, executed and delivered their deed of conveyance of an undivided half of the land so patented to him and the said Matthew, Joseph, and Antoine, to John M. Gilman, which conveyance was duly recorded in said St. Louis County, September 12, 1864, a copy of which conveyance is hereto attached and marked exhibit "G." That said Gilman took said conveyance without any actual notice of said deed from said Armstrong to the plaintiff of September 11, 1856, or that plaintiff claimed an interest in the land so conveyed to him, said Gilman.

14. That the defendant herein claims title to the piece or parcel of land in controversy as a grantee of said Gilman and under and through said deed to said Gilman of August 31, 1864.

15. That the undivided one-half of the property described in the complaint herein is worth the sum of ten thousand dollars ($10,000).

And the following conclusions of law thereupon:

I. That the appointment of persons to whom the United States were to convey the section of land reserved by the said provision of said treaty, made by the said Chief Buffalo on the 30th day of September, 1854, was a valid and sufficient appointment under said provision, and upon the ratification of said treaty vested in the said Benjamin G. Armstrong and the

other appointees named such an interest as the treaty gave to the land so reserved.

II. That the patent of the United States to Armstrong, and his acceptance of it, is as a valid execution of the treaty on that subject.

III. That the deed from said Armstrong to plaintiff of date of September 11, 1856, is, in its execution, acknowledgment and recording, a valid and sufficient deed and its record is constructive notice of its contents.

IV. That the description in the deed of said Armstrong to plaintiff of September 11, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been entitled under said treaty than the specific tract described by metes and bounds therein, and that said deed is ineffectual as a conveyance to plaintiff of any interest or title except such as said Armstrong had in or to the land therein particularly described, and that plaintiff thereunder took no title to the land for the possession of which this action is brought.

V. That the quit-claim deed from said Armstrong to said John M. Gilman, of August 31, 1864, conveyed to the said Gilman such interest and no more as said Armstrong had in the land therein described at the date of said deed.

VI. That the plaintiff is not entitled to recover in this action, and judgment is ordered for the defendant for his costs and disbursements.

The body of the deed from Armstrong and wife, dated September 11, 1856, to the plaintiff, was as follows:

"This indenture, made the eleventh day of September, in the year one thousand eight hundred and fifty-six, between Benjamin G. Armstrong and Charlotte Armstrong, wife of said Benjamin G., of the county of La Pointe, State of Wisconsin, of the first part, and Frederick Prentiss, of Toledo, Ohio, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of eight thousand dollars, to us in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and

quit-claimed, and by these presents do remise, release and quit-claim, unto the said party of the second part, and to his heirs and assigns forever, one undivided half of all the following described piece or parcel of land, situate in the county of St. Louis, and Territory of Minnesota, and known and described as follows, to wit: Beginning at a large stone or rock at the head of St. Louis River Bay, nearly adjoining Minnesota Point, commencing at said rock and running east one mile, north one mile, west one mile, south one mile to the place of beginning, and being the land set off to the Indian Chief 'Buffalo,' at the Indian treaty of September 30, A.D. 1854, and was afterwards disposed of by said 'Buffalo' to said Armstrong, and is now recorded with the government documents, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; to have and to hold the aforesaid premises, with all the privileges and appurtenances to the said premises belonging or appertaining, unto the said party of the second part, his heirs and assigns forever. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to, the above described premises, and every part and parcel thereof, with the appurtenances. And the said Armstrong and his wife, party of the first part, for themselves and their heirs, executors, and administrators, do covenant, promise, and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that they have not made, done, committed, executed, or suffered any act or acts, thing or things, whatsoever, whereby, or by means whereof, the above described premises, or any part thereof, now are, or at any time hereafter, shall, or may be impeached, charged, or incumbered, in any manner or way whatsoever.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written."

And the deed of confirmation made by Armstrong and wife to the plaintiff August 29, 1872, was as follows:

"Whereas, on the eleventh day of September, in the year one thousand eight hundred and fifty-six, we, Benjamin G. Armstrong and Charlotte Armstrong, wife of aforesaid Benjamin G. Armstrong, conveyed by a quit-claim deed to Frederick Prentice, of Toledo, Ohio, the undivided one-half part of all our interest in certain lands, situated at or near the head of St. Louis Bay, and intended to describe our interest in what is known as the Chief Buffalo tract at the head of St. Louis Bay, Minnesota Territory, and then believing that the description in said deed would cover, or was the tract that would be patented to us by the United States of America, according to said Buffalo's wishes, and a contract we held from the heirs of said Buffalo. But to definitely fix upon the lands designed to be conveyed, it was stated in said deed to be the land set off to the Indian Chief Buffalo, at the Indian treaty of September thirtieth, in the year one thousand eight hundred fifty-four. And further, I, the said Armstrong, gave a contract on the tenth day of September, in the year one thousand eight hundred and fifty-six, to the said Frederick Prentice, binding ourselves and heirs to give said Frederick Prentice any further writing or instrument he might require.

"And on the first day of July, in the year one thousand eight hundred and fifty-seven, I, Benjamin G. Armstrong and Charlotte Armstrong, agreed to, and did sell to Frederick Prentice the other one-half of said Buffalo tract, for which said Frederick Prentice paid us something over two thousand ($2,000) dollars, and since that time has paid us to our full satisfaction for the whole property. And we agreed to, and by these presents confess payment in full for the whole of the above tract, in compliance of the first deed for the one undivided half, and the carrying out of the contract to sell the balance July first, in the year one thousand eight hundred and fifty-seven. This is intended to cover the land deeded by us to the said Prentice in the deed given on the eleventh day of September, eighteen hundred and fifty-six, and recorded in liber A of deeds, page 106, at Duluth, State of Minnesota, and the land included in the contract of the first of July, eighteen hundred and fifty-seven, and intended to cover the lands as described in

patents from the United States of America to Benjamin G. Armstrong, Matthew May-Dway-Gon, Joseph May-Dway-Gon and Antoine May-Dway-Gon, and described as follows: To Benjamin G. Armstrong the west half of the southwest quarter, and the lot number five (5) of section twenty-seven, and lot number (3) of section thirty-four, containing together (182 62-100) one hundred and eighty-two and sixty-two one-hundredths acres. And to Joseph May-Dway-Gon the southeast quarter of section twenty-eight, containing one hundred and sixty acres. And Antoine May-Dway-Gon the east half of the northeast quarter of section twenty-eight, and the west half of the northwest quarter of section twenty-seven, containing one hundred and sixty acres. And to Matthew May-Dway-Gon the southwest quarter of section twenty-two, containing one hundred and sixty acres, all of the above being in town fifty, north of range fourteen, west of the fourth principal meridian, State of Minnesota, and the three last named pieces of land have been since deeded by the said Matthew, Joseph and Antoine May-Dway-Gon to Charlotte Armstrong. But previous to the date of said deeds the above-named Joseph, Matthew and Antoine May-Dway-Gon had assigned or transferred all their right, title and interest therein to the said Benjamin Armstrong. I, the aforesaid Benjamin G. Armstrong, did sell by deed and contract to Frederick Prentice, which I, the said Charlotte Armstrong, knew at the time, but did not know but that by getting another deed or conveyance after the patents were issued, we could sell the property, but am now satisfied that we had sold and assigned all our right, title and interest to Frederick Prentice previous to our deeding to any other person or persons, and that we had no right to deed or convey to any other person or persons, as the title to the lands above described was then virtually and by right vested in the said Frederick Prentice, and that the first deed for the one-half and the contract for the remaining half of said land, with the payment thereon made at the time by the said Frederick Prentice, bound us to give him good and sufficient deeds to said property whenever so demanded; and we do hereby assign and quit claim all our right, title and interest

now or at any time held by us to all the above described property, in fulfillment of our agreements with the said Frederick Prentice.

"In witness whereof we have, this 27th day of August, in the year one thousand eight hundred and seventy-two, affixed our hands and seals."

The patent of the United States to Armstrong, which covered the land in controversy, was as follows:

"UNITED STATES OF AMERICA.

"*To all [to] whom these presents shall come, Greeting:*

"Whereas by the sixth clause of the second article of the treaty between the United States of America and the Chippewa Indians, of Lake Superior and the Mississippi, made and concluded at La Pointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hnndred and fifty-four, it is stipulated that, 'the Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter; and being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the Chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct;' and whereas it appears from a return, dated the twenty-seventh day of September, one thousand eight hundred and fifty-eight, from the office of Indian affairs to the General Land Office, that there has been selected and approved for 'Shaw-Bwaw-Skung, or Benjamin G. Armstrong,' as one of the 'connections' of said chief Buffalo, the west half of the southwest quarter, and lot number five, both of section twenty-seven, and lot number three of section thirty-four, containing together one hundred and eighty-two acres and sixty-two hundreths of an acre, all in township fifty north, of range fourteen west of the fourth principal meridian, in the State of Minnesota.

"Now, know ye that the United States of America, in consideration of the premises, and in conformity with the clause of the said treaty, as above recited:

"Have given and granted, and by these presents do give and grant, unto the said 'Shaw-Bwaw-Skung, or Benjamin G. Armstrong,' and to his heirs, the tract of land above described: To have and to hold the said tract, with the appurtenances, unto the said 'Shaw-Bwaw-Skung, or Benjamin G. Armstrong,' and to his heirs and assigns forever.

"In testimony whereof, I, James Buchanan, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"Given under my hand, at the city of Washington, this twenty-third day of October, in the year of our Lord one thousand eight hundred and fifty-eight, and of the Independence of the United States the eighty-third.

"By the President:

[SEAL.] "JAMES BUCHANAN,

"By T. J. ALBRIGHT, *Sec'y.*

"M. GRANGER,

"*Recorder of the General Land Office.*

"Recorded Vol. II., pages 376, 377."

Mr. Benjamin A. Willis for plaintiff in error.

Mr. Gordon E. Cole for defendant in error.

MR. JUSTICE MATTHEWS, after making the foregoing statement, delivered the opinion of the court.

The plaintiff in error has assigned errors, in several particulars, in the finding of facts, but as there is no bill of exceptions setting forth the evidence, no error of law can be assigned in respect to any finding of fact, and we are necessarily restricted to the question whether, upon the facts as found, there was error in giving judgment for defendant.

An argument is also addressed to us by counsel for the plaintiff in error, in support of the proposition, that, if the deed under which he claims title were not effectual to convey the patented land, by reason of a mistaken description, equity would

relieve the plaintiff by reforming the deed. But plainly no such question can arise on this record. The proceeding is not in equity to reform the deed, but is at law to recover possession by virtue of an alleged legal title under it. We are dealing with the legal title alone in this action; any equities supposed to control it are not the subject of present consideration, and must be excluded altogether from the discussion.

The case of the plaintiff in error rests upon the proposition, maintained in argument by his counsel, that the deed of Armstrong and wife to him, of September 11, 1856, is capable at law of being construed, and must be construed, as a valid and effectual conveyance—not of the particular tract of land described by metes and bounds, but—of any and whatever section or tract Armstrong was then equitably entitled to, under the treaty, by virtue of the appointment of Chief Buffalo, to be thereafter specifically designated, and the legal title conveyed by the patent to be issued therefor, which, when issued, would inure to the benefit of the plaintiff in error as the previous and first grantee of Armstrong, and clothe him with the legal title to the land therein described. And in this view it is contended, that the case falls within the rule of the decisions in the cases of *Landes* v. *Brandt*, 10 How. 348; *Doe* v. *Wilson*, 23 How. 457; and *Crews* v. *Burcham*, 1 Black, 352.

In *Doe* v. *Wilson*, as explained and confirmed in *Crews* v. *Burcham*, it was held "that the reservation created an equitable interest to the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee."

And in the last-named case—*Crews* v. *Burcham*—the court say:

"We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the treaty, and that it was to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and

title to the same, with a full convenant of warranty. The land is sufficiently identified to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this act of Congress [that is the act of May 20, 1836, 5 Stat. 31]. The act declares the land shall inure to and become vested in the assignee the same as if the patent had issued to the deceased in his lifetime." 1 Black, 357.

In these cases, it will be observed, the land conveyed before the issue of the patent was the same described in and conveyed by the patent, and no question arose, as there does here, as to the identity of the description in the two conveyances. In *Doe* v. *Wilson* the court charged the jury, and correctly, as it was held, that "the description of the land in the deeds from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson, are sufficient to identify the land thereby intended to be conveyed, as the same two sections of land which are in controversy in this suit, and which are described in the patents which have been read in evidence." 23 How. 462.

In the present case, however, the land described in the deed from Armstrong and wife to the plaintiff of September 11, 1856, is not the same land in whole or in part, as that described in the patent from the United States to Armstrong. This want of identity, so far as the description by metes and bounds is concerned, is admitted; but it is insisted that this part of the description may and ought to be rejected from the deed of September 11, 1856, as a matter of construction, on the principle of the maxim, "*Falsa demonstratio non nocet*," and that enough would still be left to identify the land conveyed by the deed to the plaintiff with that described in the patent to Armstrong.

This, however, is not correct. If the alleged erroneous description were stricken from the deed what would remain would be as follows: "One undivided half of all the following described piece or parcel of land situate in the county of St. Louis and Territory of Minnesota," . . . "being the land set off to the Indian chief 'Buffalo' at the Indian treaty of

September 30, A.D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents," &c.

This description, thus remaining, refers to land already at the date of the deed set off to the Indian chief Buffalo, and described in an existing document in the archives of the government, and cannot possibly, therefore, embrace the tract subsequently selected and designated and described in the patent of October 23, 1858. And the references which must be relied on to furnish any description whatever for the land conveyed by the deed, when applied, result simply in restoring to the deed the particular description by boundaries which for imputed error had for purposes of interpretation been struck out.

The case is not one to which the maxim invoked for the construction of the deed can be applied. That rule of interpretation, which rejects erroneous particulars of description, where what is left sufficiently identifies the subject of the grant, is adopted in aid of the intention of the grantor, as gathered from the instrument itself, read in the light of the circumstances in which it was written. But here it is expressly found as a fact by the court, in reference to the land originally selected by Buffalo, and described in the deed from Armstrong to the plaintiff, "that the land Buffalo had in view and intended in such designation is not included, nor any part thereof, in the patents subsequently issued by the United States to the relatives of said Buffalo named above," and "that a large portion of the land embraced within the courses and distances of said deed is covered by water, and that portion which is not covered by water in said description is land which Chief Buffalo had in view and intended to embrace in his selection as aforesaid, but does not embrace the land involved in this suit." So that the description of the land in the deed which it is sought to reject, because it is inconsistent with that of the patent, is an accurate and not an erroneous description of the land intended by the parties to be embraced and conveyed by the deed from Armstrong to the plaintiff.

It follows that there is no error in the judgment of the Circuit Court, and it is accordingly *Affirmed.*

MORGAN, Administrator, & Others *v.* HAMLET & Another.

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

Argued January 30, 1885.—Decided March 2, 1885.

The statute of Arkansas that "All demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred"—begins, on the granting of letters of administration, to run against persons under age, out of the State with no guardian appointed within the State, and whose claims are alleged to be founded in frauds which were not discovered until after the expiration of the two years fixed by the act.

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

Mr. Solicitor-General for appellants.

Mr. U. M. Rose filed a brief on behalf of appellees.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the appellants September 3, 1879. The complainants are the administrators *de bonis non* of Samuel D. Morgan, deceased, and the children and heirs at law and widow of the intestate, citizens of North Carolina. The female defendants are the children and heirs at law of John G. Morgan, deceased, sued with their husbands, and all citizens of Arkansas.

The case alleged in the bill is substantially as follows:

In 1860 a partnership was formed between Samuel D. Morgan and John G. Morgan, who were brothers, the former advancing the means, the latter being bankrupt, for stocking and cultivating a cotton plantation in Arkansas, purchased in the name of the firm, but paid for only in part. Samuel D. Morgan continued to reside in North Carolina. John G. Morgan lived on the plantation in Arkansas, and personally conducted its operations. This he did during several years, including the year 1865, when the plantation was sold, under judicial proceed-

ings, to pay the unpaid purchase money. Samuel D. Morgan died in January, 1864. It is alleged that large profits were made by John G. Morgan, and particularly that after the death of his brother he continued in possession of the partnership property, conducted its business, and made profits amounting to $20,000. He rendered no account at any time of the business, and made no settlement of the partnership affairs, but it is charged that he converted the whole of the partnership property and profits to his own use.

John G. Morgan, in 1865, took out letters of administration on the estate of Samuel D. Morgan, in Ashley county, Arkansas, in which the plantation and partnership property were situated. The administration was closed in 1872.

John G. Morgan died in 1875, the defendants, his heirs at law, having come into possession of the property in his possession at his decease, more than sufficient to satisfy the claim of the complainants.

Of the complainants, Samuel T. Morgan became of age September 8, 1876, and William W. Morgan in May, 1878. They never had a guardian, and allege their ignorance of the frauds charged to have been practised against them by John G. Morgan until 1879.

The prayer of the bill is for an account, &c.

The answer of the defendants, though admitting the fact of such a partnership as alleged, denies that any profits were made, and denies all the allegations of fraud. It also shows that John G. Morgan died in April, 1875, leaving him surviving Emma S. Morgan, his widow, and the defendants, Alice R. Hamlet and Emma G. Abell, and Lula Morgan, an infant, his only children; that letters of administration were issued on his estate by the Probate Court of Chicot County, Arkansas, in which he lived at the time of his death, on August 6, 1875, to his widow, who acted as administratrix of his estate until October 13, 1875, when she resigned, and the defendant, John C. Hamlet, was appointed by the same court administrator *de bonis non*, and qualified and acted as such. And it is relied on as a defence that the demands made in the bill were not authenticated and presented to the administratrix or the administrator *de bonis non*

of John G. Morgan, deceased, according to law, within two years of the granting of letters of administration on his estate.

The cause was heard on the pleadings and proofs, and on final hearing the bill was dismissed. From this decree the complainants bring the present appeal.

In Arkansas it appears that there is a special statute of limitations governing claims against estates of deceased persons, commonly called the statute of non-claim. It is as follows:

"All demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred." Dig. Ark. Stat. 1874, § 98.

It has been decided that the statute runs against all creditors, whether resident or non-resident. *Erwin* v. *Turner*, 6 Ark. 14.

And that all claims fall within the provisions of the statute that are capable of being asserted in a court of law or equity existing at the death of the deceased, or coming into existence within two years after the grant of administration, whether due or not, if running to a certain maturity. *Walker* v. *Byers*, 14 Ark. 246.

And the effect of a failure to present the claim as prescribed in the statute, is not to let it in against the heirs or devisees, but it is to bar it forever as against all persons. *Bennett* v. *Dawson*, 18 Ark. 334; *Brierly* v. *Norris*, 23 Ark. 771.

And in *Public Works* v. *Columbia College*, 17 Wall. 521, 530, in a like case, it was held by this court that a failure to present the claim is, in the absence of circumstances constituting an excuse, fatal to the bill for relief in equity.

It is sought, in argument on behalf of the appellants, to distinguish their case, at least the case of the two infant children of Samuel D. Morgan, from any case within the statute of non-claim, on the ground that at the death of their father, his title to the real estate, which constituted the plantation, descended to them as his heirs at law, and thereafter as to the operations conducted by John Morgan in 1864 and 1865, having no guardian, the latter was in equity their representative and guardian *de son tort* and trustee, so that upon his death, and until they

arrived at age, there was no one competent to make a demand against his administrator, within the terms of the statute.

But we are unable to appreciate the force of this supposed distinction. The statute in question contains no exception in favor of claimants under disability, of non-age, or otherwise; the claim of the complainants against John G. Morgan was adverse to his administration, although it may have originated in consequence of a relation of trust; and there is no ground, that we are able to understand, on which it can be excepted out of the operation of the statute in question. Their claim was equally against the administrator of John G. Morgan, whether the latter be considered as the defaulting partner of themselves or of their father. Whatever its description, it was a claim against the estate of John G. Morgan, and for which his personal representative was in the first instance liable; and the statute is a bar to every such claim, unless presented within the time prescribed.

On this ground, the decree of the Circuit Court is

Affirmed.

CHASE *v.* CURTIS & Another.

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

Argued January 30, 1885.—Decided March 2, 1885.

The provision in § 12 of the act of the legislature of New York of February 17, 1848, as amended June 7, 1875, whereby trustees of corporations formed for manufacturing, mining, mechanical, or chemical purposes are made liable for debts of the company on failure to file the reports of capital and of debts required by that section, is penal in its character, and must be construed with strictness as against those sought to be subjected to its liabilities.

In a suit under the provisions of that act, as amended, to recover of the trustees of such corporation the amount of a judgment against the corporation, the judgment roll is not competent evidence to establish a debt due from the corporation to the plaintiff.

A claim in tort against a corporation formed under that act, as amended, is

Statement of Facts.

not a debt of the company for which the trustees may become liable jointly and severally under the provisions of the amended § 12.

In a proceeding to enforce a liability created by a state statute, the courts of the United States give to a judgment of a state court the same effect, either as evidence, or as cause of action, which is given to it in like proceedings in the courts of the state whose laws are invoked in the enforcement.

The complaint in this action, after alleging that the plaintiff (who is plaintiff in error) was a citizen of Pennsylvania, and the defendants citizens of New York, proceeded as follows:

"*Second.* That at the times hereinafter mentioned the defendants were trustees of the Union Petroleum Company of New York.

"*Third.* That the said company is, and at the times hereinafter mentioned was, a corporation organized pursuant to an act of the legislature of the State of New York, entitled 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed on the 17th day of February, 1848, and the amendments thereto, its principal place of business being in the city of New York.

"*Fourth.* That the said plaintiffs brought their plea of trespass on the case against the said Union Petroleum Company of New York in the Court of Common Pleas for the county of Venango, in the State of Pennsylvania, in which the said Union Petroleum Company duly appeared, and that the said action was thereafter and on or about the 9th day of September, 1873, on the petition of the said Union Petroleum Company, verified by the affidavit of Abijah Curtis, one of the defendants above named, removed to the United States Circuit Court for the Western District of Pennsylvania. And that on the 30th day of July, 1874, and before the time for filing the annual report hereinafter mentioned, the above-named plaintiffs duly recovered a judgment in the said action against the said Union Petroleum Company of New York in the Circuit Court of the United States in and for the Western District of Pennsylvania, by the judgment and consideration of said court having jurisdiction therein, and of the said Union and Petroleum Company of New York, for forty thousand five hundred dollars

($40,500.00) damages, and three hundred and twenty-eight dollars and ninety-seven cents ($328.97) costs, which judgment was duly given, and still remains in full force and effect, not satisfied or annulled, and no part thereof has been paid.

"*Fifth.* That the said Union Petroleum Company of New York did not within twenty (20) days from the first day of January, 1875, make and publish a report as required by law in such case made and provided, signed by its president and a majority of its trustees, and verified by the oaths of the president or secretary thereof, and did not file the same in the office of the clerk of the county where the business of the company was carried on, to wit, the county of New York; nor have they made, published, signed, verified, or filed any such report whatsoever as by law required, but have wholly failed so to do.

"Wherefore the plaintiffs demand judgment against the above-named defendants in the sum of $40,828.97, with interest on $40,500.00 from the 30th day of July, 1874, and on $328.97 from the 3d day of October, 1874, besides the costs and disbursements of this action."

To this complaint the defendants severally demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered in favor of the defendants, dismissing the complaint, to reverse which this writ of error was prosecuted.

The statute on which the action was founded is as follows:

"Section 1. The twelfth section of the 'Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed February 17, 1848, as said section was amended by chapter 657 of the laws of 1871, is hereby further amended, so that section 12 shall read as follows:

"§ 12. Every such company shall, within twenty days from the first day of January, if a year from the time of the filing of the certificate of incorporation shall then have expired, and, if so long a time shall not have expired, then, within twenty days from the first day of January in each year after the expiration of a year from the time of filing such certificate, make a report which shall be published in some newspaper published

in the town, city, or village, or if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made; but whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a ratable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against his co-trustees, jointly or severally, to recover from them their proportion of the amount so paid on such judgment; provided that nothing in this act contained shall affect any action now pending." Laws of New York, 1875, ch. 510, passed June 7, 1875.

Mr. George A. Black (*Mr. Henry J. Scudder* was with him) for plaintiff in error.—The distinctions made in certain conflicting cases between judgments and contracts can have no bearing here. *O'Brien* v. *Young*, 95 N. Y. 428; *Taylor* v. *Root*, 4 Keyes, 335, 344. The case of *Miller* v. *White*, on which the decision below was based, is reported in 57 Barb. 508; 59 Barb. 443, and 50 N. Y. 137. It shows this peculiarity, that the debt for which the trustees became liable was contracted prior to the default, and only put in judgment after the default. This is obvious from the report of the case in 59 Barb. 435, where the complaint alleged that on the first of January, 1865, the company was indebted, that the judgment was recovered on this indebtedness in June, 1866, and that no report was filed in January of 1865, '66, '67 or '68. In its opinion the Court of Appeals, 50 N. Y. 137, says: "The right of action in this case

arose, if ever, at the expiration of twenty days from the first day of January, 1865; at that time the judgment had no existence. It was not recovered until June, 1866. It is true that the plaintiffs aver defaults in the company in making said reports for the years 1866, 1867 and 1868, but no evidence was given of any default except in January, 1865. . . . The question involved in this case is not free from doubt or difficulty. . . . I think the principles of the law are better sustained by holding this judgment not evidence against these defendants, that they are neither parties nor privies to it, and that they should not be bound by it." The courts of New York have refused to follow this case except within the strict limits of the facts presented by it. *Lewis* v. *Armstrong*, 8 Abbott N. C. 385. The judgment is evidence in this action of the debt of the company *ex necessitate*. The action was for trespass on the case for a tort (entering upon and taking oil from the lands of the plaintiff), which was unliquidated except by the verdict, which possibly contained an allowance in the nature of punitive damages. It was impossible of exact computation, containing allowances for costs provable in no other way. It would be absurd, unreasonable and productive of uncertainty and confusion to require the submission to another jury of the facts which led to this verdict, for if they found a less amount it is palpable that a part only of the debt of the company would be recovered against these defendants who are liable for all the debts of the company. If they gave a larger verdict these defendants would be the first to complain. Under the statute they are severally as well as jointly liable. Each one could be sued apart from the others, and if one trustee is sued alone, all the trustees shall contribute a ratable share of the amount paid on such judgment. If in each suit against each trustee the whole evidence of the original claim had to be gone into and separate verdicts rendered, which might be for very dissimilar amounts, the contribution would become a matter more involved than the original claim. As the theory on which the judgment is made conclusive, is that, as the parties to it have had their day in court and have exhausted their proofs, they are thereby estopped from denying its

validity. Whatever may be the ruling of the State courts in respect to admissions of evidence, they are not binding upon the United States courts, because such decisions do not present a case of statutory construction. *McNiel* v. *Holbrook*, 12 Pet. 84; *Town of Venice* v. *Murdock*, 92 U. S. 494. The view that a judgment is evidence against the trustee of a liability of the corporation is supported by numerous very respectable authorities in the State of New York. *Slee* v. *Bloom*, 20 Johns. 668, 684; *Moss* v. *McCullough*, 7 Barb. 279; *S. C.* 5 Hill, 131; *Moss* v. *Averell*, 10 N. Y. 449; *Belmont* v. *Coleman*, 1 Bosw. 188; *S. C.* 21 N. Y. 96. And in other States and England: *Utley* v. *Tool Co.*, 11 Gray, 139; *Farnum* v. *Ballard Vale Machine Shop*, 12 Cush. 507; *Dauchy* v. *Brown*, 24 Vt. 197; *Milliken* v. *Whitehouse*, 49 Maine, 527; *Corse* v. *Sanford*, 14 Iowa, 235; *Wilson* v. *Pittsburgh, &c., Coal Co.*, 43 Penn. St. 424; *Gaskill* v. *Dudley*, 6 Met. 546; *Green* v. *Nixon*, 23 Beav. 530, 538; *Bank of Australia* v. *Nias*, 4 Eng. Law & Eq. 252; Thompson's Liability of Stockholders, § 329 *et seq.*

Mr. Grosvenor P. Lowry for defendants in error.

Mr. Justice Matthews delivered the opinion of the court. He recited the facts as above stated, and continued:

It is the well settled rule of decision, established by the Court of Appeals of New York in numerous cases, that this section of the statute, to enforce which the present action was brought, is penal in its character, and must be construed with strictness as against those sought to be subjected to its liabilities. *Merchants' Bank* v. *Bliss*, 35 N. Y. 412; *Wiles* v. *Suydam*, 64 N. Y. 173; *Easterly* v. *Barber*, 65 N. Y. 252; *Knox* v. *Baldwin*, 80 N. Y. 610; *Veeder* v. *Baker*, 83 N. Y. 156; *Pier* v. *George*, 86 N. Y. 613; *Stokes* v. *Stickney*, 96 N. Y. 323.

In the case last cited the action authorized by it was held to be *ex delicto*, and that it did not survive as against the personal representative of a trustee sought to be charged.

In *Bruce* v. *Platt*, 80 N. Y. 379, it was said:

"It is settled, by repeated decisions applicable to this case, that the statute in question (Laws of 1848, ch. 40, § 12) is

penal, and not to be extended by construction; that in an action to enforce a liability thereby created, nothing can be presumed against the defendants, but that every fact necessary to establish their liability must be affirmatively proved," citing *Garrison* v. *Howe*, 17 N. Y. 458; *Miller* v. *White*, 50 N. Y. 137; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62.

This rule of construction in reference to this and similar statutory provisions has been heretofore adopted and applied by this court. *Steam Engine Co.* v. *Hubbard*, 101 U. S. 188; *Flash* v. *Conn*, 109 U. S. 371.

In the case last mentioned, this court, following the Court of Appeals of New York in the case of *Wiles* v. *Suydam*, 64 N. Y. 173, showed the distinction between the liability of stockholders for the debts of the corporation, under a section of the same act, making them severally individually liable for the debts and contracts of the company to an amount equal to the amount of stock held by them respectively, until the whole amount of the capital stock fixed and limited by the company has been paid in, and the liability imposed upon the trustees by the section now under discussion. It was held that the former was a liability *ex contractu*, enforceable beyond the jurisdiction of the State, and that the statute should be construed liberally in furtherance of the remedy; that the latter was for the enforcement of a penalty, and subject to all the rules applicable to actions upon statutes of that description.

The distinction is illustrated and enforced in *Hastings* v. *Drew*, 76 N. Y. 9, and *Stephens* v. *Fox*, 83 N. Y. 313.

The precise question involved here was decided by the Court of Appeals of New York in the case of *Miller* v. *White*, 50 N. Y. 137. In that case the complaint set forth the recovery of a judgment against the company, but not the original cause of action against it, on which the judgment was founded. The defendant moved for a dismissal on this ground, which was refused, and judgment was rendered in favor of the plaintiff on the production in evidence of the judgment roll. This was held to be erroneous on the ground that the judgment was not competent as evidence of any debt due from the corporation, and that no action could be maintained thereon against the

trustees under this section of the act. Judge Peckham, delivering the unanimous opinion of the court, said:

"It will be perceived that this is a highly penal act, extremely rigorous in its provisions. It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president, or a sufficient number of his co-trustees to constitute a majority, declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable as well as those who refuse to do their duty."

It was accordingly held, "that, as against these defendants, the judgment did not legally exist, as they were neither parties nor privies to it. . . . It is not a judgment as to these defendants; no action could be maintained thereon against them. . . . Nor is the judgment *prima facie* evidence of the debt as against these defendants."

This doctrine was repeated and reaffirmed by the same court in *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62–72. In that case the court said: "The debt must be proved by evidence competent against the defendants. The facts upon which the debt is founded must be proved. The naked admissions of the corporation or judgment against the corporation are not evidence against the trustees. They are *res inter alios acta;* but, when facts are proved which would establish the existence of a debt against the corporation, the liability of the trustees for the debt follows upon the proof of the other facts upon which the liability is made by statute to depend."

The case of *Miller* v. *White*, *ubi supra*, has never been overruled, nor questioned by the New York Court of Appeals. On the contrary, it has been repeatedly and expressly cited and approved, and either followed or distinguished from the case under decision, in the following cases: *Rorke* v. *Thomas*, 56 N. Y. 559–565; *Hastings* v. *Drew*, 76 N. Y. 9–15; *Stephens* v. *Fox*, 83 N. Y. 313–317; *Knox* v. *Baldwin*, 80 N. Y. 610–613; *Bruce* v. *Platt*, 80 N. Y. 379–381.

It is attempted, however, in argument to distinguish the present case from that of *Miller* v. *White*, *ubi supra*, upon the

facts, so as to except this from the rule of that decision. In the case of *Miller* v. *White*, *ubi supra*, the judgment sued on was not recovered until after the alleged default on the part of the defendants, as trustees, in filing their report, whereas in the present case the default is alleged to have occurred after the recovery of the judgment sued on. But in *Miller* v. *White*, the plaintiffs did aver defaults occurring after the rendition of the judgment, although none were proved except one occurring before it was recovered; and the court said (50 N. Y. 140): "The right of action in this case arose, if ever, at the expiration of the twenty days from the first day of January, 1865. At that time the judgment had no existence. It was not recovered until June, 1866." But this language plainly shows, that the very point of the decision was, that no right of action could arise upon the judgment itself, but upon the debt alone, on which the judgment was founded, and as to this, it is, as we have already seen from other parts of the opinion, expressly declared, that the judgment was, as against the trustees, evidence, neither conclusive nor *prima facie*, of the existence of a debt due from the corporation, for the payment of which they could be charged.

Upon this point, it is further said in argument, that it is reduced to a question of evidence, and that the rules of evidence, enforced in the courts of a State do not necessarily govern courts of the United States, although sitting in the same State. However this may be in other cases, or where the laws of the United States prescribe rules of evidence for their own tribunals, it is not true that the courts of the United States, in a special statutory proceeding, would give to a judgment of a State court any other or greater effect, either as a matter of evidence, or as ground of action, than must be lawfully given to it in the courts of the State, whose laws are invoked to enforce it.

It is, however, further urged upon us in argument that in cases like the present, which is shown by the record and admitted to be founded on an action on the case for a tort, the judgment against the corporation must be evidence of the debt *ex necessitate*. On this head the language of counsel in their printed argument is as follows:

Opinion of the Court.

"The action was for trespass on the case, for a tort (entering upon and taking oils from the lands of the plaintiff), which was unliquidated except by the verdict which possibly contained an allowance in the nature of punitive damages. It was impossible of exact computation, containing allowances for costs provable in no other way. It would be absurd, unreasonable, and productive of uncertainty and confusion, to require the submission to another jury of the facts which led to this verdict, for if they found a less amount it is palpable that a *part* only of the debt of the company would be recovered against these defendants, who are liable for *all* the debts of the company. If they gave a larger verdict these defendants would be the first to complain. Under the statute they are severally as well as jointly liable. Each one could be sued apart from the others, and if one trustee is sued alone all the trustees shall contribute a ratable share of the amount paid on such judgment. If in each suit against each trustee the whole evidence of the original claim had to be gone into and separate verdicts rendered, which might be for very dissimilar amounts, the contribution would become a matter more involved than the original claim. As the theory on which the judgment is made conclusive is, that, as the parties to it have had their day in court and have exhausted their proofs, they are thereby estopped from denying its validity."

But if this proves anything it proves too much, and instead of showing the thing to be proved that the judgment is conclusive evidence of a debt, it establishes, on the contrary, that a liability on the part of the corporation for a tort, though afterwards reduced to judgment against it, is not a debt of the corporation, even when in judgment, within the meaning of the statute imposing upon the trustees the penalty sought to be enforced in this action for not making and publishing an annual report showing, among other things, the amount of its existing debts. For, keeping in view the statement now urged by counsel, of the impossibility, in advance of liquidation by the verdict of a jury, of even approximately, much less accurately, stating the amount of such a liability, can it be supposed that the duty to do so is devolved upon the trustees, within either

the letter or spirit of this statute, under penalty of becoming personally liable to pay whatever judgment may be thereafter rendered on account thereof against the corporation? Surely not. Such claims are not within the contemplation of the act. The mischief to be prevented by its requirements has no relation to liabilities of that description. The creditors to be protected are those only who become such by voluntary transactions, in reference to which, for their benefit, the information becomes important as to the debts of the company.

The precise point does not appear to have arisen under this act, so as to have become the subject of a decision by the New York Court of Appeals. But it seems to be virtually decided in *Heacock* v. *Sherman*, 14 Wend. 58. That was an action on the case for the recovery of damages against the stockholders of a corporation, occasioned by not keeping in repair a bridge, the liability arising, as it was alleged, upon the eighth section of the act incorporating the Buffalo Hydraulic Association (Stat. of 1827, N. Y., p. 45), which was as follows:

"That the stockholders of the said corporation shall be holden jointly and severally to the nominal amount of their stock for the payment of all debts contracted by the said corporation or by their agents; and any person or persons, having any demand against the said corporation, may sue any stockholder or stockholders in any court having cognizance thereof, and recover the same with costs; provided that no stockholder shall be obliged to pay more in the whole than the amount of the stock he may hold in the said company at the time the debt accrued." Mr. Justice Nelson, delivering the opinion of the court, said: "The term demand is undoubtedly broad enough, if it stood alone, to embrace the claim of the plaintiff. . . . We must, however, look at the whole section and the connection in which it stands, in order to fix its meaning in this case. The stockholders, in the first place, are made jointly and severally holden for the payment of all debts contracted by the corporation or by their agents. The liability is here declared; it is new and unknown to the common law; and is in terms limited to demands *ex contractu*. The residue of the section was not intended to extend the liability thus declared, but is in

furtherance of the remedy. . . . But the proviso to the section is conclusive upon the point. Any person having a demand against the corporation is authorized to sue any stockholder in any court, &c., 'provided that no stockholder shall be obliged to pay more in the whole than the amount of the stock he may hold in said company at the time the debt accrued;' thereby clearly qualifying the enlarged meaning of the word demand, and showing satisfactorily that it was used by the legislature to denote a demand arising upon contract. Damage arising upon tort is not a debt accrued, within any reasonable construction of that term. It is apparent, as well from a view of the whole section as from an analysis of its parts, that the intent of the framers of it was only to make the stockholders individually responsible for the debts of the company."

This reasoning and conclusion, as applied to the present case, is not weakened, but rather strengthened, by the language cited and relied on by counsel in support of his proposition, from the opinion of Mr. Justice Story in *Carver* v. *The Braintree Manufacturing Co.*, 2 Story, 432, 448, construing a Massachusetts statute enacting that "every person who shall become a member of any manufacturing corporation shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation." He there admits that debts, in the strict sense of the term, include only contracts of the party for the payment of money and nothing else; but, feeling required to construe the statute broadly as a remedial statute, he gave to the word "debts" a meaning, not unusual, as equivalent "to dues," and to the word "contracted," a meaning, which, though more remote, he said, was still legitimate as equivalent to "incurred," so that the phrase "debts contracted," in that sense, would be equivalent to "dues owing" or "liabilities incurred;" and would therefore cover unliquidated claims arising from torts.

But, as we have already seen, the statute involved in this discussion is not a remedial statute, to be broadly and liberally construed; but is a penal statute with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their

alleged liability. Under such a rule of construction its language is limited, by its own terms, to a liability, on the part of the trustees, to debts of the corporation existing and arising *ex contractu*.

It is finally insisted that a judgment against the corporation, although founded upon a tort, becomes *ipso facto* a debt by contract, being a contract of record, or a specialty in the nature of a contract.

But we have already seen that the settled course of decision in the New York Court of Appeals rejects the judgment against the corporation as either evidence or ground of liability against the trustees, and founds the latter upon the obligation of the corporation on which the judgment itself rests. And it was decided by this court, in the case of *Louisiana* v. *New Orleans*, 109 U. S. 285, that a liability for a tort, created by statute, although reduced to judgment by a recovery for the damages suffered, did not thereby become a debt by contract, in the sense of the Constitution of the United States, forbidding State legislation impairing its obligation, for the reason that "the term 'contract' is used in the Constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence."

The same definition applies in the present instance, and excludes the liability of the defendants, as trustees of the corporation, for its torts, although reduced to judgment.

We find no error in the judgment of the Circuit Court, and it is accordingly *Affirmed.*

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* BERRY & Another, Railroad Commissioners.

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

Submitted January 7, 1885.—Decided March 2, 1885.

A consolidation of two railway companies by an agreement which provides that all the property of each company shall be taken and deemed to be transferred to the consolidated company (naming it) "as such new corporation without further act or deed," creates a new corporation, with an existence dating from the time when the consolidation took effect, and is subject to constitutional provisions respecting taxation in force in the State at that time.

One section in the charter of a railway company authorized it to consolidate with other companies. Another section provided that the "capital stock and dividends of said company shall be forever exempt from taxation; the road, fixtures and appurtenances shall be exempt from taxation until it pays an interest of not less than ten per cent. per annum." *Held*, That a new company, created by the exercise of the power to consolidate, took the property and franchises of the old company subject to the organic law as to taxation at the time of the consolidation.

This was a writ of error to review the action of the Supreme Court of Arkansas in refusing to restrain officers of that State from levying a tax on property of the plaintiff in error. The grounds on which exemption from taxation was claimed, and on which a Federal question was raised, are stated in the opinion of the court.

Mr. J. H. McGowan, *Mr. A. T. Britton*, *Mr. A. B. Browne*, and *Mr. John F. Dillon* for plaintiff in error.

Mr. U. M. Rose for defendants in error.

Mr. Justice Matthews delivered the opinion of the court.

The legislature of Arkansas passed an act, January 12, 1853, to incorporate the Cairo and Fulton Railroad Company, with power to construct, maintain, and operate a railroad from a point on the Mississippi River opposite the mouth of the

Ohio, in the State of Missouri, by way of Little Rock, to the Texas boundary line, near Fulton, in Arkansas, with one or more branches to the western boundary line of that State, with the view of entering the northeastern and the northwestern portions of Texas, and there connecting with projected railroads in that State, from the Bay of Galveston, running up the valleys of the Brazos and Trinity Rivers, and with power to construct branches to any other point or points within the State of Arkansas. The capital stock of the company was fixed at $1,500,000, to be increased from time to time to any sum not exceeding the entire amount expended on account of said road.

The act contained the following sections:

"Sec. 10. Said corporation shall have power to unite their road with the southern end of the Missouri road, at some suitable point on the line which divides these two States, and its southern end with any road coming in from Texas, at such point on the boundary line which divides that State and Arkansas that may be deemed most eligible, and to make any contract or agreement with any other railroad company in reference to their business that may best insure the early construction of said road and its successful management, and also to make joint stock with any other railroad company in this or any other State, and to form one board of directors for the management of their affairs. If it should be found necessary to facilitate the early construction of their said road, the contract or agreement of the respective boards shall form a part of their respective charters, whenever the same may be entered into and recorded with their charters.

"Sec. 11. That the capital stock and dividends of said company shall be forever exempt from taxation; the road, fixtures, and appurtenances shall be exempt from taxation until after it pays an interest of not less than ten per cent. per annum.

"Sec. 13. This act shall be deemed a public act, and shall be favorably construed for all the purposes therein expressed, and declared in all courts and places whatsoever, and shall be in force from and after its passage: *Provided*, That all the rights, privileges, immunities and franchises contained in the

charter granted at this session of the legislature of this State to 'The Mississippi Valley Railroad Company,' and not restricting or inconsistent with this act, are hereby extended to and shall form a part of this incorporation as fully as if the same was inserted herein."

The reference to the charter of the Mississippi Valley Railroad Company need not be further considered, as it does not seem to be material in the present controversy. *Railway Co.* v. *Loftin*, 98 U. S. 559.

At the time of the passing of the act incorporating the Cairo and Fulton Railroad Company the Constitution of Arkansas contained no restriction upon the power of the legislature to grant such an exemption from taxation as the charter contains. But the Constitution of the State, which took effect April 1, 1868, and was in force until October, 1874, contained the following provisions:

"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." Article 5, section 48.

"The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Article 1, section 18.

"The property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals." Article 5, section 48.

On July 23, 1868, an act was passed by the General Assembly of the State of Arkansas "to provide for a general system of railroad incorporation," in which is the following:

"SEC. 43. Any railroad company now chartered under existing laws, or which may hereafter become incorporated under this law, shall have power and authority to purchase and hold any connecting railroad and operate the same, or to consolidate their companies and make one company, under the name of one or both or any other name; but when such purchase is made or consolidation is effected the said company shall have and be entitled to all the benefits, rights, franchises, lands and

tenements, and property of every description, belonging to said road or roads so sold or consolidated, and shall be liable to all the pains and penalties imposed by their respective charters."

On January 1, 1874, the main line of the Cairo and Fulton Railroad Company was completed and was in actual operation; but the branches authorized by the charter were not completed until after the consolidation between that company and the St. Louis and Iron Mountain Railroad Company, a corporation of Missouri, which took effect on May 4, 1874, and resulted in the formation of the St. Louis, Iron Mountain and Southern Railway Company, the complainant and plaintiff in error in this suit.

This consolidation was effected by means of certain proceedings and an agreement between the parties, the parts of which, pertinent to the present controversy, are as follows:

The board of directors of the Cairo and Fulton Railroad Company, on May 4, 1874, adopted these resolutions, viz.:

"*Resolved*, That this company will enter into an agreement with the St. Louis and Iron Mountain Railroad Company for uniting and consolidating this company with the said St. Louis and Iron Mountain Railroad Company, and for making joint stock of the two companies and forming one board of directors for the management of the affairs of said companies, on the basis jointly recommended by the committees on consolidation, and embraced in the agreement executed by the said St. Louis and Iron Mountain Company, and now here submitted for execution on the part of this company.

"*Resolved further*, That the president of this company be, and he is hereby, authorized and directed to execute the agreement submitted, to be, however, subject to the approval and confirmation of the stockholders of this company, called to be holden on Monday, the 4th day of May inst., or any other day thereafter, and when approved that the president cause the same to be carried into effect, and call in the certificates of stock in this company outstanding, and exchange them for stock in the new company according to the terms of the agreement."

The agreement of consolidation referred to was approved and adopted by the stockholders of the company on the same day. It purports to be an agreement entered into April 13, 1874, between the St. Louis and Iron Mountain Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, party of the first part, and the Cairo and Fulton Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Arkansas, party of the second part. It recites that—

"Whereas the party of the first part owns and operates a line of railroad extending from the city of St. Louis southward to the boundary line between the States of Missouri and Arkansas, where it intersects the railroad of the party of the second part; it also owns and operates a line of railroad running from Bismarck to Belmont, and also owns and operates a line of railroad running from Poplar Bluff eastward to the Mississippi River, at a point opposite the mouth of the Ohio River, and a branch railroad from Mineral Point to Potosi, all in the State of Missouri. And the party of the second part owns and operates a line of railroad extending from the boundary line between the States of Missouri and Arkansas, where it forms a junction with the line of railroad of the party of the first part, through the cities of Little Rock and Fulton, to the town of Texarkana, upon the boundary line between the States of Arkansas and Texas, and the said railroads form continuous and connecting lines of railroad with each other so connected as to admit the passage of burden and passenger cars over each continuously without change, break, or interruption.

"And whereas the said parties are authorized by the laws of the several States aforesaid to consolidate their capital stock, franchises and property together, and become one corporation; and it is believed that such consolidation will be beneficial to the stockholders of each of said corporations and to the public,

"Now, therefore, this agreement witnesseth that the said parties of the first and second parts hereto, by their respective boards of directors, duly convened, have agreed, and do hereby

agree, to merge and consolidate the capital stock, franchises, and property of the said two corporations, so that the same shall become the capital stock, franchises, and property of one corporation; and for that purpose do hereby make and prescribe the following terms and conditions of such merger and consolidation, and the mode of carrying the same into effect."

It then provides that the name of the new corporation shall be "St. Louis, Iron Mountain and Southern Railway Company;" prescribes the number of the directors and officers, and the names of those who "shall be the first directors of the new corporation;" fixes the amount of the capital stock of the corporation at $26,500,000, divided into shares of $100 each, and provides that—

"Every stockholder in each of the corporations, parties hereto of the first and second parts, shall receive, in place of stock held by him in said corporations, stock in the new corporation as follows, to wit, for each share of stock held in the St. Louis and Iron Mountain Railroad Company, he shall receive one share of stock in the 'St. Louis, Iron Mountain and Southern Railway Company;' and for each share of stock held in the Cairo and Fulton Railroad Company, he shall receive sixty-hundredths of one share in the St. Louis, Iron Mountain and Southern Railway Company."

The sixth article of the agreement is as follows:

"Sec. 1. Upon the making and perfecting of this agreement and act of consolidation, and upon the adoption and ratification thereof by two-thirds of the votes of all the stockholders of the respective corporations parties hereto, and upon the filing of the same, or a copy thereof, in the manner prescribed by law, the parties hereto shall be deemed and taken to be one corporation by the name provided in this agreement, and shall possess within the several States into and through which its railroad, or any part thereof, or its branches or leased lines, may run, all the rights, privileges, and franchises of each of the said corporations so consolidated.

"Sec. 2. Upon the consummation of said act of consolidation, as provided by law, all and singular the rights, privileges, and franchises of each of said corporations parties hereto, and

all other property, real, personal, and mixed, and all debts due on whatever account, as well stock subscriptions as all other things in action belonging to each and every of said corporations, parties hereto, shall be taken and deemed to be transferred to and vested in the 'St. Louis, Iron Mountain and Southern Railway Company,' as such new corporation, without further act or deed, and all property, all rights of way, and all and every other interest shall be as effectually the property of this new corporation, without further conveyance or assurance, as they were of the former corporations parties hereto; and all rights of creditors, and all liens upon the property created by either of the said corporations, shall be preserved unimpaired, notwithstanding said merger and consolidation, and all debts, liabilities, obligations, and duties, of either of said corporations parties hereto, shall thenceforth attach to the said new corporation and be enforced against it to the same extent and in the same manner as if said debts, liabilities, obligations, and duties had been incurred or contracted by it.

"And the board of directors of said company shall have full power and authority to borrow such sums of money, and in such form, as they may deem proper, to pay off the present debts and liabilities so assumed by the corporation hereby created, and to meet other exigencies of the company, and to secure the payment thereof by a mortgage or mortgages on the property and franchises of said company or any part thereof.

"The by-laws which may be adopted by concurrent resolution of stockholders' meetings of said companies, parties hereto, shall be the by-laws of said consolidated company, subject to repeal or amendment as therein or by law provided."

The consolidated company, organized under this agreement, claims that it is entitled, under the provisions of the charter of the Cairo and Fulton Railroad Company, to the exemption from taxation contained in the eleventh section of that act. It accordingly filed its bill in equity in the Chancery Court of Pulaski County to restrain the defendants, the defendants in error, who were the railroad commissioners of the State, from proceeding to assess for taxation, under the provisions of "An Act to revise and amend the revenue laws of Arkansas," ap-

proved March 31, 1883, the railroad of the company in the State of Arkansas, alleging that "its road was completed on the 5th day of December, 1873; that it does not now, and never had, paid an interest of ten per cent. per annum, nor has any dividend ever been realized or declared on its capital stock."

A decree dismissing the bill was rendered on final hearing in the Chancery Court, on two grounds—that the complainant company was not entitled to the benefit of the exemption contained in the eleventh section of the charter of the Cairo and Fulton Railroad Company, and that, if it were otherwise, the exemption would not apply, for the reason that the court found upon the testimony that the earnings of the road in Arkansas had been, and were for the year 1882, more than ten per cent. on the cost of its construction and equipment. On appeal to the Supreme Court of Arkansas, this decree was affirmed on the single ground that the complainant company was not entitled to the benefit of the exemption from taxation claimed by it. In reference to the other question the court said: "What we have already said renders it unnecessary to go into this question. In the very nature of things it is impossible to do more than guess at it. It appears by the plaintiff's own proofs that the officers cannot tell, save by an approximation, what the actual earnings of this part of the road are." To reverse this decree the present writ of error is prosecuted.

The main point urged in argument in support of the claim of the plaintiff in error to the exemption from taxation is, that the consolidation of the Cairo and Fulton Railroad Company with the St. Louis and Iron Mountain Railroad Company was the exercise of a right, on the part of the former, plainly and expressly conferred by the tenth section of its charter, and not in anywise inconsistent with the continued force of the exemption contained in the eleventh section, which referred as well to the company when it had become a constituent of a consolidated company under the previous section, as to the same company in its original form and organization; so that the terms of the exemption, which, it is not denied, is a valid

contract protected against subsequent legislation by the Constitution of the United States, apply to the plaintiff in error, as a party directly embraced within its words and meaning.

To this view several objections are suggested.

It is said, in the first place, that the authority "to make joint stock with any other railroad company in this or any other State, and to form one board of directors for the management of their affairs," notwithstanding the punctuation which separates the sentence from the following words—"If it should be found necessary to facilitate the early construction of their said road"—yet, nevertheless, is necessarily connected with them in sense, and must be limited by them; that a consolidation, not effected until after the complete construction of the road, is not embraced within the authority conferred; and that, consequently, the consolidation, as made in 1874, must be referred to the forty-third section of the general act of 1868, and subject, therefore, to the restrictions of the State Constitution then in force, forbidding the exemption of corporate property from taxation.

But to this it is replied that the forty-third section of the act of 1868 does not authorize a consolidation of domestic with foreign corporations, and applies to the former alone; and that, consequently, the consolidation now the subject of discussion, if it cannot be referred to the tenth section of the charter of the Cairo and Fulton Railroad Company, must fail altogether.

It is next objected, however, that, admitting the consolidation to have been effected, as claimed by the plaintiff in error, under the provisions of that charter, the language of the exemption in the eleventh section cannot be applied to the consolidated company. The words of that section exempt forever from taxation the capital stock and dividends "of said company," which would seem to imply the continued separate existence of the company as originally organized, and not properly to refer to a capital stock representing a consolidated company, owning and operating a railroad in several States. But "the road, fixtures, and appurtenances" are declared to be exempt from taxation only "until after it," that is, the company, "pays an interest of not less than ten per cent. per

annum." And it is argued that this exemption necessarily implies that the property and operations of the company shall be preserved separate from those of any other, so that, at all times, it may be ascertained, by an inspection of accounts, whether the earnings equal an interest of ten per cent. per annum; a separation, it is insisted, which is inconsistent with a consolidation such as took place. And the case, it is said, is thus brought within the principle of the decision in *Railroad Company* v. *Maine*, 96 U. S. 499.

We do not find it necessary to pass upon either of these questions, however, as there is a distinct ground, which is conclusive of the controversy, upon which we prefer to rest our decision.

We assume that the consolidation as made was authorized by, and must be referred to, the tenth section of the charter of the Cairo and Fulton Railroad Company; but we do not admit, what is assumed as an inference from that, that the consolidation took effect, by relation, as of the date of that charter.

The consolidated company, the St. Louis, Iron Mountain and Southern Railway Company, the plaintiff in error, is not the identical corporation which was the Cairo and Fulton Railroad Company. The terms of the act and agreement of consolidation, which, by the express language of the charter of the Cairo and Fulton Railroad Company, became on adoption the charter of the consolidated company, created a new corporation.

It is spoken of as "the new company" in the resolutions of the board of directors, submitting the agreement to the stockholders for their approval, and directing the president to cause the same to be carried into effect, when approved, by calling in "the certificates of stock in this company outstanding," and exchanging them "for stock in the new company, according to the terms of the agreement." The two corporations agree to become one corporation, and a new name is given to the "new corporation." It is spoken of as such throughout the agreement of consolidation. The whole organization is changed and made new. The capital stock is made different from that

of either, or the aggregate of both, each share of stock held in the Cairo and Fulton Railroad Company being exchanged for sixty-hundredths of a share in the St. Louis, Iron Mountain and Southern Railway Company. The act of consolidation is declared to be a conveyance of all the rights, privileges and franchises of each of the constituent corporations, and of all other property, real, personal and mixed, and all debts due, on whatever account, belonging to each corporation, to the new corporation, without further act or deed.

This new corporation did not come into existence until May 4, 1874. It came into existence as a corporation of the State of Arkansas in pursuance of its Constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one (Art. 5, sec. 48 of the Constitution of 1868) which declared that "the property of corporations, now existing or hereafter created, shall forever be subject to taxation the same as property of individuals." This rendered it impossible in law for the consolidated corporation to receive by transfer from the Cairo and Fulton Railroad Company or otherwise the exemption sought to be enforced in this suit. The case is thus brought within the rule declared and applied in *Louisville, &c., Railroad Co.* v. *Palmes*, 109 U. S. 244.

It is not an answer to this conclusion to say that the act of consolidation, having been made in pursuance of the tenth section of the charter of the Cairo and Fulton Railroad Company, was the exercise by that company of a right secured to it by contract which no subsequent Constitution or law of the State of Arkansas could impair or defeat. For what was the contract? Construed in the most liberal spirit in favor of the company, it cannot be extended beyond a stipulation on the part of the State, that the Cairo and Fulton Railroad Company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation, with such powers and privileges as, at the time when the offer is accepted and acted upon it may be within the power of the State to confer, and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all the powers and privileges originally conferred in the char-

ter of the Cairo and Fulton Railroad Company, including the exemption in question, would have vested in the new company. But, as it was not accepted and acted upon until a change in the organic law of the State forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that when the original company entered into the consolidation it did so in full view of the existing law, and with the intention of forming a new corporation, such as the Constitution and laws of the State at that time permitted. That, at least, we must hold to be the legal effect of the transaction. In that view, the language used by this court at the present term in the case of the *Memphis and Little Rock Railroad Co. (as reorganized)* v. *Berry et al.*, 112 U. S. 609, is strictly applicable and is now re-affirmed.

The conclusion is unavoidable, that the exemption from taxation declared in the eleventh section of the charter of the Cairo and Fulton Railroad Company did not pass by the act of consolidation to the St. Louis, Iron Mountain and Southern Railway Company.

The judgment of the Supreme Court of Arkansas is therefore

Affirmed.

MORGAN & Another *v.* UNITED STATES.

UNITED STATES *v.* MANHATTAN SAVINGS INSTITUTION.

VON HOFFMAN & Another *v.* UNITED STATES.

UNITED STATES *v.* MANHATTAN SAVINGS INSTITUTION.

APPEALS FROM THE COURT OF CLAIMS.

Argued January 12, 1885.—Decided March 2, 1885.

The ruling in *Texas* v. *White*, 7 Wall. 700, that the legislature of Texas, while the State was owner of the bonds there in suit, could limit their negotiability by an act of legislation, with notice of which all subsequent pur-

Statement of Facts.

chasers were charged, although the bonds on their face were payable to bearer, overruled.

The ruling in that case, that negotiable government securities, redeemable at the pleasure of the government after a specified day, but in which no date is fixed for final payment, cease to be negotiable as overdue after the day when they first become redeemable, limited to cases where the purchaser acquires title with notice of the defect, or under circumstances discrediting the instrument, such as would affect the title of negotiable demand paper purchased after an unreasonable length of time from the date of the issue.

The distinction between redeemability and payability commented on in that case embraces and defines the five-twenty bonds in suit in this case.

Holders of government bonds must be presumed to have knowledge of the laws, by authority of which they were created and put in circulation, and of all lawful acts done by government officers under those laws.

The obligations of the United States under the five-twenty bonds, consols of 1865, are governed by the law merchant regulating negotiable securities, modified only, if at all, by the laws authorizing their issue.

The five-twenty consols of 1865 on their face were "Redeemable at the pleasure of the United States after the 1st day of July, 1870, and payable on the first day of July, 1885." In conformity with provisions of law, notice was duly given, as to the bonds of this class in suit in these actions, that in three months after the date of such notice the interest on the bonds would cease. *Held*, That the exercise of the right of redemption made the bonds payable on demand, without interest, after the maturity of the call, until the date for absolute payment.

Ordinary negotiable paper payable on demand, is not due without demand until after the lapse of a reasonable time in which to make demand.

What is reasonable time in which to demand payment of negotiable paper payable on demand, depends upon the circumstances of the case and the situation of the parties.

A holder of a called five-twenty consol could without prejudice, except loss of interest, wait without demand, for the whole period, at the expiration of which the bond was unconditionally payable.

In stamping upon these bonds the faculty of passing from hand to hand as money, and in conferring upon the Secretary of the Treasury the power to receive them in payment, in the great exchange of bonds by which the annual interest on the public debt was reduced, it was intended to leave with the called bonds the character of unquestioned negotiability, and to protect *bona fide* purchasers for value, in the due course of trade, without actual notice of a defect in the obligation or title.

These four cases involved claims against the United States for the payment of certain bonds of the United States, known as "five-twenty bonds," consols of 1865, issued in pursuance of the authority conferred upon the Secretary of the Treasury by the act of Congress approved March 3, 1865, entitled "An Act

to provide ways and means for the support of the government." Twenty bonds of the denomination of $1,000 each and sixteen of $500 each were embraced in the suits. The controversy related to the title only, all of them being claimed by the Manhattan Savings Institution, and ten of each denomination by J. S. Morgan & Co., and the others, being ten of $1,000 each and six of $500 each, by L. Von Hoffman & Co. The bonds having been called in for redemption were presented at the Treasury for that purpose by the holders respectively, J. S. Morgan & Co. and L. Von Hoffman & Co., but payment was refused by the United States on account of the adverse claim of the Manhattan Savings Institution, and the claims of the several parties to the proceeds were transmitted for adjudication to the Court of Claims by the Secretary of the Treasury, March 12, 1880, pursuant to section 1063 Revised Statutes. Judgments were rendered by that court in favor of the Manhattan Savings Institution, and against the other claimants respectively. 18 C. Cl. 386. The several appeals brought up all the cases as they stood in the Court of Claims, the United States appealing from the judgment in favor of the Manhattan Savings Institution, the other parties from the judgments dismissing their respective petitions. The controversy was wholly between the claimants, the United States being merely in the position of a stakeholder, not denying its liability to pay to the true owners of the bonds.

The act of Congress, in pursuance of which the bonds in question were issued, being "An Act to provide ways and means for the support of the government," approved March 3, 1865, 13 Stat. 468, ch. 77, provided:

"That the Secretary of the Treasury be, and he is hereby, authorized to borrow from time to time, on the credit of the United States, in addition to the amounts heretofore authorized, any sums not exceeding in the aggregate six hundred millions of dollars, and to issue therefor bonds or treasury notes of the United States, in such form as he may prescribe; and so much thereof as may be issued in bonds shall be of denominations not less than fifty dollars, and may be made payable at any period not more than forty years from date of issue, or may be

made redeemable, at the pleasure of the government, at or after any period not less than five years nor more than forty years from date, or may be made redeemable and payable as aforesaid, as may be expressed upon their face," &c.

The bonds issued under this act were called the consolidated debt or consols of 1865, because, in addition to the loan of $600,000,000 authorized by it, the Secretary of the Treasury was empowered to permit the conversion, into any description of bonds authorized by it, of any treasury notes or other obligations, bearing interest, issued under any act of Congress.

The bonds themselves, differing only in numbers and denomination, were in the following form:

"165,120.] [165.120.

"[Consolidated debt. Issued under act of Congress approved March 3, 1865. Redeemable after five and payable twenty years from date.]

"1,000.] [1,000.

"It is hereby certified that the United States of America are indebted unto the bearer in the sum of one thousand dollars, redeemable at the pleasure of the United States after the 1st day of July, 1870, and payable on the 1st day of July, 1885, with interest from the 1st day of July, 1865, inclusive, at six per cent. per annum, payable on the first day of January and July in each year, on the presentation of the proper coupon hereunto annexed. This debt is authorized by act of Congress approved March 3, 1865.

"Washington, July 1, 1865. "J. LOWERY,

"*For Register of the Treasury.*

"Six months' interest due July 1, 1885, payable with this bond.

"(Thirteen coupons attached from and including coupon for interest due January 1, 1879, to and including coupon for interest due January 1, 1885.)"

They were accordingly known as five-twenty bonds, being redeemable after five years, but not payable until twenty years after July 1, 1865.

Statement of Facts.

The act of July 14, 1870, "to authorize the refunding of the national debt," 16 Stat. 272, authorized the issue of three classes of bonds, according as they bore interest at the rates of 5 per cent., 4½ per cent. and 4 per cent. per annum, amounting in the aggregate to $1,500,000,000, which the Secretary of the Treasury was, by the second section of the act, authorized to sell and dispose of, at not less than their par value in coin, and "to apply the proceeds thereof to the redemption of any of the bonds of the United States outstanding, and known as five-twenty bonds, at their par value," or, the act continues, "he may exchange the same for such five-twenty bonds, par for par."

By the fourth section of this act it was provided:

"That the Secretary of the Treasury is hereby authorized, with any coin of the Treasury of the United States which he may lawfully apply to such purpose, or which may be derived from the sale of any of the bonds, the issue of which is provided for in this act, to pay at par and cancel any six per cent. bonds of the United States of the kind known as five-twenty bonds which have become, or shall hereafter become, redeemable by the terms of their issue. But the particular bonds so to be paid and cancelled shall in all cases be indicated and specified by class, date, and number, in the order of their numbers and issue, beginning with the first numbered and issued, in public notice to be given by the Secretary of the Treasury, and in three months after the date of such public notice, the interest on the bonds so selected and advertised to be paid shall cease."

By an act passed January 20, 1871, 16 Stat. 399, the foregoing act was amended so as to authorize the issue of five hundred millions of five per cent. bonds instead of two hundred millions, as limited by the act of July 14, 1870, but not so as to permit an increase of the aggregate of bonds of all classes thereby authorized.

During the period from July, 1874, to January, 1879, the Secretary of the Treasury made various contracts, in writing, for the negotiation of five, four-and-a-half, and four per cent. bonds issued under the refunding act of 1870, in Europe and

this country, with associations of bankers and banking institutions in London and New York, which became known as syndicates.

The claimants, J. S. Morgan & Co., were members of such a syndicate, between which and the Secretary of the Treasury a contract was entered into on the 21st of January, 1879. The members of that syndicate were Messrs. August Belmont & Co., of New York, on behalf of Messrs. N. M. Rothschild & Sons, of London, England, and associates, and themselves; Messrs. Drexel, Morgan & Co., of New York, on behalf of Messrs. J. S. Morgan & Co., of London, and themselves; Messrs. J. & W. Seligman & Co., of New York, on behalf of Messrs. Seligman Brothers, of London, and themselves; and Messrs. Morton, Bliss & Co., of New York, on behalf of Messrs. Morton, Rose & Co., of London, and themselves. The subscription was for $10,000,000 of four per cent. bonds of that date, and five millions additional each month until June 30, 1879, when the contract terminated, the proceeds to be applied to the refunding of the public debt, the Secretary of the Treasury agreeing, on receiving each subscription under the contract for not less than $5,000,000, to issue a call for the redemption of United States six per centum five-twenty bonds equal to or exceeding said sum. The syndicate agreed to pay to the Treasury at Washington within the running of such call the amount of four per cent. bonds subscribed for, at par and accrued interest to the date of subscription, in United States gold coin, United States matured coin coupons, coin certificates of deposit issued under the act of March 3, 1863, or United States six per centum five-twenty bonds called for redemption not later than the date of the subscription to which the payment was to apply. It was also agreed that the United States should maintain an agency at London for the purpose of making deliveries of the bonds subscribed for to the parties as they should desire, and the agent appointed for that purpose was authorized by the Secretary of the Treasury to receive the stipulated payment therefor, including the five-twenty bonds offered in exchange.

On October 27, 1878, the Manhattan Savings Institution, a

savings bank in New York, was the owner in possession of the thirty-six United States five-twenty coupon bonds which are the subject of these suits, sixteen for $500 each and twenty for $1,000 each; and on that day, the building in which was its banking-house was entered by burglars, and these bonds, among others, amounting in all to about $2,500,000, were stolen from the safe, without any negligence or want of proper care in their safe-keeping on the part of the officers and servants of the institution.

On July 30, 1878, the Secretary of the Treasury issued a call for the redemption of $5,000,000 of five-twenty bonds, designated by numbers, in which it was stated as follows:

"By virtue of the authority given by the act of Congress approved July 14, 1870, entitled 'An Act to authorize the refunding of the national debt,' I hereby give notice that the principal and accrued interest of the bonds herein below designated, known as 'five-twenty bonds,' of the act of March 3, 1865, will be paid at the Treasury of the United States, in the city of Washington, on and after the thirtieth day of October, 1878, and that the interest on said bonds will cease on that day."

Successive notices of other like calls were issued thereafter from time to time, according to which the dates on which the interest would cease on the bonds designated were from October 30, 1878, to and including March 18, 1879, which calls embraced all the bonds involved in these suits.

The twenty bonds claimed by J. S. Morgan & Co., and the sixteen claimed by L. Von Hoffman & Co., were bought by them, respectively, at different times, during the year 1879, in London, from well-known and responsible parties, the latter purchasing from R. Raphael & Sons, bankers of high respectability in London, dealing largely in United States government securities; but all the bonds when bought, as well by R. Raphael & Sons as by the claimants, had been called for redemption by the Secretary of the Treasury, and designated in one of the notices to that effect, and the call in each case had matured, and the bonds were bought by them, respectively, with knowledge in each case of that fact; but they bought them, in

the due course of their business as bankers, and paid the full market price for them, to wit, par and accrued interest, in good faith, without suspecting, or having any reason whatever to suspect, that the bonds, or any of them, had been stolen by or from any person, or that there was any defect in the titles of the persons from whom the purchases were made, or that the numbers of any of the bonds had been changed, or that the numbers of any of the bonds were not the original and genuine numbers as issued by the Treasury Department of the United States. In point of fact great publicity was given through the newspapers to the fact of the robbery, and some kind of a circular was issued by the Manhattan Savings Institution in regard to it, but it did not appear what its terms were, nor where, nor to whom it was sent. It was also shown that the serial numbers of four of the bonds purchased by J. S. Morgan & Co., and five of those purchased by L. Von Hoffman & Co., had been, in fact, subsequently to the robbery, wrongfully altered, but when, where, or by whom could not be ascertained, and there was nothing in the appearance of the altered bonds, or the numbers when purchased, calculated to excite the suspicion or notice of a prudent and careful man, the alterations having been so skilfully effected that they were only discoverable with the aid of a magnifying glass.

The twenty bonds claimed by J. S. Morgan & Co., were purchased by them for the purpose of making payment to the United States for four per cent. bonds, subscribed for, under the contract entered into with them and their associates, by the Secretary of the Treasury on January 21, 1879, for the negotiation of four per cent. bonds, and to avoid the transmission of gold to settle their accounts with the Treasury Department. They were delivered by the claimants at different times, soon after their purchase, to the officer in charge of the agency of the United States for the refunding of the national debt in London, who received them in payment for four per cent. bonds of the United States, then delivered by him to the claimants, and were by him transmitted to the Treasury Department at Washington for redemption. The Secretary of the Treasury, in consequence of notice of the adverse claim of the

Manhattan Savings Institution, having withheld payment of these bonds, the claimants, J. S. Morgan & Co., in a letter to the Secretary of September 1, 1879, stated the grounds of their claim as follows:

"We would submit that this course is in entire contradiction to the practice of the department hitherto, and in violation of the agreement upon the face of the bonds to pay them to bearer.

"The government has hitherto always paid its bearer obligations, as every other State, company, or individual does, to any innocent holders who had paid full value for them. This we have done for all these bonds, having purchased them in the regular way of business in the market, and even paying a small premium for them to avoid the transmission of gold to settle our accounts with the Treasury in America.

"They had no fixed maturity; they were arbitrarily drawn by the government for payment at the present time; they carried no notice on their face that they were not payable in accordance with their tenor, and the only penalty for not presenting them was the cessation of interest. The analogy drawn from the equities attaching to an overdue note, as carrying notice on the face of non-payment, has consequently no bearing on the case. These bonds are scattered all over Europe, and the notice that they are due frequently does not reach the holder for months, and sometimes years. We buy them in the regular course of our business, nor could we do otherwise.

"If the government were to decide not to pay bonds to bearer of which the ownership is disputed, except after decision of courts, they would do what neither they nor any other government has ever done before. It would prevent dealing in their securities, be a distinct injury to their negotiability, and a loss to the public credit."

The sixteen bonds claimed by L. Von Hoffman & Co. were transmitted by them directly to the Treasury Department at Washington for redemption. It was from letters from the department, written in answer to their letters of transmittal, that they received first the information that the bonds had been stolen, and some of them altered, and learned of the claim

of the Manhattan Savings Institution, as owners, to await the decision of which the bonds were retained by the Secretary in the custody of the Treasury Department.

In addition to the foregoing facts, found by the Court of Claims, it also found, that "during the period of the refunding transactions under the act of July 14, 1870, many five-twenty bonds of every call were not sent in promptly for redemption, but were held, in this country and Europe, through want of information, or otherwise, until long after the maturity of the call," and that "during the period of the refunding transactions of the government under the act of July 14, 1870, large numbers of the European holders of the five-twenty bonds of the act of March 3, 1865, called for redemption, from want of facility for sending their bonds to the United States, or to avoid the risk and expense of transmission, or various other reasons, were obliged to and did sell and dispose of their bonds, in the market, in London, to money-changers, bankers, and merchants, as the only means of obtaining the money for them. Many millions of the said called bonds were thus sold and disposed of in the London market, and dealt in by money dealers during that period, long after the maturity of the various calls;" and also that, "according to the custom and practice in London, the said called bonds of the United States were commonly dealt in by buying and selling after the time fixed for their redemption, in the same way and just as freely as the bonds not called for redemption."

Mr. Assistant Attorney-General Maury, on behalf of the United States, stated that they had no interest in the result of the suit; that their attitude was like that of the complainant in a bill of interpleader.

Mr. J. Hubley Ashton for Morgan and another, and Von Hoffman and another.

Mr. Howard C. Cady (*Mr. Waldo Hutchins* was with him) for Manhattan Savings Institution.—These bonds are a contract, and are to be taken with reference to the intent of the

parties, under the law. The government wanted to borrow a large sum, and they devised these bonds as the basis of the required loans. There could be no misunderstanding on the part of any holder that each of the bonds would become payable when the government, in the mode and at the time to be indicated, as prescribed by law, should express its will. It was not necessary to specify more on the face of the instrument than just what is there, to the end purposed. An instrument is to be taken with reference to the law governing it. This was the understanding of the public at large, for in those days bonds of this character were presented almost universally, and of this the court will take judicial notice. Again, this was the understanding of the parties, else why invariably make no claim for interest after those days? And look at the expressions of J. S. Morgan & Co. in the letter dated September 1, 1879: "Much to our surprise, payment has been withheld by the Treasury Department" of these bonds. Again, these bonds became due on the days fixed in the call, or these claimants would not all have been at the doors of the Treasury asking for principal and interest on or about the respective days when they presented these bonds. Still, again, why the notice in the call and in the law that on those days the interest on those bonds so selected and advertised for payment should cease? But we are not left to reasoning alone. Upon the cases decided heretofore by this court the questions presented in these cases are settled. *Texas* v. *White*, 7 Wall. 700, was a case where United States coupon bonds issued to Texas in 1851 were transferred to White while the government of that State was in rebellion, after the 31st of December, 1864. The bonds were dated January 1, 1851, payable by their terms to bearer, and redeemable after the 31st day of December, 1864; and each of them stated that it was "*transferable on delivery.*" The court held: "Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors. The bonds in question were dated January 1, 1851, and were redeemable after the 31st of December, 1864. In strictness, they were not payable on the day when they became redeemable; but the known usage of the United States to pay all

bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law, and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable and in respect to which no such distinction has now been made. Now, all the bonds in controversy had become redeemable before the date of the contract with White." An attempt has been made to ward off the decisive effect of this authority by reason of what was said in connection with the phrase, "except where a distinction between redeemability and payability is made by law and shown on the face of the bonds." By analyzing this we shall see what it does not mean. Certainly it does not mean that in the absence of a distinction made by law and shown, the rule laid down does not apply. What led to the phraseology will better appear, perhaps, by referring to a paragraph on page 703 of the reports, where it is stated: "In pursuance of an act of the legislature of Texas, the comptroller of public accounts of the State was authorized to go to Washington and to receive there the bonds; the statute making it his duty to deposit them, when received, in the Treasury of the State of Texas, to be disposed of '*as may be provided by law;*' and enacting further, that no bond issued as aforesaid, and payable to bearer, should be 'available in the hands of *any* holder until the same shall have been indorsed, *in the city of Austin, by the Governor of the State of Texas.*'" The italics are in the original. Applying this to the phrase in question, if such parts of this act as were intended to control the payment of these Texas bonds had been inserted on their face, it would have made such a distinction as to control the terms "redeemable after the 31st of December, 1864;" and the rule referred to in connection with the known usage of the United States to pay, &c., would not, by consequence, apply.

But look at this phrase, "distinction between redeemability and payability made by law," and see if by possibility it can apply to the bonds stolen from the Manhattan Savings Institution. Those bonds are, in terms, as will be recollected, redeemable at the pleasure of the United States after July 1, 1870,

and payable on the 1st day of July, 1885. Now, is there any law making a distinction between redeemable and payable, as used in these bonds? None. The act of '65 and the provision of section 3697 of the Revised Statutes as to the mode of working out the pleasure of the United States by calls, numbers, &c., and fixing the day and place of presentation for payment, voice the instrument; but the use of the word "redeemable" invariably contemplates payment in connection therewith. So that in the case of the bonds in these suits, there being no such distinction as that referred to, the Supreme Court of the United States says: "the known usage of the United States to pay all bonds as soon as the right of payment accrues requires the application of the rule that purchasers of bonds past due take nothing but the actual right and title of the vendors to bonds of the United States which have become redeemable." And this point was affirmed in *Texas* v. *Hardenberg*, 10 Wall. 91, where it is said: "We have reconsidered the grounds of that decision [*Texas* v. *White*], and are *still* satisfied with it." And reaffirmed in *Vermilye* v. *Adams Express*, 21 Wall. 138, 145, where it is said: "This point being, as the court considered, settled." Mr. Justice Miller, in delivering the opinion in the Vermilye case, says: "We have not quoted the *language* from the opinion in that case [*Texas* v. *White*] with any view of affirming it. It may admit of grave doubt whether such bonds [the Texas bonds], redeemable but not payable at a certain day, except at the option of the government, do become overdue, in the sense of being dishonored, if not paid or redeemed on that day." But, so far from repudiating the rule itself, as laid down in *Texas* v. *White*, the court unanimously held it applicable to redeemable United States bonds . . .

In proceeding with the consideration of the second proposition of our adversaries, the cases cited seem to be sufficient. They have dwelt much on the *lex mercatoria;* but these instruments are themselves only of recent introduction, and there can be no custom in regard to them which is a part of the law merchant. That is a graft upon the common law, which by its age and universality has become such a branch of the unwritten law that courts have knowledge

thereof. In the present cases, assuming any practice of trade in these bonds (truly or not), it is claimed to be only of recent growth; and if the wording of an instrument is such as to exclude any such practice, no such usage can affect the established rules settled by adjudication. *Crouch* v. *Credit Foncier*, 8 L. R. Q. B. 374, 386. In *Barnard* v. *Kellogg*, 10 Wall. 383, 391, Mr. Justice Davis says: "It is well settled that usage cannot be allowed to subvert settled rules of law." In *Goodman* v. *Roberts*, 10 L. R. Ex. 357, the Chief Justice of England says: "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail, if contrary to positive law. . . . To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle." In the case of *Vermilye* v. *Adams Express Co.*, above cited, Mr. Justice Miller said: "We cannot agree with counsel for the appellants that the simple fact that they were the obligations of the government takes them out of the rule which subjects the purchaser of over-due paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders." And further on he says: "Bankers, brokers, and others cannot, as was attempted in this case, establish by proof a usage or custom in dealing in such paper which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor establish a different law." In England, a decade or more ago, a disposition seemingly manifested itself to extend the rule laid down in the leading case of *Miller* v. *Race* by Lord Mansfield, 1 Burr, .452, and as stated in *Swift* v. *Tyson*, 16 Pet. 1, by Mr. Justice Story, in his quaint, incisive way, viz.: "There is no doubt a *bona fide* holder for value, without notice before due, may recover." "This is a doctrine laid up among the fundamentals of the law, and requires no authority," &c. See, also, *Goodman* v. *Simonds*, 20 How. 343. In many of the English cases, both old and modern, certain negotiable instruments are spoken of as passing like money, but in no one of these cases is that phraseology used with reference to the transfer of paper

after due. It cannot be wise to occupy time in reciting this class of cases in detail; many of them specifically maintain the doctrine that negotiable instruments past due are transferable, subject to equities. Notably, in *Miller* v. *Race*, above cited; *Gorgier* v. *Mieville*, 3 B. & C. 45; *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374. Finally, these different claimants adverse to the Savings Institution, are standing in the shoes of the robbers, so far as title goes. They derived under them matured obligations which the Supreme Court of the United States has repeatedly held to be governed by the laws of negotiable paper. And in *Commissioners* v. *Clark*, 94 U. S. 278, the rule is clearly recognized that where there is illegality shown in a previous holder the presumptions are against the title of his transferee; and in all the cases, if the obligation is past due when taken, it is subject to the right of former rightful owner.

Mr. Justice Matthews delivered the opinion of the court. He recited the facts, as above stated, and continued:

The conclusions of law reached by the Court of Claims, on which its judgments are founded, and which are stated and supported in its opinion by the late learned Chief Justice of that court, are comprised in these propositions: that if the claimants, J. S. Morgan & Co., and L. Von Hoffman & Co., or any other party from whom they are shown to have bought, had purchased the bonds in good faith for value before maturity, their title would prevail against that of the Manhattan Savings Institution, from whom they had been stolen; that, on the face of these bonds, the United States, while fixing a day of ultimate payment, after which they would certainly be overdue, had also reserved the right of redemption at an earlier time, at its pleasure after five years from date; that, as this option could be exercised only by the United States, and not by any officer or department of the government of its mere motion, it could be declared only by law, as was done in the act of Congress of July 14, 1870; that this right of redemption, being expressly reserved on the face of the bonds, was part of the contract, of which every holder had notice by its terms, and, as it could be exercised only by a public law, every holder sub-

sequent to the passage of such law must be held to know that it might be, and when it had been, exercised; that, consequently, the contract is to be read, after the passage of the act of July 14, 1870, as though the time of redemption fixed and declared in pursuance of it by the call of the Secretary of the Treasury had been originally written in it as the final day of payment; and that, by way of conclusion, it must therefore be adjudged that the claimants, against whom the judgment was passed, were purchasers of overdue paper, and not entitled to the protection of the rule which otherwise would shield their title against impeachment.

And it is insisted in argument that this conclusion is anticipated and required by the decisions of this court in the cases of *Texas* v. *White*, 7 Wall. 700, and *Vermilye* v. *Adams Express Co.*, 21 Wall. 138, 142. It becomes necessary, therefore, at the outset, to examine those cases with particularity.

The bonds in controversy in the first of them were United States coupon bonds, dated January 1, 1851, payable, by their terms, to the State of Texas or bearer, with interest at five per cent., payable semi-annually, and "redeemable after the 31st day of December, 1864." Each bond contained a statement on its face that the debt was authorized by act of Congress, and was "transferable on delivery," and to each were attached six-month coupons, extending to December 31, 1864. White and Chiles acquired their title on March 15, 1865.

The rules established in *Murray* v. *Lardner*, 2 Wall. 110, 118—"that the purchaser of coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller, and that the burden of proof in respect to notice and want of good faith is on the claimant of the bonds as against the purchaser"—were repeated and reaffirmed, but it was added: "These rules have never been applied to matured obligations. Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors. The bonds in question were dated January 1, 1851, and were redeemable after the 31st of December, 1864. In strictness, it is true they were not payable on the day when they became redeemable, but the known usage of the United States to pay all bonds as soon as

the right of payment accrues, except when a distinction between redeemability and payability is made by law and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made."

It appeared in the case that the bonds were the property of the State of Texas on January 11, 1862, having come into her possession and ownership—so the court declares—"through public acts of the general government and of the State, which gave notice to all the world of the transaction consummated by them;" and the State, while thus their owner, in 1851, passed a legislative act declaring that the bonds should be disposed of "as may be provided by law," but that no bond should be "available in the hands of any holder until the same shall have been indorsed, in the city of Austin, by the governor of the State of Texas." It was in reference to this legislation that the court said: "And we think it clear that if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation in disregard of such restrictions can convey no title to the alienee."

In 1862 the legislature of Texas repealed this act of 1851, but the repealing act was held to be void, as an act of a State government established in hostility to the Constitution of the United States, and "intended to aid rebellion by facilitating the transfer of these bonds."

It further appeared that all the bonds which had been put in circulation with the indorsement of the governor had been paid in coin on presentation at the Treasury Department; "while, on the contrary, applications for the payment of bonds without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied. As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought in fact, and, under the circumstances, could only have been bought, upon speculation. The purchasers took the risk

of a bad title, hoping, doubtless, that through the action of the national government, or of the government of Texas, it might be converted into a good one."

"On the whole case," the conclusion was, that the State of Texas was entitled, under the bill, filed for that purpose, to reclaim the bonds from persons who had acquired title under the circumstances stated.

The case came before the court again in another aspect, and is reported as *Texas* v. *Hardenberg*, 10 Wall. 68, in which the grounds of the former decision were reconsidered and declared to be satisfactory.

The same questions, as to part of the same issue of bonds, came again before the court in *Huntington* v. *Texas*, 16 Wall. 402, in which the two prior decisions were relied on, on behalf of the State of Texas, as conclusive. The court rehearsed the propositions decided in those cases, and referring to the question, in regard to the invalidity of the act of 1862, repealing the act of 1851, restricting the negotiability of the bonds, said: "But it must be observed that we have not held that such a repealing act was absolutely void, and that the title of the State could in no case be divested. On the contrary, it may be fairly inferred from what was said in *Texas* v. *White*, that if the bonds were issued and used for a lawful purpose, the title passed to the holder unaffected by any claim of the State. Title to the bonds issued to White and Chiles was held not to be divested out of the State, because of the unlawful purpose with which they were issued, and because the holders were, in our opinion, chargeable with notice of the invalidity of their issue and of their unlawful use."

Some of the same issue of bonds were in litigation before this court in *National Bank of Washington* v. *Texas*, 20 Wall. 72. In that case the title of the appellant was acquired after the 31st day of December, 1864, when they became redeemable, and they were not indorsed by the governor. It was alleged that they were issued and used in aid of the rebellion, but the fact, and all knowledge of it on the part of the appellant, was denied, and the court found the allegations were not sustained by the proof. The question "whether the bonds were overdue,

in the sense which puts a purchaser of dishonored negotiable paper on the inquiry as to defences which may be set up against it," was expressly waived, in the opinion of the court, because, it being "quite clear that they were transferable by delivery after due, the same as before," it followed that, "to invalidate the title so acquired by a purchaser, it is necessary to make out some defect in that title," which the court decided had not been done. In answer to the point that the title of the appellant failed for want of an indorsement by the governor, in support of which *Texas* v. *White* and *Texas* v. *Hardenberg* were cited, the court said:

"On an examination of the report of that case it will be seen that the court was of opinion that it was established, both in evidence and by the answers of some of the parties, that the bonds then in controversy were all of them issued to White and Chiles, and the illegal contract on which they were issued was in evidence, and the court was further of opinion that the parties had notice of these facts."

As to what was said in *Texas* v. *White*, that the indorsement of the governor was essential to the title of a purchaser, on the ground that the State could, by statute, while the bonds were in its possession, limit their negotiability by requiring as one of its conditions the indorsement of the governor, and that the repeal of that statute, in view of its supposed treasonable purpose, was void, it is remarked by the court: "All of this, however, was unnecessary to the decision of that case, and the soundness of the proposition may be doubted."

In the case of *Vermilye* v. *Adams Express Co.*, 21 Wall. 138, the controversy involved the title to treasury notes issued under the act of March 3, 1865, 13 Stat. 468, payable to the holder three years after date, and dated July 15, 1865, bearing interest payable semi-annually, for which coupons were attached, except for the interest of the last six months; that was to be paid with the principal when the notes were presented. On the back of each note was this statement:

"At maturity, convertible at the option of the holder into bonds, redeemable at the pleasure of the government at any time after five years, and payable twenty years from June 15th,

1868, with interest at six per cent. per annum payable semi-annually in coin."

The notes in question were stolen from the Express Company and subsequently bought by Vermilye & Co., bankers in New York; but, at the time of the purchase, more than three years had elapsed from the date of their issue, and the Secretary of the Treasury had given notice that they would be paid or converted into bonds at the option of the holder on presentation to the department, and that they had ceased to bear interest.

The judgment of the court sustaining the title of the Express Company was founded on the fact, that the purchase was made after the maturity of the obligations. Mr. Justice Miller, delivering the opinion of the court, said:

"They had the ordinary form of negotiable instruments, payable at a definite time, and that time had passed and they were unpaid. This was obvious on the face of the paper."

It was further shown that the fact that the holder had an option to convert them into other bonds did not change their character in this respect; and "that the simple fact that they were the obligations of the government" did not take them "out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders." And referring to the case of *Texas* v. *White*, 7 Wall. 700, where the bonds were redeemable after the 31st day of December, 1864, it was stated that the court had there held "that after that date they were to be considered as overdue paper, in regard to their negotiability, observing that in strictness it is true they were not payable on the day when they became redeemable, but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except when a distinction between redeemability and payability is made by law and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable and in respect to which no such distinction is made." Mr. Justice Miller then added: "We have not quoted the language from the opinion in that case with any view of affirming it. It may admit of grave

doubt whether such bonds, redeemable but not payable at a certain day, except at the option of the government, do become overdue in the sense of being dishonored if not paid or redeemed on that day. But the notes in the case before us have no such feature. They are absolutely payable at a certain time, and we think the case is authority for holding that such an obligation, overdue, ceases to be negotiable in the sense which frees the transaction from all inquiry into the rights of antecedent holders. This ground is sufficient of itself to justify the decree in favor of the Express Company."

It is apparent that the original decision of the court in reference to the Texas indemnity bonds in *Texas* v. *White*, 7 Wall. 700, has been questioned and limited in important particulars in the subsequent cases involving the same questions. The position there taken that the legislature of Texas, while the State was owner of the bonds, could limit their negotiability by an act of legislation, of which all subsequent purchasers were charged with notice, although the bonds on their face were payable to bearer, must be regarded as overruled. And the further position that negotiable government securities, redeemable at the pleasure of the government after a specified day, but in which no date is fixed for final payment, cease to be negotiable as overdue after the day named when they first become redeemable, must be regarded as limited to cases where the title of the purchaser is acquired with notice of the defect of title, or under circumstances which discredit the instrument, such as would affect the title to negotiable paper payable on demand, when purchased after an unreasonable length of time from the date of issue.

In addition to this, the opinion of Chief Justice Chase in the first case expressly excepts from the rule of the decision, out of the class of overdue obligations to which it is applied, those in which "a distinction between redeemability and payability is made by law and shown on the face of the bonds;" an exception which embraces and defines the very bonds now in question; for, by law, as well as by the terms of the obligation, they were redeemable at the pleasure of the government after the first day of July, 1870, but were payable, finally and un-

conditionally, on the first day of July, 1885; and the interest coupons attached covered the whole period until the date of ultimate payment. So that, in no aspect, can the cases cited be considered as governing the present, unless, indeed, the implications from them may be treated as furnishing the rule which determines that, at the time when the title of the claimants, in these cases adjudged invalid, accrued, these bonds were not overdue.

The single question in the present cases is whether the bonds in controversy were overdue at the time of the purchase by those who claim title against the Manhattan Savings Institution? That question must be resolved by a proper construction of the contract, contained in the bonds themselves, assuming it to be still open, so far as affected by previous judicial decisions; and, in construing the contract, it must be conceded that the obligations of the government in this form are governed by the rules of the law merchant regulating negotiable securities, modified only, if at all, by the laws of the United States, under the authority of which they were created and put in circulation; and of those laws, and of whatever was lawfully done or declared by the government or its officers in pursuance of them, it is also to be admitted, every holder must be conclusively presumed to have had knowledge.

On their face, these bonds are payable on the first day of July, 1885, and are redeemable at the pleasure of the United States after the first day of July, 1870. This was in conformity to the act of March 3, 1865, 13 Stat. 468, under which they were issued, which expressly authorized that they might be made payable at any period not more than forty years from date of issue, or that they might be made redeemable at the pleasure of the government at or after any period, not less than five nor more than forty years from date, or might be made both redeemable and payable, as aforesaid, as should be expressed upon their face. They were accordingly made both redeemable and payable as was expressed upon their face.

The pleasure of the government to redeem them, or any part of them, of course, could only be declared by law. Provision to this effect was made by the act of July 14, 1870, which pro-

vided the means for actual redemption by the sale or exchange of the bonds which it authorized the Secretary of the Treasury to issue, and required him to designate by public notice, from time to time, by class, date and number, in the order of their numbers and issue, the particular bonds to be redeemed by payment and cancellation. And the effect, as to all bonds called for redemption and not sooner presented, was declared to be that, "in three months after the date of such public notice, the interest on the bonds so selected and advertised shall cease."

It may be admitted, for the sake of the argument—although the proposition cannot be considered indisputable—that, after the maturity of a call for the redemption of designated bonds, the obligation of the government to pay them thereby became fixed and irrevocable, so that thereafter, on demand and refusal of payment, an action would accrue to the holder for the recovery of the principal and accrued interest, the Court of Claims having jurisdiction in such cases.

In that view, preserving the distinction expressly made by the law between redeemability and payability, the bond becomes, after the maturity of a call for redemption, payable at the option of the holder on demand, but without future interest, at any time prior to the day fixed for ultimate payment, when it becomes unconditionally due. The construction which, after the maturity of such a call, reads the contract as if the day when interest is to cease had been originally inserted as the day of ultimate payment, confounds and obliterates the express distinction made in the law itself between redeemability and payability, and rewrites the contract upon a different basis. The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date; but, consistently with the terms of the statutes and the obvious purposes in view in the original creation and issue of the securities in the form adopted, it cannot be, that the legal effect of such a call for the purpose of redemption is the same as if the bond had been originally framed as an obligation to pay absolutely on a day previously fixed.

The acts of Congress, under which these and similar bonds of the United States were authorized and issued, do not in terms attach to them the legal quality of negotiable securities; but they are such in form and fact, and obviously for the purpose of giving them the highest credit and the widest and most unfettered currency, by passing by delivery with a title unimpeachable in the hands of bona fide purchasers for value. In the form in which those now in question were issued, until a call for their redemption was advertised, they were not due upon their face until the day fixed for final payment; and the right reserved to the government, at its option, to anticipate the payment cannot be construed as affecting the contract injuriously to the holder, any further than the law declaring it, either expressly or by necessary implication, requires. That law gives to the holder three months after the date of the call for redemption within which to present his bonds for payment or exchange, with interest to the date of redemption; but the only penalty it prescribes, if the holder chooses to retain his original security, is the loss of future interest. In no other respect does it alter the original contract. It seeks to impose upon it no other disability, nor take from it any other immunity. It stands, therefore, upon its statutory basis, as a bond redeemable at the Treasury on demand without interest after the maturity of the call, payable according to its original terms, and not overdue, in the commercial sense, till after the day of unconditional payment. If the obligation had been originally written in that form—a promise to pay absolutely on the 1st day of July, 1885, with interest according to the coupons attached, but redeemable at the Treasury at and after July 1, 1870, interest to cease three months thereafter if not presented for redemption within that period—it would have expressed in advance the exact contract, as it became by the exercise of the reserved option of redemption; and in that form, it seems to us quite plain that it could not be considered an overdue obligation, in the sense in which that term is applied to ordinary commercial paper, until after the limit fixed for final payment had been passed.

The title of the purchaser of overdue negotiable paper, such

as a bill of exchange or a promissory note, stands on the same footing as if it had been dishonored by a refusal to accept or pay, and had been put under protest. When transferred after it has become due, although not reduced to the rank of an ordinary chose in action, the legal title to which cannot pass by assignment or delivery, it carries on its face the presumption which discredits it, and deprives it of that immunity which, while the time for payment was still running, was secured to it in favor of a bona fide purchaser for value without actual notice of any defect, either in the obligation or the title. This was put by Mr. Justice Buller, in *Brown* v. *Davies*, 3 T. R. 80, on the ground that to take an overdue note or bill was "out of the common course of dealing." Ordinarily a note or bill when due becomes *functus officio*, because it was made to be paid at maturity, and if it fails of its intended operation and effect, the presumption is that it is owing to some defect, which has furnished a sufficient reason to the party apparently chargeable for not having punctually performed his obligation. In the strong language of Lord Ellenborough in *Tinson* v. *Francis*, 1 Camp. 19, "after a bill or note is due it comes disgraced to the indorsee."

No such presumption, in our opinion, arises to affect the title of a holder of the bonds of the United States, such as those now in question, acquired by a bona fide purchaser for value prior to the date fixed in the bonds themselves for their ultimate payment; for, as we have already shown, the only change in the original effect of the contract by the exercise of the right of earlier redemption is to stop the obligation to pay future interest. And as against one choosing for any purpose of his own to retain his bond as a continuing security for the value it always represents, having impressed upon it by the law of its creation the faculty of passing from hand to hand as money, and therefore just as useful in the pursuits of trade and the exchanges of commerce and banking as so much money in the form of coin or bank notes, and more convenient because more portable, no such presumption can be entertained on the ground that its continued circulation is not in the due course of business, that it has fully performed all its intended functions,

and that it has been in any sense dishonored by a refusal on the part of the obligor to fulfil its obligation. On the contrary, supposing the purchaser bound to know, what in fact does not appear on its face, that the bond has been called for redemption under penalty of a stoppage of interest after three months, the very notice, which, it is said, discredits his title, is in fact an advertisement, not that the maker has any ground to refuse payment, but that the previous holder preferred to hold the security for the money rather than to accept the money which it represents.

As we have seen, the true effect to be given to the exercise of the right of redemption within the period of absolute payment is to make the bonds payable during that interval, on demand, but without interest, after three months from the maturity of the call. But the rule, as to ordinary negotiable paper, payable on demand, is that it is not due, without demand, until after the lapse of a reasonable time within which to make demand; and what the length of that reasonable time is, may vary according to the circumstances of particular cases, and must be governed very largely by the intentions of the parties, as manifested in the character of the paper itself, and the purposes for which it is known to have been created and put in circulation. It is said by Baron Parke, in *Brooks* v. *Mitchell*, 9 M. & W. 15, that "a promissory note, payable on demand, is intended to be a continuing security." And in *Losee* v. *Dunkin*, 7 Johns. 70, it is said: "The demand must be made in reasonable time, and that will depend upon the circumstances of the case and the situation of the parties." In reference to the bonds involved in this litigation, we have no hesitation in saying that, at the time the title of the purchasers was acquired, no unreasonable length of time had elapsed after the maturity of the call. On the contrary, we think any holder had a right, without prejudice, except as to loss of interest, to wait without demand for the whole period, at the expiration of which the bond was unconditionally payable.

The fact that interest was to cease to accrue three months after the date of call, had no tendency to discredit the bonds or affect the title of a bona fide purchaser for value in the due

course of trade. While it has been held that a note, the principal of which is payable by instalments, is overdue when the first instalment is overdue and unpaid, and is thereby subject to all equities between the original parties, *Vinton* v. *King*, 4 Allen, 562, yet, it is said by the Supreme Judicial Court of Massachusetts in *National Bank of North America* v. *Kirby*, 108 Mass. 497, 501, "We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security upon which it is due, as to subject the holder to the full extent of the security, to antecedent equities." "To hold otherwise," said this court in *Cromwell* v. *County of Sac*, 96 U. S. 51, 58, "would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually." And the doctrine was reaffirmed in *Railway Co.* v. *Sprague*, 103 U. S. 756. These were cases where non-payment of interest was in breach of the contract and constituted a default. It is much stronger, in its application here, where the obligation to pay interest ceases because that is the contract, to which the holder of the bond has consented and to which he submits, because he prefers to hold a security, although not bearing interest, rather than to surrender it at once.

But an adequate and complete view of the nature and function of the right of redemption reserved in these bonds, and of its intended effect upon the rights of the parties under the contract, cannot be had without considering it in its actual operation and execution. The clause which makes the bonds redeemable was not a casual provision occurring in a single obligation, but was an effective and significant instrument in a series of great financial transactions. The five-twenty bonds issued under the acts of March 3, 1865, 13 Stat. 668, and April 12, 1866, 14 Stat. 31, as we are informed by public official documents, amounted to $958,483,550, nearly a thousand millions of dollars.

On March 1, 1871, the nearest date prior to the commencement of operations under the refunding act of 1870, the following amounts of six per cent. 5-20 bonds were outstanding:

Five-twenties of 1862		$493,738,350
Five-twenties of March, 1864		3,102,600
Five-twenties of June, 1864		102,028,900
Act March 3, 1865.	Five-twenties of 1865	182,112,450
	Consols of 1865	264,619,700
	Consols of 1867	338,832,550
	Consols of 1868	39,663,750

"The National Loans of the United States," by Baily, Washington, 1882, p. 94.

Of these, large amounts were held abroad by investors in foreign countries, and had been dealt in by bankers in the principal money centres of the world. It was expected and desired by Congress that this should be so, as the Secretary of the Treasury had been expressly authorized by law to dispose of any of the bonds of the United States, "either in the United States or elsewhere." Act of March 3, 1865, § 2. And under the refunding act of July 14, 1870, as we have already seen, the Secretary of the Treasury established an agency in London for the purpose of delivering the bonds sold under that act, and receiving in exchange therefor the outstanding securities of the United States agreed to be received in payment therefor. The object of this great exchange was to reduce the annual interest on the public debt of the United States from six to the lower rates of five, four and a half, and four per cent. To have called in the redeemable debt and paid for it in gold coin, and to have obtained the gold coin for that purpose by sales of the new securities, would have been awkward, circuitous, and impracticable, involving the needless export and import of a mass of the gold coin distributed by the necessities of the world's commerce throughout its markets, the attempt to do which would have produced disturbances of market values, certain to have defeated it. Any transfer of specie, in large amounts, to meet balances occasioned by these operations, would have been almost as serious in its effects, and was, therefore, by every consideration of public and private interests, to be avoided. The difficult practical question was how to avoid it, how to substitute in the markets of the world one

loan for the other, by an exchange of securities, without any serious and disturbing movement of coin. Congress had placed it within the power of the Secretary of the Treasury to accomplish this by authorizing him to receive the five-twenty bonds, to be redeemed in exchange at par for the bonds to be issued at a lower rate of interest. This he was enabled to do by calling in the five-twenty bonds for redemption, by which they were made equal in value as money to par and interest then due, and by agreeing to treat and receive them as money in the exchange. This created a demand for the "called bonds" to be used for that purpose, and they were bought from the holders by bankers and agents of the syndicates who had contracted to place the new loans under the act of 1870. This transaction could only have been successfully effected upon the assumption that the call for redemption did not affect the negotiable quality of the bonds, nor impose upon them any disability, except the cessation of interest after the maturity of the call, nor deprive them of any other immunity which had previously belonged to them. On the contrary, it must have been within the contemplation of the Treasury Department, and of those with whom it was dealing, that the "called bonds," until finally absorbed by payments into the Treasury in exchange for new bonds, which constituted the fact of redemption, were equivalent, in all legal qualities, to money itself, or to those usual equivalents of money which circulate, without question, as such, like treasury notes payable on demand. And this view, we have already seen, the parties were authorized and justified in adopting by the language and purposes of the statutes under which the transactions were accomplished. By this means an enormous public debt was shifted and converted, so as largely to reduce the burden of its interest; the agents of the government were facilitated in the great work they had undertaken; the individual holders of the securities of the United States, scattered throughout the countries of Europe, received the money due them on the bonds for which they subscribed, at their own domicils; and this series of great financial operations was successfully accomplished without interference with the usual course of the business of

the world, without disturbing the fixed distribution of currency which commerce had apportioned to its appropriate markets, and without unsettling the value of property or labor either at home or abroad. These beneficial results were greatly facilitated, if not made feasible, by the unquestioned negotiability of the called bonds, which, when subjected to the right of redemption reserved by their terms, were thereafter considered and treated as the equivalent of money. This could not have been if the principles which protect *bona fide* purchasers for value, in the due course of trade, without actual notice of a defect in the obligation or title, had not been practically adopted. The practice, as found to have existed, was, in our opinion, well warranted by law.

This confidence was invited by the convenience of the government itself, and certainly promoted its interests and advanced its purposes. The practice it engendered, on the part of the public dealing in its securities, had been expressly sanctioned by formal recognition and approval by the Treasury Department long prior to the negotiation of the war loans, which commenced in 1862. In 1860 Attorney-General Black officially advised the Secretary of the Treasury, 9 Opinions, 413, that treasury notes, redeemable after one year from date, interest thereon to cease at the expiration thereafter of sixty days' notice of readiness to pay and redeem the same, were intended to be a continuing security, and to pass by delivery after the period of redemption equally as before, as money or bank notes not liable to any equities between the original or intermediate parties.

It was, by force of such a custom, declared by Lord Selborne "to be the legitimate, natural and intended consequence (unless there should be any law to prohibit it) of that representation and engagement which appears on the face of the scrip itself, when construed according to the obvious import of its terms," that in the case of *Goodwin* v. *Robarts*, first in the Exchequer Chamber, L. R. 10 Ex. 337, and afterwards in the House of Lords, 1 App. Cas. 476, an instrument, payable to bearer in the bonds of a foreign government, was held to be negotiable by delivery, on the ground that, "after those payments had been made and receipts for them signed, the scrip was as much a

symbol of money due and as capable of passing current upon the principle explained in the authorities, with respect to bank notes and exchequer bills, as the bonds themselves would have been if they had been actually delivered in exchange for it." 1 App. Cas. 497.

We are, therefore, of opinion that the title of J. S. Morgan & Co., and of L. Von Hoffman & Co., respectively, to the bonds claimed by them, ought to have prevailed against that set up by the Manhattan Savings Institution; and for error in not so holding,

The several judgments of the Court of Claims in these cases are reversed, and the causes are remanded to that court, with directions to render judgments in accordance with this opinion.

PROVIDENT INSTITUTION FOR SAVINGS *v.* MAYOR & ALDERMEN OF JERSEY CITY.

IN ERROR TO THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

Submitted January 9, 1885.—Decided March 2, 1885.

An act which makes water rents a charge upon lands in a municipality, with a lien prior to all encumbrances, in the same manner as taxes and assessments, gives them priority over mortgages on such lands made after the passage of the act, whether the water was introduced on the lot mortgaged before or after the giving of the mortgage.

An act thus making water rates a charge upon lands in a municipality prior to the lien of all encumbrances, does no violation to that portion of the 14th Amendment to the Constitution which declares that no State shall deprive any person of property without due process of law.

It is not necessary in this case to decide as to the effect of such act upon mortgages existing at the time of its enactment; but even in that case the court is not prepared to say that it would be repugnant to the Constitution.

This was a bill in equity filed in the Court of Chancery of New Jersey by the appellant, to foreclose two mortgages given to it on a certain lot in Jersey City by Michael Nugent and wife, and another person, the first being dated January

19, 1863, to secure the payment of $900 and interest, and the second, dated July 13, 1869, to secure the payment of $700 and interest. The complainants also claimed, under the stipulations of the mortgages, the amount of certain premiums of insurance paid by them. By an amended bill, making the Mayor and Aldermen of Jersey City a defendant, the complainants alleged that the city claimed a lien on the mortgaged premises prior to that of the mortgages, for certain water rents, for supplying water to the occupants of the same for the year 1871, and from thence to the time of filing the bill: that this claim was made under an act of the legislature of New Jersey, passed May 25, 1852, authorizing the construction of water works for the city, and the act revising the city charter, passed in March, 1871. The bill denied the validity of this claim, and averred that those portions of the said acts which purported to give such a priority had the effect to deprive the complainant of its property in the mortgaged premises without due process of law, and were in violation of the Constitution of the United States as well as that of New Jersey; and the complainant prayed for a foreclosure and sale of the lot in question as against all the defendants.

There was annexed to the bill and referred to therein a copy of the "Tariff of Rates and Regulations for the Use of Passaic Water; also Rules regulating the plumbing of houses and the tapping of Sewers;" being the regulations adopted by the Board of Public Works of Jersey City under the statutes referred to in the bill. The water rates specified in this tariff (except for measured water) were graduated in a table according to the width and number of stories of the houses, and were made payable annually in advance on the 1st of May in each year, with a penalty of three per cent. if not paid by the 1st of July, and interest at the rate of seven per cent. from the 20th of December. The regulations extend to many details, making provision for extra charges to certain kinds of establishments, providing penalties for misuse of the water, &c., &c.

The city authorities answered the bill, admitting that they had assessed upon the mortgaged premises the water rents set forth in the bill, and alleged that they were imposed in pur-

suance of an act of the legislature of New Jersey, entitled "An Act to authorize the construction of works for the supplying of Jersey City and places adjacent with pure and wholesome water," approved March 25, 1852, and an act entitled "An Act to reorganize the local government of Jersey City," passed March 31, 1871, and the supplements thereto; and insisted that said water rents were a lien prior to the mortgages, and prayed that it might be so adjudged.

The other defendants made no defence.

The complainant and the city authorities entered into a stipulation to the effect, that the allegations of fact in the bill were to be taken as true; that, in the assessment of the water rents, interest and penalties, all the requirements of the act "to reorganize the local government of Jersey City," passed March 31, 1871, and the supplements thereto, had been complied with, and that the only question to be determined by the court was, whether upon the facts stated in the bill, the water rents and interest and penalties mentioned therein, or any of them, were liens upon the property in question prior to the lien of the complainant's mortgages.

The chancellor decided that the giving of a priority of lien to the water rents over the mortgages, pursuant to the statutes, did not deprive the complainant of its property without due process of law, and did not otherwise conflict with the Constitution of the United States, or with that of New Jersey; and he decreed that, for the purpose of raising the money due on the mortgages, the mortgaged premises must be sold subject to such lien, and that the bill must be dismissed as against the city. This decree, being appealed from, was affirmed by the New Jersey Court of Errors and Appeals, and the record was remanded to the Court of Chancery. The case is brought here by writ of error, and the errors assigned resolve themselves into the single error of sustaining the priority of the lien of the water rents over that of the complainant's mortgages.

Mr. Charles H. Hartshorne for appellant.—Water rents are not assessments for special benefits. This has been often adjudicated in New Jersey. *State* v. *Jersey City*, 12 Vroom (41 N.

J. Law), 471, 476; *State, Vreeland* v. *Jersey City*, 14 Vroom (43 N. J. Law), 135. Nor are they taxes. This point has also been adjudicated by all the superior courts of New Jersey. All such rents levied since September, 1875, are, so far as levied as taxes, void under the amendment to the State Constitution adopted at that time. *State, Vreeland* v. *Jersey City*, cited above; *State, Culver* v. *Jersey City*, 16 Vroom (45 N. J. Law), 256; *Provident Institution* v. *Allen*, 10 Stewart (37 N. J. Eq.) 36. Water rents, where water has been used on the premises, can only be maintained against the owner upon the ground of an implied contract by the owner to pay for what he uses. The statute gives a special lien to the city to secure the price of the water so sold. This was settled by *Vreeland* v. *O'Neil*, 9 Stewart (36 N. J. Eq.) 399; *S. C.* on appeal under the name of *Vreeland* v. *Jersey City*, 10 Stewart (37 N. J. Eq.) 574. This adjudication, being upon a question of local law, between citizens of the same State, will be accepted as conclusive by this court. The city, thus claiming under a contract only, and not under the power of taxation, stands on the same ground as an individual or private corporation, and is entitled to no greater privileges than those to which an individual would be entitled who claimed under a similar contract with similar statutory privileges. This consideration distinguishes this case from *Murray* v. *Hoboken Land and Improvement Co.*, 18 How. 272. The statutes deprive the mortgagee of its property without due process of law, where the property is insufficient to satisfy both liens, in so far as they purport to postpone the lien of the mortgages to the lien of subsequently assessed water rents. They also deprive the mortgagee of its property without due process of law, in so far as they authorize the summary proceedings for collecting taxes to be used against mortgagees to collect water rents. The mortgagee's right of priority is a right of property. The destruction of that priority is a deprivation of property. Among the incidents of property are the right of a mortgagee to bring ejectment (the mortgage being overdue before the assessments of water rents), *Osborne* v. *Tunis*, 1 Dutcher, 633; the right to enjoin or sue for waste, *Jackson* v. *Farrell*, 10 Vroom 329; and the right to foreclosure and sale, *Parker* v. *Child*, 10 C. E.

Green (25 N. J. Eq.) 41. It will not be denied that these rights are property, protected by the constitutional guaranty. It is equally clear that the right of priority over subsequent liens is an element of that right of property. The following cases are cited to show the kind of rights which courts treat as protected by this constitutional provision: *Lavin* v. *Emigrant Industrial Savings Bank*, 18 Blatchford, 1; *Ridlon* v. *Cressey*, 65 Maine, 128; *Burke* v. *Mechanics' Saving Bank*, 12 R. I. 513; *Sinking Fund Commissioners* v. *Bank of Kentucky*, 1 Met. (Ky.) 174; *Trustees of Public Schools* v. *Trenton*, 3 Stewart (30 N. J. Eq.) 677. The statutes further deprive the mortgagee of its property without due process of law, in so far as they allow the machinery for collecting taxes to be applied against the mortgagee to the collection of water rents. It is an attempt to exercise the taxing power to collect a private debt, which cannot be done. Cooley, Constitutional Limitation, 362, 463, 490; *Ames* v. *Port Huron Co.*, 11 Mich. 147; *Glover* v. *Powell*, 2 Stockton, 211; *Rockwell* v. *Nearing*, 35 N. Y. 302; *Parsons* v. *Russell*, 11 Mich. 114; *Coit* v. *Waples*, 1 Minn. 134; *Johnson* v. *Van Horn*, 16 Vroom (45 N. J. Law), 136. No assent, by the mortgagee, to the provisions of the act of 1852, postponing the mortgage lien to the lien of the subsequently assessed water rents, can be inferred from the acceptance of the mortgages, after the passage of that act. There has been no waiver, on the part of the mortgagee, of the priority of his lien. He had no freedom of choice. It is not denied that property is held subject to laws enacted in accordance with the Constitution; but in the language of the court in *Lavin* v. *Industrial Savings Bank*, 18 Blatchford, 1, cited above: "The State cannot take away from property the essential character of property. It cannot, under cover of the exercise of the police power, make property already acquired, or thereafter to be acquired, subject to be taken away from its owner without due process of law. It could not pass a general law providing, as to all after-acquired property, that it should be held on the tenure or condition, that, in certain prescribed cases, it should be taken from the owner and given to another, without any form of judicial proceeding, without notice or an opportunity

to be heard. A construction which would allow this would, in effect, allow a State, by law, to abrogate, within its limits, the institution of property altogether; and although it is true, that that which a man has not cannot be taken from him, yet the necessary implication of the amendment is that '*property*,' as generally understood, with all its necessary incidents, shall forever be preserved, within the limits of the Union."

Mr. William Brinkerhoff for defendants in error.

Mr. Justice Bradley delivered the opinion of the court. He recited the facts as above stated and continued:

The ground on which the decision below was placed was, that the laws having made the water rents a charge on the land, with a lien prior to all other encumbrances, in the same manner as taxes and assessments, the complainant took its mortgages subject to this condition, whether the water was introduced on to the lot mortgaged before or after the giving of the mortgage; and hence the complainant had no ground of complaint that its property was taken without due process of law.

We do not well see how this position can be successfully controverted. The origin of the city's right to priority of lien goes back to the year 1852, when the legislature passed the act "to authorize the construction of works for supplying Jersey City and places adjacent with pure and wholesome water." That act laid the foundation of a scheme for leading water from the Passaic River to Jersey City, a distance of seven or eight miles, across the channel of the Hackensack River, and over the ridges of Lodi and Bergen. Power was given to a board of commissioners appointed for that purpose, to take the necessary lands by right of eminent domain, to borrow money on the credit of the city, to lay pipes through the streets, and to make all necessary and proper regulations for the distribution and use of the water, and "from time to time to fix the price for the use thereof and the times of payment;" and by section 14 of the act, it was declared "that the owner and occupier of any house, tenement or lot, shall be liable for the

payment of the price or rent fixed by the commissioners for the use of the water by such occupier, and such price or rent so fixed shall be a lien upon said house, tenement or lot, in the same way and manner as other taxes assessed on real estate in Jersey City are liens, and shall be collected in like manner." This law has been substantially continued to the present time. On a revision of the city charter in 1871, the Board of Water Commissioners was replaced by a Board of Public Works, invested with the same powers and duties; and by section 81 of the revised charter, after providing for the fixing of the water rents as in the act of 1852, it was, amongst other things, further enacted as follows:

"And the said board shall from time to time determine and give public notice of the times and places at which the said water rents shall be due and payable, and the penalties to be charged for delaying the payments beyond the times so fixed; and the said water rents shall, until paid, be liens upon the property charged therewith; and the said board may, at any time after the twentieth day of December, in each year, deliver to the Board of Finance and Taxation of Jersey City, an account certified under the hand of the president, of all such water rents and penalties for delinquency as are then due and remain unpaid; and the said Board of Finance and Taxation shall, upon receiving said certified account, cause said lands to be sold for the payment of said water rents and penalties, and the interest thereon, from said twentieth day of December, at the rate of twelve per centum per annum, and also costs, charges and expenses of advertising and sale in the same manner as said Board of Finance and Taxation may be authorized by law to sell lands in said city for the payment of taxes thereon, and said proceedings and the effect thereof, shall be the same in all things as if the said lands were sold for taxes."

By section 151 of the same charter it was enacted (substantially as the law had been since the year 1839) "that all taxes and assessments which shall hereafter be assessed or made upon any lands, tenements or real estate situate in said city, shall be and remain a lien thereon from the time of the confirmation thereof until paid, notwithstanding any devise,

descent, alienation, mortgage or other encumbrance thereof; and that if the full amount of any such tax or assessment shall not be paid and satisfied within the time limited and appointed for the payment thereof, it shall and may be lawful for the Board of Finance and Taxation to cause such lands, tenements or real estate to be sold at public auction, for the shortest term for which any person will agree to take the same and pay such tax or assessment, or the balance thereof remaining unpaid, with the interest thereon, and all costs, charges and expenses." And it was provided: "That all moneys paid for the redemption of said lands, tenements or real estate as aforesaid, together with such taxes and assessments as shall be paid by a mortgagee or other creditor, under a judgment, attachment or mechanic's lien, shall be a lien on said lands, tenements or real estate for the amount so paid, with interest at the rate of seven per centum per annum; and such lien shall have precedence of all other liens on said lands, tenements or real estate; and on foreclosure of any mortgage by such mortgagee redeeming, shall be directed to be made out of said lands, and on sale of said lands under any such judgment, attachment or mechanic's lien, shall be paid out of the proceeds of sale."

These extracts are sufficient to show the general character of the system by which the water rates are imposed and enforced in Jersey City. Much discussion has taken place in the State courts as to the precise nature of these water rents: whether they are a tax, or an assessment for benefits, or a stipulated compensation resting on implied contract. If regarded as taxes, they have been supposed to conflict with a clause in the State Constitution, adopted in 1875, declaring that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." If regarded as special assessments for benefits arising from a public improvement, they have been held as open to the objection of not being laid on correct principles—being distributed according to the dimensions and measurements of the several lots and buildings, and not according to the benefits received. These objections were held to be conclusive in the case of water rents imposed on unoccupied lots, and lots not supplied with water; both the

act of 1852, and the revised charter of 1871, having provided for the imposition of water rents on property of that kind, situated on streets in which water pipes were laid. The Supreme Court of the State has decided that under the State Constitution this imposition cannot be sustained; because, for the reasons just stated, it is neither valid as a tax, nor as a special assessment for benefits. *State* v. *Jersey City*, 14 Vroom, 135. But the rents imposed for water actually used, as in the case now under consideration, have been held valid on the ground of an implied contract to pay them. The terms being public and well known, persons applying for a supply of water are supposed to assent to them. *Vreeland* v. *O'Neil*, 36 N. J. Eq. (9 Stewart), 399; *S. C.* on appeal, 37 N. J. Eq. (10 Stewart), 574.

As the case comes before us, it is not necessary to enter into the discussions that have occupied the State courts. We are to assume that the rents, penalties and interest claimed by the city have been imposed and incurred in conformity with the laws and Constitution of the State; and that, by virtue of said laws and Constitution, they are a lien on the property mortgaged to the complainant prior to that of its mortgages; and, this being so, we are only concerned to inquire whether those laws thus interpreted are, or are not, repugnant to the Constitution of the United States. The only clause of the Constitution supposed to be violated is that portion of the 14th Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law. It is contended that the mortgages created in 1863 and 1869, there being then no valid water rents due on the lot mortgaged, invested the complainant with the first lien thereon, and that that lien is property; and that the statutes of 1852 and 1871, by giving a superior lien to water rents afterwards accrued, deprive it of its said property without due process of law.

What may be the effect of those statutes, in this regard, upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but

long subsequent thereto. When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction. The cases referred to by counsel to the contrary, holding void a consent exacted contrary to the Constitution, have no bearing upon the present cases.

It may, however, be contended (though it is not by the counsel in this case), that the revised charter of 1871 introduced new impositions, additional to the mere water rent, such as authorizing a penalty to be imposed by the Board of Public Works, if payment of the water rents were not made by a certain time, and a heavy rate of interest on rents continuing in arrear. But we look upon these provisions as merely intended to enforce prompt payment, and as incidental regulations appropriate to the subject. The law which authorized these coercive measures gave to mortgagees and judgment creditors the right to pay the rents and to have the benefit of the lien thereof; so that it was in their own power to protect themselves from any such penalties and accumulations of interest. They are analogous to the costs incurred in the foreclosure of the first mortgage, which have the same priority as the mortgage itself over subsequent encumbrances.

In what we have now said in relation to the anterior existence of the law of 1852 as a ground on which this case may be resolved, we do not mean to be understood as holding that the law would not also be valid as against mortgages created prior to its passage. Even if the water rents in question cannot be regarded as taxes, nor as special assessments for benefits arising from a public improvement, it is still by no means clear that the giving to them a priority of lien over all other encumbrances upon the property served with the water would be re-

pugnant to the Constitution of the United States. The law which gives to the last maritime liens priority over earlier liens in point of time, is based on principles of acknowledged justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens even over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States. Nor are we prepared to say that an act giving preference to municipal water rents over such liens would be obnoxious to that charge. The providing a sufficient water supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited. It may be difficult to show any substantial distinction in this regard between such a charge and that of a tax strictly so called. But as the present case does not call for an opinion on this point, it is properly reserved for consideration when it necessarily arises.

The decree of the Court of Errors and Appeals of New Jersey is *Affirmed.*

UNION PACIFIC RAILWAY COMPANY *v.* CHEYENNE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WYOMING.

Argued November 18, 19, 1884.—Decided March 2, 1885.

The act of the legislature of Wyoming, passed December 13, 1879, which required the State auditor to furnish to the Territorial Board of Equalization a list for assessment and taxation of the road bed, superstructure, and other enumerated property of every railroad and telegraph company in the Territory, when any portion of the property of such company was situated in

Statement of Facts.

more than one county; and which required the board to value and assess the property of the corporation for each mile of its road or line, and to certify to the county clerks of the counties in which the property was situated the assessment per mile, specifying the number of miles and amount in each of the counties; and which required the county commissioners to decide and adjust the number of miles and amounts within each precinct, township, or school district within their respective counties, and cause such amounts to be entered on the lists of taxable property returned by the assessors; withdrew the duty of assessing fractional parts of such railroad, and the property of such companies, from all local assessors in the Territory, including its incorporated cities.

A statute which provides a general scheme for assessing and taxing the property of railroad and telegraph companies as a whole, and for distributing it ratably among the different counties, and their several precincts, townships and districts, according to the number of miles of line in each, repeals, as to such property, a power conferred upon the authorities of a city to make provisions for the assessment of the taxes which they were authorized by other provisions of the city charter to assess and collect.

A bill which charges that the collection of an illegal tax would involve the plaintiff in a multiplicity of suits as to the title of lots being laid out and sold, which would prevent their sale, and which would cloud the title to all his real estate, states a case for relief in equity.

The bill in this case was filed by the Union Pacific Railway Company against the city of Cheyenne and its marshal, Ryan, to enjoin the collection of certain city taxes for the year 1880, which the railway company alleged were unlawfully assessed against it. The bill was demurred to by the defendants, and the District Court for the First Judicial District of Wyoming, in which the suit was brought, overruled the demurrer, and granted the injunction prayed for. The defendants adhered to their demurrer, and appealed to the Supreme Court of the Territory, and the decree of the District Court was reversed, and the bill ordered to be dismissed, and the case was brought here by appeal.

The main question raised by the bill was, whether the Union Pacific Railroad, which passes through the whole length of Wyoming Territory, and in its course passes through the city of Cheyenne, with its accompanying telegraph, appurtenances, and rolling stock, was liable to be assessed and valued for the purposes of taxation in Cheyenne by the city authorities, or only by the Territorial Board of Equalization, consisting of the

governor, treasurer and auditor of the Territory; and this question depended on the further question whether such assessment and valuation were governed by the city charter of the city, or by the act entitled "An Act in relation to the assessment of railroads and telegraph lines," passed December 13, 1879. The city charter, which was last revised on the subject of taxation by an amendment passed on the 26th of November, 1879 (only seventeen days prior to the railroad assessment act), gives to the city power "to levy and collect taxes for general revenue purposes, not exceeding six mills on the dollar in any one year on all real, personal and mixed property within the limits of said city, taxable under the laws of the Territory;" and it is provided that "the assessment, levy, and collection of all taxes shall be made as may be provided by ordinance." Authority is also given to the city to raise a further tax to pay interest on its bonds, and a tax for improvement of streets and alleys. The railroad assessment act, passed on the 13th of December, 1879, is a very carefully prepared statute, providing for a mode of assessing the value of railroad property, and distributing it amongst the counties and districts through which the railroad may run. Although general in its terms, it must have had particularly in view the Union Pacific Railroad, to which alone it would principally apply. This act is so important a factor in the decision of this case that the first section is quoted entire. The title has already been quoted. The first section is as follows:

"SECTION 1. The president, secretary, superintendent, or other principal accounting officers of any railroad or telegraph company having property in this Territory, at the time of the assessment of every railroad and telegraph company, whether incorporated by any law of this Territory or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation within the Territory, viz.: Road bed, superstructure, right of way, and all structures situated thereon, rolling stock, side track, telegraph lines, furniture and fixtures

and personal property belonging to such corporation. Such list shall contain, first, the number of miles of such railroad or telegraph line in the Territory of Wyoming, and the number of miles of the same in each organized county therein; second, and such return shall be made to the auditor of the Territory on or before the first day of July, annually. If the return aforesaid be not received by said auditor by the third day of July, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that purpose may address a written communication to the corporation, or to some officer of the corporation who has failed or refused to make the return aforesaid. As soon as practicable after the auditor has received said return, or procured the information required to be set forth in said return, a meeting of the Territorial Board of Equalization, consisting of the governor, territorial treasurer, and auditor, shall be held at the office of said auditor, and the said board shall then value and assess the property of said corporation for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of said road or line. In making up such valuation or assessment the said board shall examine and consider the return herein required to be made, or the information procured by the auditor in default of such return, together with such other reliable information relative thereto as they may be able to procure; said board shall not assess the value of any machine shop, or repair shop, or other buildings not situated on said right of way or grounds or other real estate of any corporation or company within this Territory; but it shall be the duty of the assessor of the county or district in which said machine or repair shops, or other buildings, or grounds, or other real estate is situated, to assess the same and make return thereof in the manner now provided for the assessment and return of real estate. On or before the first Monday of August, or so soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assessment, the territorial auditor shall certify to the county clerks of the several counties in which property of the

aforesaid corporation, or any part thereof, may be situated, the assessment per mile so made on the property of such corporation specifying the number of miles and amount in each of such counties; the county commissioners shall thereupon divide and adjust the number of miles and the amounts falling within each precinct, township, or school district in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several assessors. The auditor shall certify whether a return was made to him by such corporation, or proper officer thereof, or whether the information required in and by such returns was procured by himself; and in case the return was not made as required by this act, or, being made, was not sworn to, it shall be the duty of the county commissioners to add any amount not exceeding ten per cent. to the valuation thus brought before them."

The fifth section of the act declares as follows:

"All acts and parts of acts providing for the assessment of the property of railroad and telegraph companies, and the equalization of assessments, inconsistent with the provisions of this act, are hereby repealed, so far as they provide for the assessment and equalization of the property of said railroad and telegraph companies."

Mr. John F. Dillon, *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson* for appellant.

Mr. Francis Miller for appellees.—The railway assessment act did not expressly repeal the statutes which conferred on the city undoubted power to regulate its own taxation, independently of general laws. The repealing clause of the act refers only to the Territorial and county revenue laws. The acts of November 26 and December 13, being *in pari materia*, and passed at the same session, must be construed as parts of one act. *Smith* v. *People*, 47 N. Y. 330; *Commonwealth* v. *Griffin*, 105 Mass. 185. Thus construing them, the intent of the legislature is found to be that both are in force, the later railway act operating upon assessments for county and Territorial taxation. Courts prefer to construe such acts so as to give force

to both, rather than imply a repeal of the earlier. Our construction gives effect to both. Similar statutes in other States have been so construed. *Dunleith & Dubuque Bridge Co.* v. *Dubuque*, 32 Iowa, 427; *Davenport* v. *Mississippi & Missouri Railroad Co.*, 16 Iowa, 363; *Ottawa* v. *County*, 12 Ill. 339; *Mayor* v. *Mutual Bank*, 20 N. Y. 387. Statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities. Dillon, Municipal Corporations, § 54; *State* v. *Brainin*, 3 Zabr. (24 N. J. L.) 484, 529; *Baldwin* v. *Murphy*, 82 Ill. 485; *Bowen* v. *Lease*, 5 Hill, 221; *Louisville* v. *McKean*, 18 B. Mon. 9. The act of November 26 is a special act, being part of the charter of a municipality to persons residing in a particular locality. It is legislation having effect only at one place in the whole Territory. It gives the municipality certain powers which are to be exercised only within its limited boundaries for its own local purposes. On the other hand, the act of December 13, regulates a certain matter which is made general throughout the Territory. It is a good illustration of a general statute. But there is no repugnance between the two acts. The terms "township" and "school district" do not comprise cities. In Wyoming the word "precinct" has no significance as applied to taxation. It is found in a Nebraska statute from which the Wyoming legislation was borrowed. In Nebraska it had a significance, as there are in that State what are known as "taxing precincts." In Nebraska there was added to the enumeration the words "incorporated city or village," which shows that a "city" was not a "precinct." It has been so held in Nebraska. *State* v. *Dodge County*, 10 Neb. 20. Wyoming, in adopting legislation of Nebraska which had received judicial construction there, adopted the construction. *Drenman* v. *People*, 10 Mich. 169; *State* v. *Macon County*, 41 Missouri, 453; *Draper* v. *Emerson*, 22 Wis. 147. The counsel also discussed other questions which became unimportant in the view which the court took of the case.

Mr. Justice Bradley delivered the opinion of the court. He recited the facts as above stated, and continued:

It requires only a casual reading of this act to discover its purpose and object. The difficulty of assessing the value of railroad property in separate parcels, located in distinct cities and townships, is almost insuperable. A railroad cannot be regarded as mere land, like farm land, or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation. A separate mile or two of its length is almost valueless by itself. And then its rolling stock has no particular locality except a constructive one in the place where the principal office of the railroad company is situated; and it would be manifestly unequal to give to that place the benefit of taxing the whole of it. The plan adopted by the statute avoids these difficulties. It places the power of assessing the value of the whole line (so far as it lies within the Territory), including the rolling stock, in the hands of the Board of Equalization; and after they have fixed such valuation, and ascertained what it amounts to per mile for the whole length within the Territory, such valuation per mile is certified by the territorial auditor to the clerks of the several counties through which the road passes, specifying the number of miles in each county, so as to give to each its pro rata share, and then the county commissioners divide and adjust the number of miles, and the amounts, falling within each taxing precinct, township, and school district, to be entered on their respective lists of taxable property.

It seems hardly to admit of a doubt that the object of this scheme was to withdraw the difficult task of assessing fractional parts of a railroad and its property from the hands of local assessors, who could hardly be expected to proceed upon any uniform plan, and each of whom would naturally favor his own particular district.

This being the evident purpose and object of the act, it is difficult to see why it should not apply to the city of Cheyenne as well as to every other portion of the Territory. But the counsel for the city raise several grounds of objection to this view, which it is necessary for us to consider.

They contend that the language of the city charter is very broad, authorizing the corporation to assess every kind of tax-

able property situated within the city bounds; and that this includes railroad property; and they insist that this law must stand until it can be shown to be repealed; that the railroad assessment law does not repeal it in express terms; and cannot be construed to repeal it by implication, because the city charter is a special law, intended for a particular locality, and will not be repealed by implication by any general law containing contrary provisions, unless the latter be expressed in such universal terms as necessarily to include every particular case; that such universal terms are not used in the law; but on the contrary, while other subordinate territorial divisions are included by name, corporate cities and municipalities are not mentioned nor alluded to. This is a summary of the defendants' argument. It is certainly plausible and entitled to careful consideration.

First: As to the relative character of the two statutes: is it true that the one is a special statute, and the other a general one, in the sense contended for? The city charter is special as it relates to a single district or municipality; but the railroad assessment act is quite as special as relating to a single subject of taxation. The one gives general powers of assessment and taxation to the city; but the other directs that railroad property shall be assessed and valued by the Board of Equalization in a particular way. Is not the last law even more special in character than the first? Suppose a law had been passed declaring that every horse in the Territory should be assessed for the purpose of taxation at the value of $200. Would not such a particular direction be binding on the city of Cheyenne as well as on the country districts? Do not the object and reason of the railroad assessment law apply to a city like Cheyenne, as well as to counties and townships? Ought not the policy of the State with regard to special objects of taxation to be extended to every portion of the State, unless some defect in the laws themselves prevents its being done.

Second: Is it true that the language of the railroad assessment act does not include cities in the fair construction of its terms? Does it not fairly include every territorial district or

division of Wyoming—cities as well as counties and townships? Note the following passage: "Said board shall not assess the value of any machine shop or repair shop, or other buildings not situated on said right of way or grounds, or other real estate of any corporation or company within this Territory; but it shall be the duty of the assessor of the county or district in which said machine or repair shops, or other buildings, or grounds, or other real estate is situated, to assess the same, and make return thereof in the manner now provided for the assessment and return of real estate." In using the words "county or district" in this clause, is not the latter word "district" used in its largest sense, to signify any subordinate territorial division whatever less than a county? It seems to us that the language used is intended to cover every case. In connection with this, read again the direction given to the county commissioners, after the territorial auditor has certified to them the assessment per mile made by the Board of Equalization: it is as follows: "The county commissioners shall thereupon divide and adjust the number of miles and the amounts falling within each precinct, township, or school district, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several assessors." Does not this enumeration of subordinate tax districts (for clearly tax districts are meant) embrace every kind of tax districts within the county? "Precinct" is a general word and not a technical one in Wyoming; and indicates any district marked out and defined. In the connection in which it stands it signifies a district inferior to a county, for it is used to denote a portion of a county; and superior to a township, for the enumeration evidently proceeds from the greater to the less,—"precinct township, school district." What tax districts are there in Wyoming inferior to a county, and superior to a township, if incorporated cities and towns are not such?

As before suggested, the railroad assessment law, considering its purpose and object, ought to be extended to every tax district in the Territory, if its language admits of such a construction. We think that it not only admits, but fairly requires, such a construction.

If, in addition to this, we take into consideration the fifth section of the act, which expressly repeals "all acts and parts of acts providing for the assessment of the property of railroad and telegraph companies, and the equalization of assessments, inconsistent with the provisions of this act, . . . so far as they provide for the assessment and equalization of the property of said railroad and telegraph companies," we cannot doubt that the act was intended to reach every case of taxation of railroads in the Territory, when situated in more than one county. Surely the charter of the city of Cheyenne is embraced in this description of acts, or parts of acts, to be repealed; for, according to the appellee's own contention, that charter does provide for the assessment of the property of railroad and telegraph companies; and there can be no doubt that the mode of making such assessment under said charter is entirely inconsistent with that prescribed by the act in question. We are of opinion, therefore, that the assessment complained of was illegal and unauthorized.

But it is contended that the complainant should have sought a remedy at law and not in equity.

It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: "To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the

tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity." This statement is in general accordance with the decisions of this court as well as of many State courts. *Dows* v. *Chicago*, 11 Wall. 108, 109; *Hanniwinkle* v. *Georgetown*, 15 Wall. 547, 549; *State Railroad Tax Cases*, 92 U. S. 575, 612, 613, and cases there cited. In *Cummings* v. *National Bank*, 101 U. S. 153, 156, where the bank filed a bill to prevent the collection of a tax wrongfully assessed by the State against the shares of its stockholders, and which the bank was required to pay, we held that the fiduciary character in which the bank stood to its stockholders entitled it to come into a court of equity for relief. In the same case, the fact that a like remedy by injunction was given to parties in the State court was regarded as entitled to much weight; and it was further held that where a rule or system of valuation was adopted by the State Board of Assessment, calculated to operate unequally, and to violate the Constitution of the State, and applicable to a large class of individuals, or corporations, equity might properly interfere to restrain the operation of such unconstitutional exercise of power. And in *Litchfield* v. *Webster County*, 101 U. S. 773, 779, we held that a court of equity might relieve against an excessive rate of interest on taxes in arrear, which was really in the nature of a penalty, and which the State could not fairly and equitably demand, having itself claimed title to the property taxed.

These authorities are sufficient to illustrate the rules by which courts of equity should be governed in assuming jurisdiction of suits brought to arrest the collection of illegal taxes. We think that the allegations of the bill in this case bring it fairly within the jurisdiction of the court. It shows that it would involve

the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold; would prevent their sale; and would cloud the title to all its real estate. We think that these results are sufficiently apparent, and render it unnecessary to look farther. The allegation of fraud has not been proven, and cannot, therefore, have any effect in the case. It is unnecessary to inquire into the sufficiency of other grounds for equitable relief which are alleged in the bill.

Another point raised by the defendants, not affecting the jurisdiction of the court but the propriety of its taking jurisdiction, is that the complainant ought to have paid the taxes which are conceded to be due to the city for the year 1880. As we understand the facts stated by the bill (which, of course, the demurrer admits to be true), the complainant did pay to the city all the taxes which would be due upon the assessment and valuation made by the Board of Equalization, including taxes due on outside property of the company in the city.

The decree of the Supreme Court of Wyoming must be reversed, and the cause remanded, with instructions to enter a decree in favor of the complainant in conformity with this opinion; and it is so ordered.

ERHARDT *v.* BOARO & Others.

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

Argued January 14, 1885.—Decided March 2, 1885.

A written notice of a claim to fifteen hundred feet on a mineral-bearing lode or vein in Colorado, signed by the discoverer thereof, and posted on a stake at the point of discovery, when made in good faith, and not as a speculative location, is a valid location on seven hundred and fifty feet on the course of the lode or vein in each direction from that point, and gives the right of possession to the discoverer until the other steps necessary for completing the title can be taken according to law.

The forcible eviction of the discoverer and locator of a mineral-bearing lode or vein from the lode or vein before the sinking of the shaft which the stat-

Statement of Facts.

utes of Colorado require as one of the acts to complete title, and the prevention of his re-entry by threats of violence, excuse him, as against the party keeping him out of possession, and so long as he is kept out of it, from complying with the requirements of the act in respect of a shaft.

Discovery and appropriation are recognized as sources of title to mining claims; and development by working as the condition of continued ownership, until a patent is obtained.

Whenever preliminary work is required to define and prescribe a located mineral claim, the law protects the first discoverer in the possession of the claim, until sufficient excavations and development can be made, so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal.

A mere posting of a notice that the poster has located thereon a mining claim, without discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, is a speculative proceeding, which initiates no right.

This was an action for the possession of a mining claim in Pioneer Mining District, in the county of Dolores and State of Colorado. The claim was designated by the plaintiff as "The Hawk Lode" mining claim, and by the defendants as "The Johnny Bull Lode" mining claim. The plaintiff was a citizen of New York, and the defendants were citizens of Colorado. The complaint was in the usual form in actions for mining claims under the practice in Colorado. It contained two counts. The first alleged in addition to the citizenship of the parties as stated, the possession by the plaintiff, on the 17th of June, 1880, of the claim, which was fully described, his right to its possession by virtue of its location pursuant to the laws of the United States and of the State, and the local rules and customs of miners in the district, and by virtue of priority of possession; the wrongful entry upon the premises by the defendants on the 30th of that month, their ousting the plaintiff therefrom, and unlawfully withholding the possession thereof from him to his damage of $50,000. The second count, in addition to the citizenship of the parties, the possession of the claim by the plaintiff, and the subsequent wrongful entry of the defendants and their ousting him, alleged that the defendants worked and mined in the claim, and dug out and removed from it large quantities of gold and silver-bearing ore of the value of $50,000, to the damage of the plaintiff in that amount. The plaintiff

therefore prayed judgment for the possession of the mining premises, and for damages of $100,000.

The answer of the defendants contained a specific denial of the several allegations of the complaint except that of the citizenship of the plaintiff, and as to that it averred their want of information and demanded proof. And it set up the discovery of the claim in controversy on the 30th of June, 1880, by the defendants Boaro and Hull, to which they gave the designation of "The Johnny Bull Lode;" and its definite location and record within ninety days thereafter, and their subsequent relocation of the claim, September 8, 1880, to avoid a conflict with an adjoining claim. They prayed, therefore, that they might be decreed its possession and ownership in accordance with their rights.

On the trial the plaintiff produced evidence tending to show that on the 17th of June, 1880, one Thomas Carroll, a citizen of the United States, whilst searching, on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral, discovered, on vacant unoccupied land of the public domain of the United States, in the Pioneer Mining District mentioned, the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities; that by an agreement between him and the plaintiff, pursuant to which the explorations were prosecuted, all lodes and veins discovered by him were to be located, one-fifth in his name and four-fifths in the name of the plaintiff; that on the day of his discovery Carroll designated the vein or lode as the "Hawk Lode," and posted at the point of discovery a plain sign, or notice in writing, as follows:

"HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein or deposit. Dated June 17, 1880.

"JOEL B. ERHARDT, $\frac{4}{5}$ths,
"THOMAS CARROLL, $\frac{1}{5}$th;"

that on the same day, at the point of his discovery, Carroll commenced excavating a discovery shaft and sunk the same

to the depth of about eighteen inches or two feet on the vein; that on the 30th of the month, in the temporary absence of himself and the plaintiff, the defendant Boaro, with knowledge of the rights and claims of the plaintiff and Carroll, entered upon and took possession of their excavation, removed and threw away or concealed the stake upon which their written notice was posted, and, at the point of Carroll's discovery of the vein or lode, erected a stake and posted thereon a discovery and location notice as follows:

"JOHNNY BULL LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing vein or lode, running six hundred feet northeast and nine hundred feet southwest, and 150 feet on each side of the same, with all its dips and spurs, angles and variations.

"June 30th, 1880. "ANTHONY BOARO.

"W. L. HULL."

The evidence also tended to show that Boaro and Hull entered upon the premises thus described about July 21, 1880, and remained thereafter continuously in possession; that threats of violence to the plaintiff and Carroll, if they should enter upon the premises or attempt to take possession of them, were communicated to Carroll as having been made by Boaro early in August following; that in consequence of such threats and the possession held by Boaro, Carroll was prevented from resuming work upon and completing the discovery shaft and from entering upon any other part of the lode or vein, and performing the acts of location required by law within the time limited. The evidence also tended to show that within ninety days from the discovery of the lode by Carroll, one French, on behalf of the plaintiff and Carroll, secretly caused the boundaries of the claim to be marked by six substantial posts so as to include the place of discovery and the premises in controversy, and filed in the office of the recorder of the county a location certificate setting forth the name of the lode, the date of the location, the names of the plaintiff and Carroll as locators, and the course of the lode or vein; and giving

such a description of the claim, with reference to natural objects and permanent landmarks, as would suffice to identify the same with reasonable certainty.

The evidence offered by the defendants tended to rebut that of the plaintiff, and to show that, on the 30th of June, 1880, when Boaro entered upon the ground in controversy, he found nothing on the surface to indicate a vein or lode, or that any excavation had been made, or stake erected, as alleged by the plaintiff, or that any portion of the ground claimed by the defendants had ever been previously located or claimed; that their discovery cut was commenced at a point thirty-five feet distant from the point described and claimed by Carroll as the point at which he had begun to sink the discovery shaft of the "Hawk Lode," and erected his stake and posted his notice, and that the top of the vein was at least four feet below the surface; that Carroll had abandoned all claim to the premises in controversy, and that his omission to perform the required location work was due to such abandonment, and not to any threats of the defendants, or of any of them, nor to the occupation of the ground by Boaro and Hull, or either of them; that neither the plaintiff nor Carroll ever demanded possession of or asserted any title to the premises until the working of the claim by the defendants had shown it to be valuable.

The evidence of the defendants also tended to show that they had commenced work upon the claim about July 21, 1880, and sank and excavated an open cut, striking the vein or lode at the depth of ten feet or more, and exposed therein a vein of rock in place bearing gold and silver; that no mineral nor any indications of a vein or lode were found until they reached the depth of seven or eight feet; and that subsequently and within the time limited by law, they marked the bounds of their claim on said lode, called by them the "Johnny Bull Lode," and recorded a location certificate, describing their claim by reference to natural objects and permanent landmarks, and complying in all respects with the requirements of the law.

The evidence being closed, the court was, among other things, requested to instruct the jury that from and after the date of the discovery by a citizen of the United States, upon

vacant unoccupied mineral lands, of the outcrop of a vein or body of mineral-bearing rock, the discoverer is entitled to the possession of the point at which he made his discovery, and of such a reasonable amount of adjacent ground as is necessary or incidental to the proper prosecution of the work of opening up or exposing the vein or body of mineral-bearing rock to the depth and within the time required by law, and that to such extent he is protected by law in his possession for the period of sixty days from the date of his discovery. But the court refused to give this instruction, and the plaintiff excepted to the refusal. The court charged the jury, among other things, that it was in evidence, and seemed to be conceded, that the notice on the stake put up by Carroll contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom, and "in this respect," said the court, "the notice was deficient, and under it the locators could not claim more than the very place in which it was planted. Elsewhere on the same lode or vein, if it extended beyond the point in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, could not be said to have any extent beyond what would be necessary for sinking a shaft;" and also, that to entitle the plaintiff to recover, "it should appear from the evidence that Boaro entered at the very place which had been taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted." To the giving of these instructions the plaintiff also excepted. The defendant obtained a verdict, and to review the judgment entered thereon the plaintiff brought the case here on writ of error.

Mr. Elihu Root for plaintiff in error.

Mr. C. S. Thomas and *Mr. T. M. Patterson* for defendants in error.

Opinion of the Court.

MR. JUSTICE FIELD, after stating the case in the above mentioned language, delivered the opinion of the court:

As seen by the statement of the case, the court below, in its charge, assumed that the notice on the stake, placed by Carroll at the point of his discovery, contained no specification or description of the ground claimed by the locators, because it did not designate the number of feet claimed on each side of that point, or in any direction from it. The court accordingly instructed the jury that the notice was deficient, and under it the locators could not claim any more than the very place in which the stake was planted, and that elsewhere on the same lode beyond the point of discovery any other citizen could make a valid location.

In this instruction we think the court erred. The statute allows the discoverer of a lode or vein to locate a claim thereon to the extent of fifteen hundred feet. The written notice posted on the stake at the point of discovery of the lode or vein in controversy, designated by the locators as "Hawk Lode," declares that they claim fifteen hundred feet on the "lode, vein, or deposit." It thus informed all persons, subsequently seeking to excavate and open the lode or vein, that the locators claimed the whole extent along its course which the law permitted them to take. It is indeed indefinite in not stating the number of feet claimed on each side of the discovery point; and must, therefore, be limited to an equal number on each side, that is, to seven hundred and fifty feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient. Greater particularity of description of a location of a mining claim on a lode or vein could seldom be given until subsequent excavations have disclosed the course of the latter. These excavations are to be made within sixty days after the discovery. Then the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and, within one month thereafter, that is, within three months from the discovery, a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the

number of feet claimed on each side of the centre of the discovery shaft, the general course of the lode, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty. Rev. Stat. § 2324 ; Gen. Laws of Colorado, §§ 1813–1814.

But during the intermediate period, from the discovery of the lode or vein and its excavation, a general designation of the claim by notice, posted on a stake placed at the point of discovery, such as was posted by Carroll, stating the date of the location, the extent of the ground claimed, the designation of the lode and the names of the locators, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. The statute of Colorado requires that the discoverer, before a certificate of location is filed for record, shall, in addition to posting the notice mentioned at the point of discovery, sink a shaft upon the lode to the depth of at least ten feet from the lowest part of such shaft under the surface, or deeper, if necessary, to show a defined crevice and to mark the surface boundaries of the claim. Before this work could be done by the plaintiff and his co-locator, the ground claimed by them was taken possession of by the defendants, the stake at the point of discovery, upon which the notice was posted, was removed, and Carroll was thereby, and by threats of violence, prevented from re-entering upon the premises and completing the work required to perfect the location and prepare a certificate for record—at least, the evidence tended to establish these facts. If they existed, and this was a question for the jury, the plaintiff was entitled to recover possession of the premises. To the extent of seven hundred and fifty feet on the course of the lode on each side from the point of discovery, he and his co-locator were entitled to protection in the possession of their claim. They did not lose their right to perfect their location, and perform the necessary work for that purpose, by the wrongful intrusion upon the premises, and by threats of violence if they should attempt to resume possession. As against the defendants, they were entitled to be reinstated into the possession of their claim. They could not be deprived of their inchoate rights by the tortious

acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers.

The government of the United States has opened the public mineral lands to exploration for the precious metals, and, as a reward to the successful explorer, grants to him the right to extract and possess the mineral within certain prescribed limits. Before 1866, mining claims upon the public lands were held under regulations adopted by the miners themselves in different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals, and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals; and, when not in conflict with the laws of the United States, or of the State or Territory in which the mining ground was situated, were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although since 1866 Congress has to some extent legislated on the subject, prescribing the limits of location and appropriation and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the State or Territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. Rev. Stat. § 2324. In all legislation, whether of Congress or of the State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership, until a patent is obtained. And whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made, so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal. Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle

for possession, instead of previous discovery, would determine the rights of claimants.

It does not appear, in this case, that there were any mining regulations in the vicinity of the "Hawk Lode," which affect in any respect the questions involved here. Had such regulations existed they should have been proved as facts in the case. We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject. And the laws of the United States do not prescribe any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. That is left to the legislation of the State, which, as we have stated, prescribes sixty days for the excavations upon the vein from the date of discovery, and thirty days afterwards for the preparation of the certificate and filing it for record. In the judgment of the legislature of that State this was reasonable time.

This allowance of time for the development of the character of the lode or vein does not, as intimated by counsel, give encouragement to mere speculative locations, that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with a view to obtain the benefit of a possible discovery of metal by others within that time. A mere posting of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Then protection will be afforded to the locator to make the necessary excavations and prepare the proper certificate for record. It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether

it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject.

This case, as appears by the record, is brought in the name of one of the locators, Erhardt, who owns only four-fifths of the claim. But as a tenant in common with Carroll, he can maintain an action of ejectment for the possession of the premises, the recovery being not merely for his benefit but for that of his co-tenant, who is equally entitled with him to the possession.

It follows from what we have said that

The judgment of the court below must be reversed and the case remanded for a new trial; and it is so ordered.

ERHARDT *v.* BOARO & Others.

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

Argued January 14, 1885.—Decided March 2, 1885.

Where irremediable mischief, going to the destruction of the substance of the estate, is being done by the person in possession, to an estate in litigation at law, an injunction will be issued to prevent it.

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

Mr. Elihu Root for appellant.

Mr. T. M. Patterson and *Mr. C. S. Thomas* for appellees submitted on their brief.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity ancillary to the action for the possession of the mining claim just decided. It is brought to restrain

the commission of waste by the defendants pending the action. The bill sets forth the discovery by one Thomas Carroll, a citizen of the United States, while searching on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral on vacant unoccupied land of the United States, of the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, the posting by him in his name and that of the plaintiff, at the point of discovery, of a notice that they claimed 1,500 feet on the lode, the intrusion of the defendants upon the claim, their ousting the locators, and other facts which are detailed by the record in the case decided, and the commencement of the action at law. It also alleges that the defendants were working the claim, and had extracted from it one hundred and fifty tons, or thereabouts, of ore, containing gold and silver of the value of $25,000, and that about one hundred tons remain in their possession on the premises. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. The principal facts stated in the bill are supported by affidavits of third parties. The court granted a preliminary injunction, but, after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the court the case is brought here by appeal.

It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth* v. *Hopton*, 6 Vesey, 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench "that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in

modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. *Jerome* v. *Ross*, 7 Johns. Ch. 315, 332; *Le Roy* v. *Wright*, 4 Sawyer, 530, 535.

As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.

The decree of the court below must, therefore, be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered.

RICHARDS v. MACKALL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 1, 1884.—Decided March 2, 1885.

Where there is an appeal from the Supreme Court of the District of Columbia to this court, the citation may be signed by any justice of that court.

An appeal from the Supreme Court of the District of Columbia to this court may be allowed by that court sitting in special term.

From the transcript of the record it appears that the supersedeas bond in this case was in due form, and was approved by the court.

This was a motion to dismiss. The grounds of the motion sufficiently appear in the opinion of the court.

Mr. W. Willoughby in support of the motion.

Mr. William B. Webb and *Mr. Enoch Totten* opposing.

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

The Supreme Court of the District of Columbia consists of

one Chief Justice and five Associate Justices. Rev. Stat. Dist. Col. § 750, 20 Stat. 320, ch. 99, § 1. The law provides for both special and general terms of the court, and for an appeal from the special to the general term, but the judgments and decrees when rendered are, whether they be at general or special term, the judgments and decrees of the Supreme Court. Rev. Stat. Dist. Col. §§ 753, 772. A general term is held by three justices, two, however, constituting a quorum, and a special term by one. Rev. Stat. Dist. Col. §§ 754, 757, 20 Stat. 320, ch. 99, § 2.

By § 705 of the Rev. Stat., as amended February 25, 1879, 20 Stat. 320, ch. 99, § 4, the final judgments and decrees of the Supreme Court of the District of Columbia, in cases where the value of the matter in dispute exceeds $2,500, may be brought to this court for review "upon writ of error or appeal, in the same manner and under the same regulations as are provided by law in cases of writs of error on judgments, or appeals from decrees rendered in a Circuit Court."

This is an appeal from a decree of the Supreme Court of the District at a general term held by Chief Justice Cartter and Associate Justices Hagner and Cox, which began on the first Monday in April, 1884, and ended July 5, 1884. The transcript contains the following:

"[Filed July 8, 1884.]

"Supreme Court of the District of Columbia.

"Brooke Mackall, Jr., *vs.* Alfred Richards et al. } 8,118 Eq.

"And now comes the said defendant, Alfred Richards, and appeals to the Supreme Court of the United States from the decree of the general term passed July 5, 1884, in the above cause against him.

WM. B. WEBB,
for defendant Richards.

"The above appeal is allowed this 8th day of July, 1884.

"By the court: MACARTHUR, *Justice.*"

Then follows a citation in proper form signed by the Chief Justice of the court, bearing the same date as the order allowing the appeal. This citation was served October 7, 1884. Next in the transcript is the following:

"In the Supreme Court of the District of Columbia,
the 10th day of July, 1884.

"Brooke Mackall, Jr., *vs.* Alfred Richards et al. } No. 8,118 Eq. In error."

Then follows a supersedeas bond in due form, and at the foot these words:

"Approved July 11, 1884. MacArthur, *Justice.*"

The appeal was docketed in this court on the 15th of October, 1884.

The grounds of the motion may be stated thus:

1. The citation was not signed by the justice who approved the bond;

2. The citation was not served in time; and,

3. Mrs. Richards and Leonard Mackall, who were defendants below, have not joined in the appeal.

§§ 999, 1012 and 705 of the Revised Statutes, taken together, provide in effect that, when there is an appeal from the Supreme Court of the District of Columbia to this court, the citation may be signed by any justice of that court. Such an appeal is to be taken under the same regulations as appeals from the Circuit Court. § 705. On appeals from the Circuit Court a judge of that court may sign the citation. § 999. Clearly, therefore, when the appeal is from the Supreme Court of the District, a justice of that court may do the same thing.

The transcript in this case shows that the appeal was allowed by the court, undoubtedly sitting in special term. This, we think, may be done. An appeal in a proper case is a matter of right. The decree appealed from was the decree of the Supreme Court, and the court, while sitting in special term, was still the Supreme Court, and as such capable of allowing an appeal to this court from one of its final decrees, though

rendered at general term. As the general term had closed, it was quite proper to apply to the court sitting in special term for the allowance of the appeal. The allowance by the court, while in session at special term, would not do away with the necessity of a citation, because the allowance would not have been made at the same term in which the decree was rendered. *Yeaton* v. *Lenox*, 7 Pet. 220, 221; *Railroad* v. *Blair*, 100 U. S. 661, 662. As the allowance was made by the court, it was quite regular for the Chief Justice to sign the citation.

The transcript also shows that the bond was approved by the court. It seems to have been presented to the court on the 10th of July and approved the next day. What was done was, according to the transcript, "In the Supreme Court of the District of Columbia."

Even if the citation was not served in time, which we do not decide, the failure to serve will not work a dismissal of the appeal. *Dayton* v. *Lash*, 94 U. S. 112.

The last ground of the motion to dismiss was not relied upon in argument. The effect of what has been done was to allow a separate appeal by Alfred Richards.

The motions are overruled.

PEUGH *v.* DAVIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued January 27, 1885.—Decided March 2, 1885.

In a suit in equity for redeeming unoccupied and unenclosed city lots from a mortgage, the mortgagee in constructive possession is chargeable only with the amounts actually received by him for use and occupation.

It would be unreasonable to charge him with interest on the loans secured by the mortgage.

Respondent defended against complainant's claim to redeem, by setting up that the alleged mortgage was an absolute conveyance. This being decided adversely, *Held*, That in accounting as mortgagee in constructive possession, he was not liable for a temporary speculative rise in the value of the tract, which subsequently declined—both during the time of such possession.

Opinion of the Court.

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

Mr. Richard T. Merrick and *Mr. T. T. Crittenden* (*Mr. Luther H. Pike* was with them), for appellant.

Mr. Albert G. Riddle for appellee.

Mr. Justice Miller delivered the opinion of the court.

This case was before us at the October term, 1877, and the question then was whether certain instruments of writing, made by Peugh to Davis, constituted an absolute conveyance of lots in the District of Columbia, or were in the nature of a mortgage security for loan of money. The court was of opinion that on all the facts of the case the latter was the true construction of the transaction between the parties.

The court below was directed to permit the plaintiff Peugh to redeem the property by the payment of the loan, with interest at six per cent. per annum, and, as it appeared that the defendant had taken possession of the property, it was said in the opinion that he "should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him." *Peugh* v. *Davis*, 96 U. S. 332.

Upon the return of the case to the Supreme Court of the District of Columbia it was referred to an auditor to ascertain the sum necessary to redeem on that basis. Two reports were made, neither of which were entirely acceptable to the parties or to the court, which finally, by a decree in general term, allowed nothing for use and occupation by defendant, but did make an allowance for a sum received from the United States for its use, after deducting from this latter sum the amount paid to an agent for its collection.

The appellant assigns for error that no allowance was made him for the use and occupation by defendant.

The reply to this is that he never used and occupied it or

received any rents, except the amount for which he is charged as received from the government.

The lots were open, unenclosed, with no buildings on them, and no actual possession or use of them was had by the defendant. His possession was merely constructive under his interpretation of the contract, that the land was his own. The witnesses say it was worth nothing in its actual condition, and no evidence is given to the contrary.

It is urged that a sum equal to the interest on the money borrowed by Peugh should be allowed as rent, or for occupation, from the time Davis asserted his ownership and possession. We can see no reason for this, and it would have been in conflict with the instruction contained in the opinion of this court that he "should be charged a reasonable sum for the use and occupation." If this was worth nothing, that was the end of that matter.

It is said that during the period in question the land rapidly rose in value and afterwards declined. That Peugh could have sold it, and probably was offered a sum for it which would have left him a large profit, and that he ought in this transaction to set off this loss against the amount he must pay to redeem.

This is not allowance for use and occupation. It is damages for a tort. It cannot be recovered in this suit if it could be recovered in any.

The short answer to all this is, that Mr. Peugh owed the money he had borrowed from Davis. What he is now claiming in the original suit is the right to pay the money and have a re-conveyance of the land. Nothing hindered during all this time that he should pay this money; and if, as he alleges, Davis denied his right to do so, then he should have made a regular and lawful tender of the amount due.

If he had done so, the interest would have ceased to run against him, and the amount that he is now required to pay would have been diminished by more than one-half.

A lame attempt is made to show that he did make this tender. Some evidence is offered that he told Davis he was ready to account with him and pay what was due, and that he had the money with him.

Statement of Facts.

But in order to make a tender that would have caused the interest to cease, he should have ascertained for himself the sum due, or have fixed upon a sum which was sufficient, and then made a formal tender by counting out or offering that sum to Davis distinctly and directly as a tender.

The fact that he did not do this is the answer to all that he now claims in this court. He has been permitted to redeem. His own assertion of that right has been allowed him; but if he ever had this money and was ready and willing to pay it, he did not do so. He did not produce or show it. He did not fix the amount he was ready to pay; but he took the money away with him, and used it himself, and there is no hardship in requiring him to pay six per cent. interest on it, if he wishes to redeem the lots.

The decree of the Supreme Court of the District is

Affirmed.

GUMBEL *v.* PITKIN & others.

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

Submitted January 26, 1885.—Decided March 2, 1885.

A writ of error will not be dismissed for want of jurisdiction by reason of failure to return with it an assignment of errors. *Ackley* v. *Hall*, 106 U. S. 428, affirmed.

When a third party intervenes in a pending suit, to claim property in the custody of the marshal by virtue of a writ of attachment issued therein, a judgment dismissing his intervention is final as to that issue; and one distributing the proceeds of the property to other parties is also final.

When a writ of error gives the names of all parties as they are found in the record of the case in the court below, and there is nothing in the record to show that there were other parties, the writ is sufficient, even if the defendants in error are there described by firm names, as A. B. & Co., &c. This case distinguished from *The Protector*, 11 Wall. 82.

Motion to dismiss and affirm. The grounds of the first motion were, (1) That no copy of the writ had been lodged with

the clerk; (2) That no assignment of errors was transmitted with the record; (3) That the writ of error did not set forth the names of the members of the firms mentioned in the writ as defendants, and there was nothing in the record by which the irregularity could be corrected; (4) That the judgment appealed from was not a final judgment.

Mr. Thomas J. Semmes in support of the motion to dismiss. —1. The failure to serve the writ of error by lodging a copy with the clerk, entitles defendants to dismiss. *Wood* v. *Lide*, 4 Cranch, 180. 2. The new rules adopted in January, 1884, are evidently designed to enforce Section 997 of Revised Statutes. Rule 8, § 1; Rule 21, § 4. *Micas* v. *Williams*, 104 U. S. 556. 3. The failure to state the names of the defendants in error is fatal, especially as the irregularity cannot be cured by an inspection of the record. *The Protector*, 11 Wall. 82. The right to amend, secured by Section 1005 of the Revised Statutes, is not absolute; it is within the discretion of the court, and the exercise of the discretion depends on the particular circumstances of the case. *Pierson* v. *Yewdall*, 95 U. S. 294; *Moore* v. *Simonds*, 100 U. S. 145. 4. The plaintiff in error intervened in the United States Circuit Court in the suit of *Hoffheimer Bros.* v. *Dreyfus* to assert his rights to a fund in the hands of the Marshal; he claimed to be paid out of the funds in preference to other creditors, because he had made the first seizure of the goods, the sale of which had produced the fund. A judgment in such a case cannot be reviewed on writ of error. *Curtis* v. *Petitpain*, 18 How. 109. *Bayard* v. *Lombard*, 9 How. 530.

Mr. Charles F. Buck, and *Mr. George H. Braughn*, opposing.

Mr. Justice Miller delivered the opinion of the court.

A motion is made to dismiss the writ of error in this case on the following grounds:

1. The writ of error was never served by lodging a copy thereof with the clerk of the court.

2. No assignment of errors was transmitted with the record, as required by the rules of the court and by § 997 Rev. Stat.

3. The writ of error does not set forth the names of the members of the several firms mentioned in the writ as defendants, and there is nothing in the record by which this irregularity may be corrected.

4. The original petition demands restoration of the goods seized by the marshal to the sheriff, on the ground of previous seizure by that officer under an attachment emanating from the State court; the amended petition abandons that ground, and goes for priority in the distribution of the proceeds of sale in the marshal's hands, the result of an order of sale *pendente lite;* such a petition is a mere rule or motion for distribution of proceeds, and a judgment rendered thereon is not reviewable by writ of error.

As to the first of these, it appears to be unfounded in fact, as the record now before us shows that the writ was filed in the Circuit Court June 14, 1884, and is so marked over the signature of the clerk.

The second ground is met by the decision of this court in the case of the *School District of Ackley* v. *Hall*, 106 U. S. 428, where it is said that a writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors pursuant to the requirements of § 997 Rev. Stat. Nor does Rule 8 require a copy of assignment of errors in the transcript when no such assignment was filed in the court below.

The fourth ground of dismissal is equally untenable.

The record shows that a large number of the creditors of Joseph Dreyfus, of the city of New Orleans, sued him in the Circuit Court of the United States, and in those actions, or in one of them, a writ of attachment was issued and levied on the goods of Dreyfus by the marshal, who took possession of them.

In this action Gumbel intervened by petition, as he was authorized to do by the laws of Louisiana, and by the decision of this court in *Freeman* v. *Howe*, 24 How. 450, alleging that a seizure under a writ of the State court in his favor had been made by the sheriff before the marshal's levy, and he claimed

a priority of lien on those goods. The goods were sold under an order of the Circuit Court *pendente lite*, and the proceeds distributed to other parties, and Gumbel's intervention dismissed on the ground that the sheriff had made no seizure prior to that of the marshal.

The order dismissing Gumbel's intervention disposes of his rights, and is a final judgment as to that issue, as to which he has a right to a writ of error. The order distributing the proceeds of the sale is also final, as it disposes of the fund.

As regards the third ground for dismissal the case is not so clear.

This court has undoubtedly, from the case of *Deneale* v. *Stump*, 8 Pet. 526, to that of *The Protector*, 11 Wall. 82, held that all the parties to the judgment must be named in the writ of error, and that the use of the name of one of the parties, with the addition of the words, "and others," as "Joseph W. Clark and others," does not satisfy the requirement, but on the contrary shows that there were parties to the judgment or decree in the inferior court who are not named in the writ. It is upon this ground that the judgment in the case of *Smith* v. *Clark*, 12 How. 21, is distinctly placed by Chief Justice Taney in the opinion.

In the case of *The Protector*, 11 Wall. 82, the appeal was taken in the name of William A. Freeborn & Co., while the record showed that William A. Freeborn, James F. Freeborn, and Henry P. Gardner were the libellants.

In this court counsel insisted that the objection was not fatal, and that the appeal might be amended, but the court held otherwise and dismissed the appeal.

In the present case the defendants are named in the writ in almost every instance by such designations as B. Dreyfus & Co., Corning & Co., John Osborn, Son & Co., and so on.

We should have no hesitation now, under § 1005 of the Revision, which section became a law by the act of June 1, 1872, after the case of *The Protector* was decided, to permit the plaintiff in error to amend if there was anything to amend by.

But the transcript of the record before us shows that these parties came into the Circuit Court as defendants or intervenors,

and prosecuted their rights throughout the whole proceedings by the designations applied to them in this writ of error and by no other names whatever.

No amendment of the writ to remove this difficulty can, therefore, be made from the record before us.

If the plaintiff in error has a just foundation for his assertion of error in the judgment against him, it would be a great and apparently irremediable injustice to dismiss his writ. The present case differs from that of *The Protector*, the latest on the subject, for, in that case, the record showed that William A. Freeborn, James F. Freeborn, and Henry P. Gardner were the libellants whose libel was dismissed, and no good reason is to be seen why they did not bring their appeal in those names instead of William A. Freeborn & Co.

In the case of *Smith* v. *Clark*, the objection relied on in the opinion of the court, 12 How. 21, is, that this form of appeal showed to the court that there were other parties to the decree below not named, and, therefore, not brought before this court by the appeal.

Neither of these cases cover the present. In this case the plaintiff in error gives his own full name and he is the only plaintiff. He describes in his writ of error all the parties opposed to him, by the names and designations which they gave themselves in their pleadings, motions, and proceedings in the court below, and by which they are mentioned in the judgment which distributes to them the money that he asserts should rightfully go to him. We are not advised, as in the Freeborn case, by the record that the appellants had other names than Freeborn & Co., nor, as in the Darneal case, that there were others who were attempted to be made parties by that word, with no other designation.

We think that, where the writ gives all the names of the parties as they are found in the record of the case in the Circuit Court, and where there is nothing to show that any other person was a party than such as are so named, this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record and would lead to a manifest injustice.

Syllabus.

The motion to dismiss is overruled, and the case is one to be heard on the merits, and not to be affirmed on motion.

Both motions are denied.

FUSSELL *v.* GREGG & others.

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

Argued January 8, 9, 1885.—Decided February 2, 1885.

A Court in Equity has no jurisdiction over a suit based upon an equitable title to real estate, unless the nature of the relief asked for is also equitable.

A court of the United States sitting in equity, cannot control the principal surveyor of the Virginia military district in the discharge of his official duties ; or take charge of the records of his office ; or declare their effect to be other than what appears on their face.

The plain meaning of the act of March 23, 1804, 2 Stat. 274, to ascertain the boundaries of the Virginia Military District in Ohio, is, that a failure within five years to make return to the Secretary of War of the survey of any tract located within the Territory, made previous to the expiration of the five years, should discharge the land from any claim founded on such location and survey and extinguish all rights acquired thereby.

The series of acts relating to this District, beginning with the act of March 23, 1804, and ending with the act of July 7, 1838, 5 Stat. 262, as revived and continued in force by later acts, are to be construed together, and as if the third section of the act of March 23, 1804, had been repeated in every act of the series.

The act of March 3, 1855, 10 Stat. 701, allowing persons who had made entries before January 1, 1852, two years time to return their surveys, did not apply to those who had made both entries and surveys before the latter date.

The land office referred to in § 2 of the act of May 27, 1880, 21 Stat. 142, relating to the Virginia Military District in Ohio is the General Land Office.

On the pleas and issues in this cause, the complainant has failed to make good the case stated in the bill.

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

Mr. Jeremiah Hall for appellant cited *Galt* v. *Galloway*, 4 Pet. 332; *United States* v. *Stone*, 2 Wall. 525; *Shipp* v. *Miller*, 2 Wheat. 316; *Stephens* v. *McCargo*, 9 Wheat. 502; *The Aurora*, 7 Cranch, 382; *The Anne*, 7 Cranch, 569; *Peck* v. *Pease*, 5 McLean, 486; *Satterlee* v. *Matthewson*, 2 Pet. 380; and the United States Land Laws.

Mr. William Lawrence filed a brief for appellees, citing the acts of Congress and of Virginia relating to Virginia Military Lands in Ohio; *Galt* v. *Galloway*, 4 Pet. 332; *Hart* v. *Cregg*, 32 Ohio St. 502; *Latham* v. *Oppy*, 18 Ohio, 104; *Jackson* v. *Clark*, 1 Pet. 628; *Reckner* v. *Warner*, 22 Ohio St. 275; *Stubblefield* v. *Boggs*, 2 Ohio St. 216; *Dresback* v. *McArthur*, 7 Ohio, Part 1, 146; *Harlan* v. *Thatcher*, 18 Ohio, 48; *Thomas* v. *White*, 2 Ohio St. 540; *Weaver* v. *Froman*, 6 J. J. Marsh, Ky. 213; *Dixon* v. *Caldwell*, 15 Ohio St. 412; *Chinn* v. *Trustees*, 32 Ohio St. 236; *Hager* v. *Reed*, 11 Ohio St. 625, 635; *Clark* v. *Southard*, 16 Ohio St. 408; *Walker* v. *Knight*, 12 Ohio St. 209; *Slater* v. *Cave*, 3 Ohio St. 80; *Clark* v. *Potter*, 32 Ohio St. 49; *Whitney* v. *Webb*, 10 Ohio, 513; *Carey* v. *Robinson*, 13 Ohio, 181; Congressional Documents, House Mis. Doc. No. 10, 2d Session 47th Congress, November 16, 1882, and House Mis. Doc. No. 42, 1st Session 47th Congress, June 23, 1882; which documents Mr. Lawrence said had been prepared by him and contained much information on Virginia military land titles in Ohio.

Mr. Justice Woods delivered the opinion of the court.

This was a bill in equity, filed November 20, 1879, to establish the title of the plaintiff to, and recover the possession of, a certain tract of land in the County of Logan, in the State of Ohio, and for an account of rents and profits. Filling the many blanks left in the bill by resort to the evidence, the case made thereby was substantially as follows:

On July 19, 1822, warrant No. 6,508 for 200 acres of land was granted by the State of Virginia to the grandfather of the plaintiff, Archibald Gordon, late of Cecil County, Maryland, in consideration of his services as a private in the Virginia line on

the Continental establishment in the War of the Revolution. On January 21, 1823, he caused his warrant to be located by entry No. 12,017 in the Virginia Military District in the State of Ohio, and the entry to be duly recorded. On March 25, 1823, he caused the entry to be surveyed by Thomas J. McArthur, a deputy surveyor of said military district, and on November 5, 1824, he had the survey recorded in the office of the principal surveyor of the district. Archibald Gordon died intestate about the year 1829, leaving Archibald Gordon, Jr., late of Baltimore, Maryland, his only child and heir-at-law. Archibald Gordon, Jr., died intestate about the year 1833 or 1834, leaving the plaintiff and her sister, Sarah Priscilla Gordon, his only children and heirs-at-law. The plaintiff, on October 31, 1854, intermarried with Joseph B. Fussell, who died December 6, 1864, and the plaintiff's sister, Sarah Priscilla, having intermarried with one William H. Kelly, died intestate on May 12, 1853, leaving issue one daughter, her only child, Mary Elizabeth Kelly. William H. Kelly died at a date not mentioned, leaving his daughter, Mary Elizabeth, surviving him, who died at the age of 9 years 6 months and 3 days without issue, leaving the plaintiff her sole heir-at-law. The plaintiff claimed that by direct inheritance from her father, Archibald Gordon, Jr., and collateral inheritance from her niece, Mary Elizabeth Kelly, she was seized of an equitable estate in fee in the lands covered by survey 12,017, and entitled to the immediate possession thereof.

It was further alleged that on October 4, 1851, Daniel Gregg, one of the defendants, made an entry on the records of the principal surveyor of the district, No. 16,070, of 130 acres on military warrant No. 442, and on December 20, 1851, he procured one hundred acres of his entry to be so surveyed as to cover one hundred acres of land appropriated by the entry and survey of Archibald Gordon, No. 12,017, and on November 2, 1855, he caused the survey to be recorded, and on November 20, 1855, obtained a patent of that date for the lands described in this survey. The bill further averred that the entry, survey, and patent of Gregg were all made and obtained in violation of the proviso of section 2 of the act of March 1, 1823, entitled

"An Act extending the time for locating Virginia military land warrants, and returning surveys thereon to the General Land Office," 3 Stat. 772, and were, therefore, null and void, and never appropriated any land or vested any title in Gregg as against the plaintiff, or those under whom she claimed.

It was further alleged that the defendant, Eleazer P. Kendrick, being the principal surveyor of the Virginia Military District, and in possession of the records of that office, did, subsequently to the entry and survey of Gregg, without the knowledge or consent of plaintiff, or of any person under whom she claimed title, write in the margin of the record of Archibald Gordon's entry the word "withdrawn," and in and across the plat and record of the survey thereof the words "State line," and that Kendrick refused to give the plaintiff a duplicate of said survey to enable her to obtain a patent for the land described therein.

Daniel Gregg, Eleazer P. Kendrick, William Swissgood, Emily Swissgood, Francis Higgins, John W. Higgins, Angeline Higgins, Matilda Higgins, James Eaton, W. G. Smithson and Andrew Murdock were made defendants to the bill of complaint, the bill alleging that the defendants, except Gregg and Kendrick, wrongfully kept the plaintiff out of possession of the premises sued for, claiming title under Gregg. The prayer of the bill was, that the validity of the entry and survey of Gordon might be affirmed and established, and the entry, survey, and patent of Gregg declared void; that the words "withdrawn" and "State line" might be adjudged to have been written upon the record of the Gordon entry and survey without authority; that the plaintiff might be put in possession of the premises sued for, and have an account of rents and profits, and for general relief. Daniel Gregg, Francis Higgins, John W. Higgins, Angeline Higgins and Matilda Higgins, by plea, and the other defendants, except Kendrick, by answer, denied the title of the plaintiff, and set up the limitation of twenty-one years prescribed by the statute of Ohio, in bar of the relief prayed by the bill. Kendrick made no defence. Upon final hearing upon the pleadings and evidence the Circuit Court dismissed the bill, and the plaintiff appealed.

We think that the averments of the bill do not entitle the plaintiff to relief. Her case, as alleged, is, that she has an equitable estate in fee in the premises in dispute, and that the defendants, except Gregg and Kendrick, are in possession without title; in other words, are naked trespassers. The theory of her bill seems to be that, because she has an equitable title only, and for that reason could not recover in an action at law, a court of equity has jurisdiction of her case. But this is plainly an error. Mr. Justice Bradley, in *Young* v. *Porter*, 3 Woods, 342. To give a court of equity jurisdiction, the nature of the relief asked must be equitable, even when the suit is based on an equitable title. The plaintiff does not allege that the defendants, who are in possession of the premises, have the legal title, or that they obtained possession under any person who had it. Nor does she state any facts which connect them with her equity. They being mere naked trespassers, in possession, she prays that they may be turned out of, and she, who has only an equitable title, may be put in possession. The relief prayed for is such as a court of law is competent to grant, if the plaintiff's title would justify it. But the plaintiff does not seek by her bill to better her title. If all the relief asked for were granted, she would still have an equitable title only. The case is, therefore, an ejectment bill brought on an equitable title. In these respects it is similar to the bill in the case of *Galt* v. *Galloway*, 4 Pet. 332. That was a bill in equity brought by the heirs of James Galt for general and special relief against Galloway, Baker, Patterson, and others, setting up title to one thousand acres of land in the Virginia Military District in Ohio, based upon an entry and survey in the name of James Galt. Baker and Patterson were in possession of six hundred acres of the land, claiming title in the name of Galt. The court found that Baker and Patterson had no title to the lands held by them, and upon this state of case said: "These occupants can be considered in no other light by the court than intruders; and the remedy against them is at law and not in chancery. No decree could be made against them, unless it be that they should deliver possession of the premises; and to obtain this the action of ejectment is the appropriate remedy." Page 339.

Opinion of the Court.

This decision is in point, and shows the bill to be without equity as to those of the defendants who are in possession. Their possession is good against all the world except the true owner. As the bill asserts no equity against them, they have the right to stand on their possession until compelled to yield to the true title, and to demand a trial by jury of the question whether the plaintiff has the true title. The plaintiff cannot deprive them of that right by neglecting to acquire the legal title, and upon the ground of her equitable title, ask the aid of a court of equity. She can turn the defendants out of possession only upon the strength of the legal title, which she must first acquire. Having done this, a court of law is the proper forum in which to bring her suit. *Hipp* v. *Babin*, 19 How. 271; *Parker* v. *Winnipiseogee Manufacturing Co.*, 2 Black, 545; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U. S. 568.

As to the defendant Kendrick, it is clear that a court of the United States, sitting in equity, cannot control him in the discharge of his duties as principal surveyor, or take charge of the records of his office, or declare their effect to be other than what appears upon their face.

But we are also of opinion that, upon the issues raised by the pleas and answers, the plaintiff has failed to make good the case which she has stated in her bill. The pleas and answers denied that the plaintiff had, as she averred, an equitable estate in fee in the lands described in the bill.

We think that this defence is established by the facts; that by reason of the failure of Archibald Gordon, or his legal representatives, to make return of the survey to the General Land Office within the time prescribed by the several acts of Congress on that subject, the entry and survey became vacated, annulled and void, and the lands covered thereby became released from such entry and survey. So that the plaintiff, at the time of bringing her suit, was without any interest or estate in the lands described in her bill.

The lands in controversy are within what is known as the Virginia Military District in the State of Ohio. The State of Virginia claimed title to a large territory northwest as well as

southeast of the Ohio River, by virtue of a grant to the Colony of Virginia made by King James I. of Great Britain, on May 23, 1609. The Virginia Military District is within the limits of this grant. The State of Virginia, by an act of its legislature, passed in October, 1779, 10 Hening's Stat. 159, provided for bounty in lands to the officers and soldiers of Virginia in the Revolutionary War, both in what was designated as the Continental and State establishment, and prescribed the quantity to which they were respectively entitled. Other acts of the legislature provided for the issue of land warrants to those entitled to them, 10 Hening's Stat. 50, and prescribed how they might be located, 11 Hening's Stat. 353. On March 1, 1784, the delegates of the State of Virginia to the Congress of the United States, being authorized thereto by an act of the legislature passed December 20, 1783, 11 Hening's Stat. 326, conveyed to the United States all the lands which the State of Virginia owned or claimed northwest of the Ohio River. See deed of cession, 11 Hening's Stat. 571.

The cession was made subject to certain reservations and conditions, among which was the following: "That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland River, and between the Green River and Tennessee, which has been reserved by law for the Virginia troops on the Continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands to be laid off between the rivers Scioto and Little Miami on the northwest side of the River Ohio, in such proportions as have been engaged to them by the laws of Virginia."

This court, in the case of *Jackson* v. *Clark*, 1 Pet. 628, speaking by Chief Justice Marshall, construed this reservation to be "not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line on the Continental establishment southeast of the Ohio," and declared that the residue of the lands was

ceded as a common property for the use and benefit of the members of the Confederation; and this trust was to be executed by a faithful and bona fide disposition of the land for this purpose.

As an inference from these views, the court further held that it was within the power of Congress to prescribe the time within which the lands to be appropriated by those holding the bounty warrants should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust, and if the time within which the warrants might be located was extended by Congress, it had the right to annex conditions to the extension.

Congress, in the exercise of these powers, which, in the case just cited, it was subsequently decided it possessed, on March 23, 1804, passed an act entitled "An Act to ascertain the boundary of the lands reserved by the State of Virginia, northwest of the river Ohio, for the satisfaction of her officers and soldiers on Continental establishment, and to limit the period for locating the said lands." 2 Stat. 274. Section 1 of this act defined the boundary of the Virginia Military District in Ohio. Section 2 provided:

"That all the officers and soldiers, or their legal representatives, who are entitled to bounty lands within the above-mentioned reserved territory, shall complete their locations within three years after the passing of this act, and every such officer and soldier, or his legal representative, whose bounty land has or shall have been located within that part of the said territory to which the Indian title has been extinguished, shall make return of his or their surveys to the Secretary of the Department of War within five years after the passing of this act, and shall also exhibit and file with the said Secretary, and within the same time, the original warrant or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept; which warrant, or certified copy thereof, shall be sufficient evidence that the grantee therein named, or the person under whom such grantee claims, was originally entitled to such bounty land; and every person

entitled to said lands and thus applying, shall thereupon be entitled to receive a patent in the manner prescribed by law."

The third and last section provided: "That such part of the above-mentioned reserved territory as shall not have been located, and those tracts of land within that part of the said terrritory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the Secretary of War within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty lands."

The plain meaning of the act is that a failure within five years after its passage to make return to the Secretary of War of the survey of any tract of land located within said territory, made previous to the expiration of said five years, should discharge the land from any claim founded on such location and survey, and extinguish all right, title, and estate previously acquired thereby; and that all lands within said district not located within the same period, should be released and discharged from the right of any person to locate a military warrant thereon. The survey of the entry of Archibald Gordon has, to this day, never been returned to the Secretary of War or, as provided by subsequent acts, to the General Land Office of the United States. His right to the lands covered by his entry and survey was therefore cut off by the act of March 23, 1804, unless it has been saved by subsequent legislation of Congress. Counsel for plaintiff not denying that such was the effect of the act of March 23, 1804, insists that the period limited for returning the survey has been, from time to time, so prolonged that the entry and survey of Gordon are now valid and subsisting, and vest in the plaintiff, as the sole heir of Gordon, an equitable estate in the lands covered by the survey.

This legislation will now be noticed. The act which first followed the law of 1804 was that approved March 2, 1807, 2 Stat. 424. It allowed the officers and soldiers who were entitled to bounty lands in the Virginia Military District a further time of three years from March 23, 1807, to complete their locations, and five years from the same date to return

their surveys and warrants to the office of the Secretary of War. The act also contained the following proviso: "that no locations, as aforesaid, within the above mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patent which may nevertheless be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

The period of limitation prescribed by the act of March 23, 1804, for making locations and returning surveys was subsequently, from time to time, extended by successive acts of Congress. Act of November 3, 1814, 3 Stat. 143; Act of February 22, 1815, 3 Stat. 212; Act of April 11, 1818, 3 Stat. 423; Act of February 9, 1821, 3 Stat. 612; Act of March 1, 1823, 3 Stat. 772; Act of May 20, 1826, 4 Stat. 189. These acts, except that of February 22, 1815, 3 Stat. 212, all contained and repeated the proviso above recited of the act of March 2, 1807.

Congress having established by the act of April 25, 1812, 2 Stat. 716, a General Land Office, the act of November 3, 1814, provided for the return of the surveys and warrants to that office instead of to the Secretary of War, and in this respect was followed by the subsequent statutes, except the act of February 22, 1815, which contained no direction in respect to the return of surveys and warrants.

The act of May 20, 1826, extended the time for making locations to June 1, 1829, for making surveys to June 1, 1832, and for returning surveys to June 1, 1833. After the expiration of the term limited by this act an interval of five years occurred, during which no authority existed for making locations, surveys, or returns of surveys.

The act of July 7, 1838, 5 Stat. 262, extended the time for making locations and surveys, and the return of surveys to the General Land Office, to August 10, 1840, and provided as follows: "That all entries and surveys which may have heretofore been made within the said reservation in satisfaction of any such warrants on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held

to be good and valid, any omission heretofore to extend the time for making of such entries and surveys to the contrary notwithstanding." It also contained the proviso of the act of March 2, 1807, above recited.

By an act approved August 19, 1841, 5 Stat. 449, the act of July 7, 1838, was "revived and continued in force" until January 1, 1844, and by an act approved July 29, 1846, 9 Stat. 41, the act of August 19, 1841, was "revived and continued in force" until the first day of January, 1848. On July 5, 1848, 9 Stat. 244, a like act was passed, by which the act of August 19, 1841, was "revived and continued in force until January 1, 1850." And by an act passed February 20, 1850, 9 Stat. 421, the same act of July 5, 1848, was revived and continued in force until January 1, 1852.

The effect of the series of acts, beginning with the act approved August 19, 1841, and ending with the act of February 20, 1850, was to continue in force the act of July 7, 1838, till January 1, 1852. The whole series, beginning with the act of March 23, 1804, and ending with the act of July 7, 1838, as revived and continued in force by the later acts just referred to, relates to the same subject and is to be construed together. *The United States* v. *Freeman*, 3 How. 556; *Rex* v. *Loxdale*, 1 Burr. 445, 447. It appears, even from a cursory reading, that § 3 of the act of March 23, 1804, was not repealed or modified, either directly or indirectly, by any of the subsequent acts above mentioned. There was no direct repeal of the section. Neither was there any repeal by implication. *McCool* v. *Smith*, 1 Black, 459; *United States* v. *Tynen*, 11 Wall. 88; *Henderson's Tobacco*, Ib. 652; *Murdock* v. *Memphis*, 20 Wall. 590; *Red Rock* v. *Henry*, 106 U. S. 596. It was allowed to remain unaltered on the statute book; the effect of the subsequent legislation being only to suspend its operation until the first day of January, 1852. The interpretation must, therefore, be the same as if the third section of the act of March 23, 1804, had been repeated in every subsequent statute of the series. As neither Archibald Gordon, nor any of his heirs or representatives, ever made a return of the survey of the land in dispute, either to the Secretary of War, or the Commissioner of the General

Land Office, either before or after the first day of January, 1852, the third section of the act of March 23, 1804, cuts up by the roots all the right and title derived from the location and survey of Archibald Gordon.

Under the acts of Congress, Gordon, by his entry and survey, acquired title depending on his performance of certain prescribed conditions. His failure to perform the conditions stripped him of all interest or estate in the lands covered by his entry and survey.

That such is the effect of the third section of the act of March 23, 1804, is made manifest by the proviso above quoted of the act of July 7, 1838, which declared all entries and surveys theretofore made to be good and valid, notwithstanding any omission by Congress to extend the time for making such entries and surveys. This is equivalent to a declaration by Congress that § 3 of the act of 1804 was still in force, and legislation was necessary to relieve from its operation entries and surveys not made within the time limited by that or the subsequent enactments.

Since the act of February 20, 1850, Congress has passed two acts, on both of which the plaintiff relies as making good her title. The first of these is the act of March 3, 1855, 10 Stat. 701, entitled "An act allowing the further time of two years to those holding land by entries in the Virginia Military District in Ohio which were made prior to the first of January, 1852, to have the same surveyed and patented." This act provided "that the officers and soldiers of the Virginia line of Continental establishment, their heirs or assigns, entitled to bounty lands which have, prior to the first day of January, 1852, been entered within the tract reserved by Virginia between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon Continental establishment, should be allowed the further time of two years from and after the passage of this act to make and return their surveys and warrants, or certified copies of warrants, to the General Land Office."

This act is by its terms confined to lands entered and not surveyed prior to January 1, 1852. The policy of the act is

clear. The acts passed prior to the act of July 7, 1838, fixed one period for locating entries and a longer time for making and returning surveys, plainly because the surveys could not be made until the entries were made. But the act of July 7, 1838, as revived and continued in force by subsequent statutes, fixed the first day of January, 1852, as the limit allowed both for making entries and making and returning surveys. It therefore doubtless happened that laggard warrant holders procrastinated the making of their entries until it was too late to make and return their surveys before the first of January, 1852. Therefore the act of March 3, 1855, was passed allowing the holders of warrants, who had made their entries before January 1, 1852, two years further time after the passage of the act to make and return their surveys. Those who before January 1, 1852, had made both their entries and surveys were not within the words or spirit of the act.

The next act on which the plaintiff relies is the act of May 27, 1880, 21 Stat. 142. This act is entitled "An Act to construe and define 'An Act to cede to the State of Ohio the unsold lands in the Virginia Military District in said State' approved February 18, 1871, and for other purposes." The act which was to be construed and defined provided "that lands remaining unsurveyed and unsold in the Virginia Military District in the State of Ohio, be, and the same are hereby, ceded to the State of Ohio," and saved to any *bona fide* settler not exceeding one hundred and sixty acres by him occupied by his pre-empting the same in such manner as the State of Ohio might direct. 16 Stat. 416.

The plaintiff relies on the first three sections of the act of May 27, 1880. The first section declares that the true intent and meaning of the act of February 18, 1871, just mentioned, was to cede to the State of Ohio only such lands as were unappropriated and not included in any entry or survey within said district founded on military warrants upon Continental establishment.

The second section is as follows: "That all legal surveys returned to the land office on or before March third, eighteen hundred and fifty seven, on entries made on or before January

first, eighteen hundred and fifty-two, and founded on unsatisfied Virginia military Continental warrants, are hereby declared valid."

The third section provided that the officers and soldiers of the Virginia line on Continental establishment, their heirs or assigns, "entitled to bounty lands which have, on or before January first, eighteen hundred and fifty-two, been entered" in the Virginia Military District in Ohio, should be allowed three years after the passage of the act to make and return their surveys for record to the office of the principal surveyor of said district, and might file their plats, and certificates, warrants, or certified copies of warrants, at the General Land Office, and receive patents for the same.

The provisions of the third section are based on the same policy, and are similar to those of the act of March 3, 1855, *ubi supra*, and must receive the same construction, namely, that three years further time was allowed for the return of the surveys of the land which had been entered but not surveyed before January 1, 1852. The section does not, therefore, help the plaintiff's title.

But the plaintiff relies confidently on the second section, and her contention is, that the "land office" referred to in this section is the same as the "office of the principal surveyor of said," the Virginia military, "district" mentioned in the third section of the act, and that, as on November 25, 1824, Archibald Gordon had recorded his survey in the latter office, kept at Chilicothe, Ohio, the section above quoted makes the survey valid.

In construing the second section of the act of 1880, the rule already referred to must be applied, namely, that all acts in relation to the same subject are to be construed together as if one act. The act of 1880 is part of the system of legislation relating to the Virginia Military District in the State of Ohio, beginning with the act of March 23, 1804, and continued in the fourteen other acts heretofore referred to. The acts of March 23, 1804, and of March 2, 1807, passed before the establishment of the General Land Office, required surveys to be returned to the Secretary of War. All the subsequent acts,

except the act of February 22, 1815, which omitted any direction for the return of surveys, fourteen in number, either directly or by reference to other acts, required surveys to be returned to the General Land Office. When, therefore, the second section of the act of May 27, 1880, provides that all legal surveys returned to the "land office" before March 3, 1857, shall be valid, it is not open to question that the land office referred to is the General Land Office. In all the legislation on the subject, found in thirteen acts of Congress, extending over a period of sixty-eight years, no other land office had been mentioned. The theory that the words "land office," in the act of May 27, 1880, meant the office of the principal surveyor of the District of Chilicothe, which, in all the previous legislation had never been named or alluded to, is without any support in any rule of construction, and is inconsistent with the system for the disposition of the lands adopted and maintained by Congress for more than three-quarters of a century. That system, as we have seen, required the surveys and warrants to be returned to the city of Washington, at first to the Secretary of War, and afterwards to the General Land Office. It required that patents should be issued by the President upon surveys so returned, and no patent could issue on any survey not so returned. It cannot be conceived that Congress, by the omission of the word "general" before the words "land office," intended to reverse this policy which it had persistently adhered to through fifteen different statutes and for nearly three generations, and thus to unsettle the titles to land in a large and densely peopled territory.

Nor can we impute to Congress the incongruity of using the words "land office," and the words "the office of the principal surveyor of said district," in contiguous sections of the same act, to mean the same thing. But all doubt, if any existed, of the true meaning of the words "land office" in the section under consideration is removed by the fact that the section is plainly in substance and effect a re-enactment of the act of March 3, 1855, which provided in terms for the return of surveys to the General Land Office.

The plaintiff further insists that the first and second sec-

tions of the act of May 27, 1880, repeal, by implication, the third section of the act of March 23, 1804. There is no ground for such a contention. It is most unreasonable to suppose that Congress intended, by doubtful inference, to repeal the salutary provision of section 4 of the act of 1804, which, in numerous enactments, it had cautiously preserved for a period of seventy-six years, and on which the titles to a vast domain rested.

The object of the first and second sections of the act of May 27, 1880, was not to confer new rights, but to preserve rights already vested, from impairment by any construction which might be placed on the act of February 18, 1871, by which the unsurveyed and unsold lands in the Virginia Military District were ceded to the State of Ohio.

But it is enough to say that there is no inconsistency between the two enactments, one of which is said to repeal the other. There can, therefore, be no repeal by implication.

It follows that the plaintiff can derive no aid from any act of Congress passed since the first day of January, 1852. On that day all interest and estate of the heirs of Archibald Gordon in the lands covered by his entry recorded on January 1, 1823, and his survey recorded on November 6, 1824, ceased and determined. The plaintiff, therefore, has failed to make good her averment that she has an equitable estate in fee simple to the premises in controversy. She has, therefore, shown no right to the relief prayed by her bill.

It is immaterial whether the patent of Gregg, under which the defendants claim, was valid or void. The plaintiff, having no title, can have no relief against them. The defendants, being in possession, are entitled to retain possession until ousted by one who has the title. The decree of the Circuit Court, by which the bill was dismissed, was, therefore, right, and is

Affirmed.

Fussell *v.* Hughes, Appeal from the Circuit Court of the United States for the Northern District of Ohio.

The bill in this case was also filed November 20, 1879. It was based on the same alleged title as that in case No. 147, and was

brought for a part of the lands covered by the same entry and survey, and prayed for the same relief. The same defences were pleaded. It follows, from what has been said in the above case, that this suit is not within the jurisdiction of a court of equity, and that the plaintiff has no right whatever to the lands to which she seeks to establish title, and of which she prays to be put in possession. The decree of the Circuit Court by which the bill was dismissed was, therefore, right.

Decree affirmed.

ST. LOUIS *v.* MYERS.

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

Submitted November 24, 1884.—Decided March 2, 1885.

The act of March 6, 1820, 3 Stat. 545, admitting Missouri into the Union left the rights of riparian owners on the Mississippi River to be settled according to the principles of State law.

The act of June 12, 1866, § 9, 14 Stat. 63, relinquishing to the city of St. Louis the rights of the United States in wharves and thoroughfares, did not authorize the city to impair the rights of other riparian proprietors by extending streets into the river.

This case presents no Federal question to give jurisdiction to the court, and is distinguished from *Railway Co.* v. *Renwick*, 102 U. S. 180.

This was a motion to dismiss for want of a Federal question to give jurisdiction.

Mr. Nathaniel Myers for the motion.

Mr. Leverett Bell opposing.

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

The question on which this case turned below was whether Myers, the lessee of property situated on the bank of the Mississippi River within the city of St. Louis, which had been improved with a view to its use, and was used in connection with the navigation of the river, could maintain an action

against the city for extending one of its streets into the river so as to divert the natural course of the water and destroy the water privileges which were appurtenant to the property. The Supreme Court of the State decided that he could; and to reverse that decision this writ of error was brought.

We are unable to discover that any federal right was denied the city by the decision which has been rendered. The act of Congress providing for the admission of Missouri into the Union, Act of March 6, 1820, ch. 22, 3 Stat. 545, and which declares that the Mississippi River shall be "a common highway and forever free," has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of State law. Certainly there is nothing in the provisions of the act from which a right can be claimed by the city of St. Louis, even though it be the owner of the bed of the river, to change the course of the water as it flows, to the injury of those who own lands on the banks. This act was not mentioned in the pleadings, and, so far as we can discover, it was not alluded to in the opinions of either of the courts below except for the purpose of showing that the Mississippi River was in law a navigable stream.

By an act passed June 12, 1866, ch. 116, § 9, 14 Stat. 63, Congress relinquished to the city of St. Louis all the right, title and interest of the United States "in and to all wharves, streets, lanes, avenues, alleys and of the other public thorough fares" within the corporate limits; but this did not, any more than the act providing for the admission of Missouri into the Union, purport to authorize the city to impair the rights of other riparian proprietors by extending streets into the river, and neither in the court below nor here has there been any provision referred to which it is claimed has that effect.

The case of *Railway Co.* v. *Renwick*, 102 U. S. 180, 182, was entirely different from this. There the question was whether the owner of a saw-mill on the bank of the Mississippi River, who had improved his property by erecting piers and cribs in the river under the authority of a statute of Iowa, but without complying with the provisions of § 5254 Rev. Stat., could claim

compensation from the railroad company for taking his property in the river for the construction of its road. The company claimed that, as Congress, in the exercise of its jurisdiction over the navigable waters of the United States, had prescribed certain conditions on which the owners of saw-mills on the Mississippi River might erect piers and cribs in front of their property, the statute of Iowa, under which Renwick had made his improvements, was void. This we held presented a federal question and gave us jurisdiction; but nothing of that kind appears in this record.

On the whole we are satisfied that no case has been made for our jurisdiction, and

The motion to dismiss is granted.

BROWN, Administratrix, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 13, 1885.—Decided March 2, 1885.

In case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive.

The provisions of the act of August 3, 1861, ch. 42, § 23, 12 Stat. 291, relating to the retirement of officers of the navy, having been uniformly held, by the officers charged with their execution, to be applicable to warrant officers, are now held to be so applicable.

The act of July 15, 1870, 16 Stat. 321, did not abolish the furlough pay list; and an order after the passage of that act retiring a naval officer on furlough pay was made in pursuance of law.

The administrator of a retired naval officer cannot, in order to recover from the United States an increase in the compensation of his intestate, take advantage of an alleged defect in the proceedings by which he was retired, and which he acquiesced in without objection during his lifetime.

§ 1588 Rev. Stat. does not apply to officers retired on furlough pay.

Officers of the navy on the retired list are not entitled to longevity pay. *Thornley* v. *United States, ante,* 310, affirmed.

James Brown, the intestate of the appellant, was a boatswain in the United States navy. The petition in this case was filed against the United States by the administratrix of his estate in

the Court of Claims to recover a balance of pay which she alleged was due to Brown at his death. The Court of Claims found the following facts: Brown, the decedent, was appointed a boatswain in the navy of the United States, January 4, 1862. On October 22, 1872, the Naval Retiring Board, before which he had been ordered by the Secretary of the Navy under the provisions of § 23 of the act of August 3, 1861, 12 Stat. 291, reported that he was incapacitated from performing the duties of his office, and that there was no evidence that such incapacity was the result of any incident of the service. He was accordingly, upon the day last mentioned, by order of the President, retired on furlough pay. From October 22, 1872, to June 30, 1875, Brown received pay at the rate of $900 per annum, and from July 1, 1875, to June 6, 1879, at the rate of $500 per annum. On the day last named he died.

The court further found that the acts of August 3, 1861, 12 Stat. 287, and of December 21, 1861, 12 Stat. 329, were soon after their enactment construed by the President and Navy Department to include warrant officers, and under that construction it had been the uniform practice of the President to place warrant officers on the retired list, and large numbers of these officers had been so retired. No protest or objection was made by Brown during his lifetime either to his retirement or rate of pay. The accounting officers of the treasury had uniformly held that longevity pay to retired officers was not authorized by § 1593 of the Revised Statutes.

From these findings of fact the Court of Claims deduced, as a conclusion of law, that Brown was legally placed on the retired list, and had received the full amount of pay allowed him by law, and was not entitled to recover, and entered judgment dismissing the petition. The appeal of the petitioner brings that judgment under review.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellant.

Mr. Solicitor-General for appellee.

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

It is not denied that up to July 1, 1875, Brown received all the pay to which he was entitled.

The first contention of the appellant is that the placing of Brown on the retired list was unauthorized by law, and that he was therefore entitled to the full pay of a boatswain from July 1, 1875, up to the time of his death.

§ 23 of the act of August 3, 1861, 12 Stat. 291, by authority of which the President assumed to retire Brown, reads as follows:

"That whenever any officer of the navy, on being ordered to perform the duties appropriate to his commission, shall report himself unable to comply with such order, or whenever, in the judgment of the President of the United States, an officer of the navy shall be in any way incapacitated from performing the duties of his office, the President, at his discretion, shall direct the Secretary of the Navy to refer the case of such officer to a board. . . . The board, whenever it finds an officer incapacitated for active service, will report whether, in its judgment, the incapacity resulted from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service; if so, and the President approve of such judgment, the disabled officer shall thereupon be placed upon the list of retired officers, according to the provisions of this act. But if such disability or incompetency proceeded from other causes, and the President concur in opinion with the board, the officer may be retired upon furlough pay, or he shall be wholly retired from the service with one year's pay, at the discretion of the President; and in this last case his name shall be wholly omitted from the Navy Register. . . ."

The appellant asserts that this section applies only to commissioned officers, and not to warrant officers, to which latter class Brown belonged.

It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the enactment of the act the President and the Navy Department construed the section to include warrant as well as commissioned offi-

cers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale.

In *Edwards* v. *Darby*, 12 Wheat. 206, it was said by this court that "in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect." This case is cited upon this point with approval in *Atkins* v. *Disintegrating Co.*, 18 Wall. 272, 301; *Smythe* v. *Fiske*, 23 Wall. 374, 382; *United States* v. *Pugh*, 99 U. S. 265; and in *United States* v. *Moore*, 95 U. S. 760, 763. In the case last mentioned the court said that "the construction given to a statute by those charged with the duty of executing it . . . ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterward called upon to interpret." And in the case of *United States* v. *Pugh*, the court said: "While, therefore, the question," the construction of the abandoned and captured property act, "is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of Claims and the Executive for so long a time." See also *United States* v. *State Bank of North Carolina*, 6 Pet. 29; *United States* v. *Alexander*, 12 Wall. 177; *Peabody* v. *Stark*, 16 Wall. 240; and *Hahn* v. *United States*, 107 U. S. 402.

These authorities justify us in adhering to the construction of the law under consideration adopted by the executive department of the government, and are conclusive against the contention of appellant, that § 23 of the act of August 3, 1861, did not apply to warrant officers.

The appellant next contends that the retirement of Brown was illegal, because at the time of his retirement no officer could be placed on the retired list for disability not originating in the line of duty. The theory of this contention seems to be this: the statute required that all officers retired for disability

or incompetency not resulting from long and faithful service, or wounds or injuries received in the line of duty, or from sickness or exposure therein, should be retired on furlough pay, and, as §§ 3, 5 and 19 of the naval appropriation act of July 15, 1870, 16 Stat. 321, abolished the furlough pay list, the President was only authorized to retire Brown wholly from the service with one year's pay. We think it is clear that the sections of the statute referred to were not intended to abolish the furlough pay list. So far as they refer to retired officers they apply to the retired list, and not to the retired list on furlough pay. For thirty years the legislation of Congress has divided retired naval officers into two classes. By § 2 of the act of February 28, 1855, 10 Stat. 616, the officers on the retired, or, as it was then designated, reserved list, were divided into those entitled to receive leave of absence pay and those entitled to receive furlough pay. The distinction between the two classes of retired officers has been preserved down to the present time. Thus, in § 3 of the act of January 16, 1857, 11 Stat. 154, it was provided that the President should be authorized to transfer any officer from the furlough to the reserved pay list. By § 23 of the act of August 3, 1861, 12 Stat. 290, 291, by virtue of which Brown was retired, it was provided that officers incapacitated for active service from long service, wounds, etc., should be placed on the list of retired officers, but those incapacitated from other causes should be retired upon furlough pay. So, by § 2 of the act approved July 28, 1866, 14 Stat. 345, it was provided that the rate of pay of officers of the navy on the retired list and not on duty, nor retired on furlough pay, should be one-half the pay to which such officers would be entitled if on duty at sea.

This legislation has been reproduced in the Revised Statutes, where the distinction between officers on the retired list and officers on the retired list on furlough pay is preserved. Thus, §§ 1588 and 1592 prescribe one rate of pay for retired officers, and § 1593 a different rate for officers on the retired list on furlough pay, and § 1594 authorizes the President, by and with the advice and consent of the Senate, to transfer any officer of the navy on the retired list from the furlough to the retired

pay list. It is plain, therefore, that § 5 of the act of July 15, 1870, relied on by appellant, and which is the only one which refers to the pay of retired officers, applies in both its terms and meaning only to the pay of officers on the retired list, and not to the compensation of officers retired on furlough pay, to which class Brown belonged, and did not abolish the furlough pay list. The order of the President retiring Brown on furlough pay was, therefore, made strictly in accordance with the provisions of the statute then and still in force.

It is next objected that the order of the President retiring Brown was illegal and void, because the retiring board having reported him incapacitated, did not find and report what was the cause of his incapacity, but only that there was no evidence that it was the result of any incident of the service. But as it is incumbent on the officer whose case comes before a retiring board to show, in order to secure a report which will entitle him to be placed on the retired list rather than on the retired list on furlough pay, that his incapacity was the result of some incident of the service, the report of the board that there was no evidence to support such a finding is to all intents and purposes a report that the incapacity was not the result of an incident of the service, and justifies an order retiring the officer on furlough pay. But if there had been any irregularity or defect in the report of the board it was the duty of Brown to object to it without unreasonable delay. After his acquiescence in the proceedings during the remainder of his life, it does not lie with his administratrix to object to them, even for a substantial defect, much less for such an irregularity, if it be an irregularity, as is set up in this case. Our opinion is, therefore, that the order of the President retiring Brown was authorized by law, and was regular and valid.

Appellant next insists that, conceding the retirement of Brown to be valid, he did not receive, after July 1st, 1875, the pay to which he was entitled. It is contended, first, that he should have been paid according to the provisions of § 5 of the act of July 15, 1870, 16 Stat. 333, now forming the last clause in § 1588 of the Revised Statutes. This enactment provides that officers on the retired list shall receive one-half the sea-pay

allowed to the grade or rank which they held at the date of their retirement. But we have seen that Brown did not belong to the general list of retired officers, but to a distinct class, namely, officers retired on furlough pay. His case, therefore, fell under the enactments embodied in § 1593 of the Revised Statutes, which fixed his pay at one-half that to which he would have been entitled if on leave of absence on the active list. This is the rate at which he has been paid. It is next said that, conceding that his pay was fixed by § 1593, he should, after his retirement, have received the increase of pay allowed officers on the active list for length of service by § 1556 of the Revised Statutes, page 267, commonly known as longevity pay, which, after July 1, 1875, would have entitled him to $600 per annum instead of the $500 which he actually received. This last contention has been decided adversely to the view of the appellant by this court, at the present term, in the case of *Thornley* v. *United States*, *ante*, page 310. We are, therefore, of opinion that Brown was paid, in his lifetime, all that he was entitled to receive under the laws then in force. The judgment of the Court of Claims dismissing his petition was therefore right, and is

Affirmed.

CHICAGO LIFE INSURANCE COMPANY *v.* NEEDLES, Auditor.

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

Argued January 29, 1885.—Decided March 2, 1885.

When the final judgment of a State court necessarily involves an adjudication of a claim, made therein, that a statute of the State is in derogation of rights secured to a party by the Constitution, this court has jurisdiction of the cause in error, although the State court did not in terms pass upon the point.

A grant of corporate franchises is necessarily subject to the condition that the privileges and franchises conferred shall not be abused; or employed to defeat the ends for which they were conferred; and that when abused or misemployed, they may be withdrawn by proceedings consistent with law.

A corporation is subject to such reasonable regulations, as the legislature may from time to time prescribe, as to the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it.

The establishment against a corporation, before a judicial tribunal, in which opportunity for defence is afforded, that it is insolvent; or that its condition is such as to render its continuance in business hazardous to the public, or to those who do business with it; or that it has exceeded its corporate powers; or that it has violated the rules, restrictions, or conditions prescribed by law; constitute sufficient reason for the State which created it to reclaim the franchises and privileges granted to it.

An adjudication by a competent tribunal, after full opportunity for defence, that a corporation against which the foregoing grounds have been established, shall no longer enjoy its corporate franchises and privileges, does not deprive it of its property without due process of law, or deny to it the equal protection of the laws.

The facts are stated in the opinion of the court.

Mr. C. C. Bonney for plaintiff in error.

Mr. J. L. High (*Mr. E. B. Sherman* was with him) for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

By an act of the General Assembly of Illinois, approved February 16, 1865, certain named persons were created a body politic and corporate by the name of the Traveller's Insurance Company, with authority to carry on the business of insuring persons against the accidental loss of life or personal injury sustained while travelling by railways, steamers, and other modes of conveyance. Subsequently, by an act approved February 21, 1867,—the provisions of which were formally accepted by the company—its name was changed to that of the Chicago Life Insurance Company, and it was invested with power to make insurance upon the lives of individuals, and of persons connected by marital relations to those applying for insurance, or in whom the applicant had a pecuniary interest as creditor or otherwise; "to secure trusts, grants, annuities, and endowments, and purchase the same, in such manner, and for such premiums and considerations as the board of directors

or executive committee shall direct." That, as well as the original act, was declared to be a public act, to be liberally construed for the purposes therein mentioned.

A general law of the State, approved March 26, 1869, and which took effect July 1, 1869, entitled "An Act to organize and regulate the business of life insurance," provides (§ 10): "When the actual funds of any life insurance company doing business in this State are not of a net value equal to the net value of its policies, according to the 'combined experience' or 'actuaries' rate of mortality, with interest at four per centum per annum, it shall be the duty of the auditor to give notice to such company and its agents to discontinue issuing new policies within the State until such time as its funds have become equal to its liabilities, valuing its policies as aforesaid. Any officer or agent who, after such notice has been given, issues or delivers a new policy from and on behalf of such company before its funds have become equal to its liabilities as aforesaid, shall forfeit, for each offence, a sum not exceeding one thousand dollars." The same statute requires, among other things, every life insurance company incorporated in Illinois to transmit to the auditor, on or before the first day of March, in each year, a sworn statement of its business, standing, and affairs, in the form prescribed or authorized by law and adapted to its business; empowers that officer to address inquiries to any company in relation to its doings or condition, or to any other matter connected with its transactions, to which it was required to make prompt reply; and makes it his duty to make, or cause to be made, an examination of its condition and affairs, whenever he deems it expedient to do so, or whenever he has good reason to suspect the correctness of any annual statement, or that its affairs are in an unsound condition. The provisions, relating to life insurance companies, incorporated in other States, and doing business in Illinois need not be here examined, or their effect determined.

By another general statute, approved February 17, 1874, in force July 1, 1874, it is provided as follows:

"Sec. 1. If the auditor of State, upon examination of any insurance company incorporated in this State, is of the opinion

that it is insolvent, or that its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded, or is exceeding its corporate powers, he shall apply by petition to a judge of any Circuit Court of this State to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business, until a full hearing can be had, or otherwise, as he may direct. It shall be discretionary with such judge, either to issue said injunction forthwith, or to grant an order for such company, upon such notice as he may prescribe, to show cause why said injunction should not issue, or to cause a hearing to be had on complaint and answer, or otherwise, as in ordinary proceedings in equity, before determining whether an injunction shall be issued. He may in all such cases make such orders and decrees, from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company."

"SEC. 5. When the charter of any such insurance company expires, is forfeited, or annulled, or the corporation is restrained from further prosecution of its business, or is dissolved, as hereinbefore provided, the court, on application of the auditor, or of a member, stockholder or creditor, may, at any time before the expiration of said two years, appoint one or more persons to be receivers, to take charge of the estate and effects of the company, including such securities as may be deposited with the auditor or treasurer of State, and to collect the debts due, and property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and do all other acts necessary for the collection, marshalling and distributing of the assets of the company, and the closing of its concerns; and, when necessary for the final settlement of its unfinished business, the powers of such receivers may be continued as long as the court deems necessary therefor."

"SEC. 9. The mode of summoning parties into court, the rules of practice, course of procedure, and powers of courts, in cases arising under this act, shall be the same as in ordinary proceedings in equity in this State, except as herein otherwise provided."

Under the authority conferred by the latter statute the auditor caused an examination to be made, by the chief clerk of the insurance department of the State, into the condition of this company. That officer reported that it had been doing a losing business for several years, was insolvent within the meaning of the statute, and that immediate steps should be taken to appoint a receiver, to the end that the affairs of the company be wound up as quickly as possible, as being for the best interests of its policy-holders. As the result of that examination, the present proceedings were commenced by the auditor in the Circuit Court of Cook County under the said act of 1874. The petition filed by him shows that, in his opinion, the condition of the company rendered its further continuance in business hazardous to the insured. He prayed that the company be enjoined from further prosecuting its business; that a receiver be appointed to take charge of its real estate and effects; and that such other relief be granted as should be meet. An injunction was issued, and a receiver appointed, with authority to take possession of the property of the company, the latter being directed to execute all conveyances necessary to vest in him full title to all its property, assets and choses in action. The company, by its answer, put the plaintiff on proof of all the material allegations of the petition. At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was, that the statutes of the State, under which these proceedings were had, were in violation of the Constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policy-holders and creditors.

This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prose-

cuted to the Supreme Court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the Constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the Supreme Court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of state proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied.

The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained, consistently with the power which the State has, and, upon every ground of public policy, must always have, over

corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett* v. *Taylor*, 9 Cranch, 43, 51; Angell & Ames on Corporations, 9th Edit. § 774, note.

Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 68, 70; *Commonwealth* v. *Farmers' & Mechanics' Bank*, 21 Pick. 542; *Commercial Bank* v. *Mississippi*, 4 Sm. & Marsh. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all.

In the present case it is claimed by the State that the Chicago Life Insurance Company was never solvent at any time after

its original organization; that only ten per cent. of its authorized capital stock was ever paid in; that stock subscription notes, representing unpaid subscriptions, were ingeniously made payable on demand, with interest after such demand, and that no demand having been made, no interest accrued; that, nevertheless, the verified reports of the company to the State indicated that its capital stock was fully paid up in cash, thus leading the public and the insured to believe that the stock was paid up and invested in interest-bearing securities; that large dividends were annually paid to stockholders from the earnings of the company, which, consistently with an honest exercise of its franchises and privileges, and with its duty to policy-holders, should not have been paid; that interest upon collateral securities deposited by stockholders owing subscriptions was received by the stockholders themselves; that the annual dividends paid to stockholders were in direct violation of the company's by-laws; that the annual reports to the auditor scheduled large amounts of assets and securities as the property of the corporation, when, in fact, they were the property of individuals; that such reports falsely magnified the receipts of the company and misstated its disbursements; and that its last annual report included, among its securities, about $80,000 of mortgages which were not the property of the company. These statements, counsel for the State claim, are fully sustained by the evidence in the cause, while counsel for the company, with equal emphasis, contends that the showing made is all that could be desired in a corporation managed by careful, honest directors.

We express no opinion as to the correctness of either of these opposing views; for, they refer to matters that do not necessarily involve the validity of the statutes which, it is contended, violate the National Constitution; they relate only to the manner in which the company has exercised its corporate powers, and do not involve any question of a federal nature. It is not competent, under existing laws, for this court to inquire whether the State court correctly interpreted the evidence as to the company's insolvency; nor whether the facts make a case which, under the statute of 1874, required or permitted a judgment perpetually enjoining it from doing any further busi-

ness. We are restricted by the settled limits of our jurisdiction to the specific inquiry, whether the statutes themselves, upon which the judgment below rests, impair the obligation of any contract which the company, or its policy-holders, had with the State, or infringe any right secured by the National Constitution. *Railroad Co.* v. *Rock*, 4 Wall. 177, 180; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383. It is only as bearing upon the question of the power of the State—without any express reservation to that end having been made in the charter of the company—to subject it to such regulations as those established by the act of 1869, or to compel it to cease doing business when the circumstances exist which are set out in the act of 1874, that we have referred to, the facts which counsel for the State contend are fully established by the evidence. If the State had no such power, then the statutes under which she proceeds would impair the contract which the company had with her by its charter. But can it be possible that the State, which brought this corporation into existence for the purpose of conducting the business of life insurance, is powerless to protect the people against it, when—assuming, as we must, the facts to be such as the judgment below implies—its further continuance in business would defeat the object of its creation, and be a fraud upon the public, and on its creditors and policy-holders? Did the company, by its charter, have a contract that it should, without reference to the will of the State, or the public interests, exercise the franchises granted by the State after it became insolvent and consequently unable to meet the obligations which, as a corporation, under the sanction of the State, it had assumed to its policy-holders? Our answer to these questions is sufficiently indicated by what has been said. The act of 1869 does not contain any regulation respecting the affairs of any corporation of Illinois which is not reasonable in its character, or which is not promotive of the interests of all concerned in its management. It only guards against mismanagement and misconduct; its requirements constitute reasonable regulations of the business of such local corporations; it does not impair the obligation of any contract which this company had with the State; the conditions imposed upon the

rights of the company to continue the issuing of policies are neither arbitrary nor oppressive.

The same general observations apply to the act of 1874, which, recognizing the contract right of the company to carry on business as a corporation, does not, by a legislative decree merely, based upon the *ex parte* representations of public officers, assume to withdraw that right. There is no denial, as counsel supposes, of the equal protection of the laws, nor any deprivation of property without due process of law; for, that statute authorizes a public officer to bring the company before a judicial tribunal, which, after full opportunity for defence, may determine whether it is insolvent, or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions or conditions prescribed by law; grounds which, if established, constitute sufficient reason why the corporate franchises and privileges granted by the State should be no longer enjoyed. *Terrett* v. *Taylor*, *ubi supra*; 2 Kent's Com. 304, 312; *Slee* v. *Bloom*, 5 Johns. Ch. 366, 379; *Commonwealth* v. *Farmers' & Mechanics' Bank*, 21 Pick. 542. See also Angell & Ames on Corporations, § 774 and note, 9th Ed. That a suit, for such purposes, might be instituted if, in the opinion of the auditor of state, any of those grounds existed, affords no justification to characterize this proceeding as harsh or arbitrary; for, at last, the final judgment of the court must depend upon the facts as established by competent evidence, and not upon the mere opinion of that officer. Indeed, the existence of such an opinion, upon the part of that officer, as a condition of his right to institute the proceedings prescribed by the act of 1874, is in the interest of the corporations embraced by its provisions; for it furnishes some protection against hasty or oppressive action against them.

These views are strengthened by the company's acceptance of the amended charter granted in 1867. The fifth section of that act is in these words: "This act and the act to which this is an amendment shall not be deemed to exempt said company from the operation of such general laws as may be here-

after enacted by the General Assembly on the subject of life insurance." That section may not be equivalent to a reservation of the right of the legislature to alter, amend, or repeal the original charter at pleasure; and, if it be admitted that the company, prior to that amendment, could not have been subjected to the regulations prescribed by the acts of 1869 and 1874, yet it was entirely competent for it to waive—as, by its acceptance of the amended charter, it did waive—any such exemption, and, in consideration of the grant of additional powers, or without any consideration of that character, agree to come under the general laws on the subject of the business in which it was engaged, which did not materially impair its right to carry on that business, or take from it any substantial privilege conferred by the original charter. It took the additional rights given by the act of 1867, subject to the condition imposed by its fifth section.

It is further contended that the State enactments in question impair the obligation of the contracts which the company has made with its creditors and policy-holders. To this it is sufficient to reply, in the language of the court in *Mumma* v. *Potomac Co.*, 8 Pet. 281, 287, where it was said: "A corporation, by the very terms and nature of its political existence, is subject to a dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuse and non-use. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter." The contracts of policy-holders and creditors are not annihilated by such a judgment as was rendered below; for, to the extent that the company has any property or assets, their interests can be protected, and are protected by that judgment. The action of the State may or may not have affected the intrinsic value of the company's policies; that would depend somewhat on the manner in which its affairs have been conducted, upon the amount of profits it has realized from business, and upon its act-

ual condition when this suit was instituted; but the State did not, by granting the original and amended charter, preclude herself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she had given, when they should be so misused as to defeat the objects of her grant, or when the company had become insolvent so as not to be able to meet the obligations which, under the authority of the State, it had assumed to policy-holders and creditors.

The whole argument in behalf of the company proceeds upon the erroneous assumption that this court has authority to determine whether the facts make a case under the statutes of 1869 and 1874, and if it be found they did not, that it must enforce the right of the company to continue in business, despite the final judgment to the contrary by the courts of the State which created it; whereas, we have only to inquire whether the statutes in question impair the obligation of any contract which the company has with the State, or violate any other provision of the National Constitution. Being of opinion that they are not open to any objection of that character, the judgment must be affirmed without any reference to the weight of the evidence upon any issue of fact made by the pleadings.

Judgment affirmed.

PEARCE & Another *v.* HAM.

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

Submitted January 9, 1885.—Decided March 2, 1885.

F contracted with a county to construct a public building, and gave bond with K as surety for the performance of the contract. F abandoned the contract. After procuring some modifications in it at request of H, K assigned the contract to P and H as partners with equal interests. P and H agreed with W to construct the building. H then left the vicinity and engaged in other work elsewhere. W constructed the building. K received the compensation under the original contract, paid W in full

for the work done by him, and divided the profits with P, claiming to be partner. *Held,* That H could recover one-half of the profits from P and from K.

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

Mr. John M. Palmer for appellants.

Mr. Samuel P. Wheeler for appellee.

Mr. Justice Woods delivered the opinion of the court.

The bill was filed by Charles I. Ham, the appellee, against Isaac N. Pearce and Andrew J. Kuykendall, the appellants. The record showed the following facts: On August 5, 1868, one Joseph K. Frick entered into a contract in writing of that date with the County Court of Johnson County, in the State of Illinois, by which he agreed to build, according to certain plans and specifications, a court-house for said county, at Vienna, the county seat, furnishing the material and completing it by the first Monday of September, 1870, in consideration whereof the County Court agreed to pay him $38,357 in the bonds of Johnson County, bearing ten per cent. interest, and due in six years. The bonds were to be paid in instalments, one-fourth at the time of the execution of the contract, one-fourth when the work was half done, one-fourth when the work was three-fourths done, and the residue when it was completed. Frick, to secure the performance of his contract, executed to the judges of the County Court, a bond in the penal sum of $20,000, with the appellant, Andrew J. Kuykendall as his surety.

Frick never did any work on the building, and, owing to some misunderstanding with the County Court, abandoned the contract, and told Kuykendall that he might go on and build the court-house if he chose to do so. On September 9, 1869, Kuykendall, as the agent and attorney in fact of Frick, assigned the contract of the latter to Ham and Pearce, Ham being the appellee, and Pearce one of the appellants, who had formed a partnership for the purpose of building the court-house under said contract.

Opinion of the Court.

Before accepting the assignment, Ham, who was a practical mechanic, read the contract and made an estimate of the cost of the building according to the plans and specifications, and told Pearce "that there was no money in the contract." He therefore suggested six changes in the plan which would greatly reduce the cost, and would not detract from the general utility of the building, and explained them to the County Court. The court, without insisting on any reduction in the price to be paid, agreed that the changes might be made, and suggested two others, to which Ham assented, and, with the original contract of Frick thus modified, Ham and Pearce accepted the assignment of the contract and undertook to perform it.

About October 1, 1869, they begun work on the building, did some excavating for the foundation, and quarried and delivered some stone. This work was carried on under the supervision of Ham, and amounted in value to $690, the most of which was paid by Pearce, but the sum so paid was afterwards refunded to him.

Afterwards Ham, believing that the work of building the court-house could be sub-let so as to afford a large profit to Pearce and himself, with that view entered upon a treaty with one Wickwire, and, on December 8, 1869, Wickwire having assented to the terms proposed by Ham, the firm of Ham & Pearce made a contract in writing, of that date, with Wickwire, by which he agreed to furnish the materials and build the court-house according to the modified plans and specifications, and to complete it by the first day of November, 1870, in consideration whereof Ham & Pearce agreed to pay him $27,300 in the bonds of Johnson County, at par, in four equal instalments, the first when Wickwire began the work, the second when one-third, the third when three-fourths, and the fourth when all the work was completed. Ham told Wickwire that he should probably be in Vienna and see him every day, and if so he would render him all the assistance in his power in the erection of the building and the negotiation of the bonds. Kuykendall, as the agent of Frick, had already received from the County Court one-fourth of the bonds which they were to pay for the building of the court-house, and at

once turned over to Pearce bonds of the face value of between $8,000 and $9,000, and a special county order for $400. Having made the contract with Wickwire, Ham left Vienna, and about February 1, 1870, engaged in the construction of a piece of railroad in Indiana, which he had contracted to build, and did not return until the court-house was completed. Wickwire, under the supervision and inspection of an agent appointed by the County Court, did, in fact, furnish the materials and build the court-house according to the plans and specifications specified in Frick's contract as subsequently modified. The work and materials seem to have been in all respects satisfactory to the County Court, who accepted the court-house and paid the contract price, $38,357, in the bonds of Johnson County, at par.

These bonds were delivered in instalments by the County Court to Kuykendall, who used them either directly or indirectly to pay Wickwire the amount which he was to receive for the building of the court-house, and divided the residue between himself and Pearce.

The object of the suit was to obtain an account of what was due to Ham by virtue of his said partnership and partnership enterprise, and that Pearce and Kuykendall might be decreed to pay him what might be found due on such accounting either in cash or Johnson County bonds.

Upon final hearing upon the pleadings and evidence, the Circuit Court rendered a decree in favor of Ham against Kuykendall and Pearce for $5,001. The appeal of Kuykendall and Pearce brings that decree under review.

Ham and Pearce, it is conceded on all hands, engaged as partners in the enterprise of building a court-house for the county of Johnson. It plainly appears that Ham secured such a modification of the plan and specifications of the court-house as to enable Pearce and himself to build it at a profit, and not at a loss; that after this modification the contract by which Frick had engaged to erect the building was assigned to Ham & Pearce by Kuykendall, acting as attorney in fact for Frick, and that Ham & Pearce sub-let the contract to Wickwire on such terms as would yield them a profit of at least $10,000. Ham's

interest was worth, as it turned out, not less than $5,000. Without his consent, Ham's share of the profits of his partnership venture was appropriated by Kuykendall and Pearce. These facts alone considered justify the decree of the Circuit Court, and that decree should be affirmed, unless the reasons assigned by Pearce and Kuykendall afford good ground for the appropriation by them of Ham's share in the profits of the enterprise.

The answers of both Pearce and Kuykendall, which were not under oath, alleged that after the contract between Ham & Pearce with Wickwire had been made, Pearce, on account of the absence and neglect of Ham, cancelled the contract, and Kuykendall cancelled the assignment to Ham & Pearce of the contract of Frick. But it appears from their testimony that this was only a mental operation. There was, in fact, no cancellation of either the Wickwire contract or of the assignment of the Frick contract. Pearce handed a copy of the Wickwire contract to Kuykendall to be cancelled, but Kuykendall immediately returned it to him uncancelled for safe keeping. The assignment of the Frick contract was allowed to remain uncancelled upon the records of the County Court. What was done, as plainly appears by the testimony of Pearce and Kuykendall, was this: Wickwire, without any new contract in writing between him and Kuykendall or between him and Kuykendall and Pearce, was allowed to perform, and did perform without any change whatever in its terms, the contract entered into by him with Ham & Pearce. Kuykendall simply took Ham's place in the enterprise, agreeing verbally with Wickwire that he would negotiate the county bonds at ninety cents on the dollar.

One excuse given for this is stated by Pearce to be that when he went into the enterprise with Ham it was with the expectation that Ham, who was a practical builder, would superintend the work, and that he himself would manage the financial affairs of the partnership. But this was the understanding when they expected to carry out the contract themselves, and the necessity for any supervision of the work or financial management mainly ended when they sub-let the contract to Wick-

wire. He carried on the work apparently with fidelity, and certainly to the satisfaction of the County Court, under the eye of a supervisor appointed by the court. The only financial duty to be performed by Pearce under the contract of Ham & Pearce with Wickwire was to draw the county bonds as the work progressed, and hand them over to Wickwire as he became entitled to them. There was no necessity for the supervision of Ham, and it is not alleged or shown that any delay or damage resulted for want of his supervision.

Some other pretext was needed for putting Ham out of the enterprise and taking Kuykendall in. This was found in the alleged fact that Ham had agreed with Wickwire to assist him in negotiating the county bonds, or enough of them to raise $5,000, and had left the neighborhood and failed to perform that part of his contract, and that Wickwire for want of $5,000 in cash was unable and refused to proceed with the construction of the building. Thereupon it became necessary for Kuykendall, who insisted that he was liable as surety for Frick for the building of the court-house, to take Ham's place and negotiate the bonds so that the work might proceed to completion within the time limited by the Frick contract.

But the written contract with Wickwire, which embodied the result of his treaty with Ham & Pearce, contained no provision by which the latter bound themselves to negotiate the bonds for Wickwire. He agreed to receive the bonds themselves as his compensation. Whatever Ham may have said to Wickwire about negotiating the bonds was a mere voluntary and conditional offer and formed no part of the consideration for the contract, and the absence of Ham and his failure to help sell the bonds, did not release Wickwire from his obligation to perform his contract; nor could the neglect of Ham to perform his individual promise, made not to Pearce but to Wickwire, furnish a ground upon which Pearce could legally dissolve his partnership with Ham without Ham's consent.

But the testimony in the record is abundant to show that the bonds sold readily at their market price, which was not less than ninety cents on the dollar. They were the bonds of a solvent county and bore ten per cent. interest payable annually,

and no sort of defence to them had ever, so far as appears, been raised. There was, therefore, no reason why they should not readily sell for ninety cents on the dollar, which was the price Wickwire was willing to take for them. Anybody could have sold them. But the hollowness of his excuse for turning Ham out of his enterprise and taking Kuykendall in, is found in the fact that when Wickwire came to Pearce and told him he could not go on with the contract for want of $5,000 in money, Pearce had in his possession between $8,000 and $9,000 in Johnson County bonds, with more than one year's interest at ten per cent. due thereon, and over $400 in a special order, turned over to him by Kuykendall as the agent of Frick, and being part of the first instalment on the contract for building the court-house. These bonds and the special order were without question the property of the partnership of Ham & Pearce. All that it was necessary for Pearce to do was to sell the bonds and furnish Wickwire with the money he said he wanted, or hand him the bonds. Wickwire testifies that if the bonds had been handed him he thinks he would have begun the work. But Pearce, according to his own testimony, never offered Wickwire the bonds, or even informed him that he had them in his possession, and he does not aver or swear that he made any effort to sell the bonds; and, although he avers in his answer that he tried to raise the $5,000 for Wickwire, he does not testify to the fact in his deposition. It, therefore, plainly appears from the evidence, that when Wickwire told Pearce that he could not begin the work for want of $5,000 in money, the latter had assets of the firm of Ham & Pearce in his hands to the amount of nearly $10,000, which could have been readily disposed of at ninety cents on the dollar; and it does not appear that Pearce made any effort to sell the bonds or in any other way raise the sum needed.

There is nothing in the testimony to show that Pearce did anything more towards carrying on the business enterprise of the firm of Ham & Pearce than was done by Ham. He did not superintend the work, or manage the finances of the firm. His only part in the business of building the court-house appears to have been to keep partial and fragmentary accounts for

Kuykendall. It is true that, by some arrangement with Wickwire, he accepted the orders of Kuykendall, given for labor and materials, and paid them in merchandise to the amount of about $20,000; but this was his own private business as a merchant, carried on for his individual profit.

In his answer, Kuykendall bases his defence on the ground, that all he did in the matter was in the interest of Frick, and as his agent, and to protect himself against his liability as surety on Frick's bond. But, when he testifies in the case, it appears that he was acting for himself only, and proposed to keep his share of the profits made in the erection of the court-house. He knew that when Wickwire was asserting that he could not begin the work for want of $5,000 in cash, Pearce had Johnson County bonds belonging to the firm of Ham & Pearce, which could have been readily turned into cash at 90 cents on the dollar, sufficient to raise between $8,000 and $9,000, for he himself had delivered these bonds to Pearce for the firm. He knew, therefore, that the excuse of Pearce, that he could not raise money for Wickwire, was a subterfuge. Both he and Pearce knew that Ham had not abandoned the enterprise, for, in the spring of 1870, Pearce visited Ham in Indiana, and proposed to him that they should allow Kuykendall an interest of one-third in their venture, and that Ham declined to accede to the proposition.

Kuykendall testifies that he sold $16,000 of the county bonds for 80 cents on the dollar, but he does not mention the name of any purchaser at that price, and no witness testifies that he ever bought a bond for less than 90 cents, except one, who says he bought two bonds, not of Kuykendall, but of one McDemot, who at first asked 85 or 90 cents on the dollar for this bond, but afterwards took 75 cents, because, as he said, "he was bound to have some money." But even if Kuykendall did sell a part of the bonds at 80 cents on the dollar, he cannot impose upon Ham a loss incident to his own unwarrantable interference in Ham's affairs.

In their answers both Pearce and Kuykendall aver that after the alleged cancellation of the contract between Ham & Pearce and Wickwire, Pearce had no further concern with the enter-

prise or interest therein, and Kuykendall avers that, as agent of Frick, he sub-let the contract to Wickwire. But in his deposition Kuykendall testifies that he divided equally with Pearce the profits made on the contract, which statement is not contradicted by Pearce in his testimony.

Ham had an interest in the assets and prospective profits of the firm of Ham & Pearce. It does not appear that he failed to perform any duty which, as a member of the firm of Ham & Pearce, he had undertaken to perform, or that, with good faith on the part of Pearce, the partnership enterprise could not have been successfully carried out. And however the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership.

The case, as presented by the evidence, is this: Pearce undertook, without any just cause, to exclude Ham, his partner, from an interest in a valuable contract, in which they were equally concerned, and to take in Kuykendall in his stead, and Kuykendall, knowing that Pearce could not rightfully exclude Ham, conspired with Pearce to accomplish that purpose, and undertook to appropriate to himself the profits of the contract which of right belonged to Ham. It is clear that these actings and doings of Kuykendall and Pearce had no effect on the rights of Ham; that he is entitled to one-half of the profits of the contract. This conclusion finds ample support, if support be needed, in the case of *Ambler* v. *Whipple*, 20 Wall. 546.

The profits are easily ascertained. They would have consisted of $10,000 in the bonds of Johnson County, bearing ten per cent. interest, and, at the time of the bringing of this suit, there was at least three years' interest due on the bonds, making in principal and interest $13,000. Estimating the bonds to be worth only 90 cents on the dollar, the amount due Ham exceeded the decree rendered in his favor by the Circuit Court, even after allowing Kuykendall a reasonable compensation for any services rendered by him.

Syllabus.

The entire profits were appropriated by Pearce and Kuykendall, and they must account to Ham for his share.

Decree affirmed.

AYERS & Another *v.* WATSON.

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

Argued November 11, 1884.—Decided March 2, 1885.

The ruling in *Hyde* v. *Ruble*, 104 U. S. 407, that clause 2, § 639 Rev. Stat. as to removal of causes, was suspended and repealed by the act of March 3, 1875, 18 Stat. 470, reaffirmed.

§ 2 of the act of March 3, 1875, defining the cases in which causes may be removed from State courts to Circuit Courts of the United States, being fundamental and based on the grant of judicial power, its conditions are indispensable—cannot be waived—and must be shown by the record.

§ 3 of that act not being jurisdictional, but a mere rule of limitation, its requirements may be waived.

The party at whose instance a cause is removed from a State court is estopped from objecting that the removal was not made within the time required by § 3 of the act of March 3, 1875, 18 Stat. 470.

The general rule in Texas for construing descriptions in grants of land is: that natural objects control artificial objects; that artificial objects control courses and distances; that course controls distance; and that course and distance control quantity.

A grant of land in Texas was made to the grantor of the plaintiff in error, with the following description: "Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a landmark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia.; a line was run to the north 22° east 22,960 varas and planted a stake in the prairie for the second corner. Thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow Creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmarks for the third corner. Thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow Creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English 'box elder,' from which 7 varas to the south 28° west there is a cottonwood with two trunks and 16 varas to the south 11° east there is an

elm 15 in. dia. Thence following up the river by its meanders to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas." The evidence showed that the lines, when run on these courses and distances, did not coincide with ascertained monuments, either called for in the grant, or conceded to mark the track of a survey of the tract made in 1833. Two marked hackberry trees were found in 1854 in the eastern line, but not at the point called for by the description. If the courses and distances were followed, this grant covered most of the claim of defendant in error. If the two hackberry trees found in 1854 were the ones described in the grant, it would not include any of that claim. *Held:*

(1) That a request by defendant below (plaintiff in error), for an instruction "that a call for two small hackberries at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for course and distance. And the jury are not authorized to consider any evidence in this case about two small hackberries found by S. A. Bigham, and by him pointed out to various other persons, which are found more than a mile from the point where course and distance would place the S. E. corner of the 11-league grant," was properly overruled;

(2) That the jury should have been told "that if the testimony was not sufficient to identify the two hackberries with those called for in the grant, and could not fix the northeast corner nor the back line by any other marks or monuments, then they should fix it by the courses and distances of the first and second lines of the survey, except that the second line should be extended so as to meet the recognized east line as marked and extended beyond the hackberries;" and

(3) That the instructions actually given failed to put this to the jury with sufficient distinctness.

Trespass, to try title. The facts which make this case, both on the jurisdiction of the court and on the merits, are stated in the opinion of the court.

Mr. W. W. Boyce for plaintiffs in error.

Mr. L. W. Goodrich filed a brief for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an action of trespass to try title of certain land in Bell County, Texas, originally brought in the District Court of said county by Watson, the defendant in error, against the plaintiffs in error and one Anderson. The land claimed was

described in the petition as a tract lying in said county of Bell, about fifteen miles northeast by north from the three forks of Little River, stating the boundaries. The defendants excepted to the petition for insufficiency of law, and also pleaded not guilty. One of them, Frank Ayers, pleaded specially that he was owner in fee simple of a tract of eleven leagues granted by the government of Coahuila and Texas to Maximo Moreno in the year 1833, describing its metes and bounds; and he alleged that the land described in the plaintiff's petition and claimed by him under some pretended patent from the State of Texas to the heirs of one W. W. Daws, deceased, was embraced within the boundaries of said eleven-league grant, which was an elder and superior title.

Anderson pleaded separately that he was occupying the Moreno grant as tenant of Ayers; and especially that 100 acres, including improvements, where he resided (describing its situation), was held by him under said Moreno title; that he had been in possession of said land for more than twelve months before the institution of this suit, adversely and in good faith; and he claimed the value of his improvements if the court should hold the plaintiff entitled to cover.

The plaintiff's original petition was filed in August, 1877, and the amended petition and pleas were filed in April, 1879. The cause was first tried in April, 1879, and again in April, 1880, and on both occasions the juries disagreed. Ayers then presented a petition for the removal of the cause to the Circuit Court of the United States, alleging that he was a citizen of the State of Mississippi, and that the plaintiff was a citizen of Texas, and that there could be a final determination of the controversy, so far as he was concerned, without the presence of the other defendants as parties in the cause. The court granted the petition and the cause was removed, no objection to the removal being made either then or in the Circuit Court afterwards. But after the issuing of the present writ of error from this court, the plaintiffs in error, at the instance of one of whom (Frank Ayers) the cause was removed, assigned for error, amongst other things, that the Circuit Court erred in taking jurisdiction of the cause.

In view of the position of the party who raises the objection we certainly should not feel disposed to reverse the judgment on the ground of the removal of the cause, unless it was clear that the Circuit Court had no jurisdiction whatever to hear and determine it. The only reasons assigned before us for the want of jurisdiction are—first, that it did not appear that the matter in dispute exceeded, exclusive of costs, the value of $500; secondly, that the application for removal was too late.

The first reason has no foundation in fact. The plaintiff's petition demanded the recovery of the land and $500 damages. This was certainly a demand for more than $500, unless it can be supposed that the land itself was worth nothing at all, which will hardly be presumed.

The second reason is more serious. The application for removal was beyond question too late according to the act of 1875, though not so under the act of 1866 as codified in Rev. Stat. § 639, clause 2, which allows the petition for removal to be filed "at any time before the trial or final hearing of the cause." This language has been held to apply to the last and final hearing. A mis-trial by disagreement of the jury did not take away the right of removal. See *Insurance Co.* v. *Dunn*, 19 Wall. 214; *Stevenson* v. *Williams*, 19 Wall. 572; *Vannevar* v. *Bryant*, 21 Wall. 41; *Railroad Co.* v. *McKinley*, 99 U. S. 147. But we have held that this clause of § 639 was superseded and repealed by the act of 1875. *Hyde* v. *Ruble*, 104 U. S. 407, 410; *King* v. *Cornell*, 106 U. S. 395; *Holland* v. *Chambers*, 110 U. S. 59. We are compelled, therefore, to examine the effect of the act of 1875 upon the jurisdiction of the court when the application is made at a later period of time than is allowed by that act.

By § 2 of the act of 1875, any suit of a civil nature, at law or in equity, brought in a State court, where the matter in dispute exceeds the value of $500, and arising under the Constitution or laws of the United States, or in which the United States is plaintiff, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and

foreign State, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district, and when in any such suit there is a controversy wholly between citizens of different States, which can be fully determined as between them, one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper district. This is the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal. By § 3 it is provided that a petition must be filed in the State court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the Circuit Court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield & Coldwater Railway Co.* v. *Swan*, 111 U. S. 379. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the

objection as to the time within which the application for removal is made. It does not belong to the essence of the thing; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word jurisdiction is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it. And since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped. In *Railroad Co.* v. *Koontz*, 104 U. S. 5, 17, we held that where the State court disregarded a petition for removal properly made, and the plaintiff continued to prosecute the suit therein, he would be deemed to have waived any objection to the delay of the defendant in entering the cause in the Circuit Court of the United States until the decision of the State court is reversed.

We do not think that this assignment of error is well taken.

The case, on its merits, depends upon the correctness of the instructions given to the jury. By agreement of the parties, the patents or grants under which they respectively claimed, as set forth in the petition and answer, and their deraignment of title under the same, were admitted on the trial, and the controversy was reduced to the simple question of locating the surveys on the ground. The tract claimed by the plaintiff, Watson, was one-third of a league, patented to the heirs of Walter W. Daws, and its position was well ascertained and defined; and the question was, whether it was or was not embraced in the older survey of the eleven-league grant, owned by the defendant Ayers, which was described in the field notes of the grant, as follows, viz: "situated on the left margin of the river San Andres, below the point where the creek called Lampassas enters said river on its opposite margin, and having the lines, limits, boundaries, and landmarks following, to wit: Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a land-mark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia.; a line was run to the north

22° east 22,960 varas and planted a stake in the prairie for the second corner. Thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow Creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner. Thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow Creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English 'box-elder,' from which 7 varas to the south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 in. dia. Thence following up the river by its meanders to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas."

This tract extended backward from the river, in a northerly direction, from twelve to fourteen miles, and, as that was about the distance from the river of the tract claimed by the plaintiff, the question was whether it embraced the latter. If it did, being held by an elder title, the defendant would be entitled to the verdict; if not, the plaintiff would be entitled to it. Under the concessions made by the parties, the burden of proof was devolved upon the defendant to show that his eleven-league tract extended so far back from the river as to embrace the plaintiff's land, or any part of it.

The evidence was that of surveyors and chain-bearers, and tended to show the following facts, namely, that, by commencing at the beginning point of the Moreno grant (the position of which was not disputed), and following the lines of the survey by courses and distances only, it would embrace nearly the whole of the Daws patent; but, run in this way, the lines would not coincide with certain well ascertained monuments, either called for in the grant, or conceded to mark and identify the footsteps of the surveyor who originally located it in 1833. For example, the easterly line of the survey, which is identified by several miles of marked trees, and the southern terminus of which, at the river San Andres, is fixed by agreement of the parties and by monuments called for in the grant

itself, is situated about 570 varas, or three-tenths of a mile, east of what its position would be if the courses and distances were followed; and, as fixed by such monuments, if the tract were made to extend as far back from the river as the defendant contends, it would contain fourteen or fifteen square leagues instead of eleven. But the point of greatest importance was to fix the position of the northern boundary line of the tract, to ascertain whether it took in or crossed the Daws patent. This was a line described in the survey as running from the stake set in the prairie, south 70° east, 12,580 varas, or Mexican yards, [about 6⅔ miles,] to two small hackberry trees. Of course, these hackberries marked the northern terminus of the eastern boundary line, before mentioned, which commenced from them; and two such trees, having all the old marks and blazes requisite, were found in said eastern boundary line (and were adopted as the northeast corner of the tract), in the course of an official survey, made by the order of the court in 1854, being at a distance of 26,960 varas from the river San Andres —the distance given in the field notes of the grant, based on calculation and not actual measurement, being 26,400 varas; whereas, by following the courses and distances mentioned in the grant, the easterly line, extended to the river, would be 30,760 varas in length, and, as before stated, would not coincide with the marked line conceded to be the easterly line as run at the original survey. If the northerly line of the Moreno tract should be located and fixed by taking for its eastern terminus the two hackberry trees referred to, it would not reach the plaintiff's land, but would pass south of it a full half of a mile. The defendant, Ayers, however, disputed the identity of these hackberry trees with those called for in the Moreno grant, and claimed that the grant extended a mile and a half or more farther north, which, indeed, it would do according to the length of the first course measured from the beginning corner; and he adduced testimony to show some marked trees north of the two hackberries, in the line of the eastern boundary, corresponding to his views, and some marks along the northerly or back line, claimed by him to be the true line.

The controversy, therefore, was substantially reduced to this

alternative, namely: if the first line of the survey taken according to its course and distance, should govern the position of the back line, the Moreno tract would include the greater part of the Daws patent; but if the two hackberry trees, discovered in 1854, were to be regarded as identical with the trees referred to in the field notes of the survey for the northeast corner thereof, then they would fix the position of the back line, and the Moreno grant would not include any part of the Daws patent.

In this state of the evidence, the judge charged the jury as follows, omitting parts not material to the controversy here:

"The original field notes do not call for any landmark at the intersection of the western line with the back or north line of the survey. At the intersection of the back line with the eastern line two small hackberries are mentioned as serving for a landmark to designate the corner. Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with reasonable certainty, and where he cannot be tracked on the ground, we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made. . . . There has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and north lines of the grant actually stood, at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant. And if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses, Sam. and Pat Bigham, were the two hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood, N. 70 W., until it intersects the western line of said grant, will bound the eleven-league grant upon the north, and if the Daws ⅓ of a league is situated wholly north of this line, it does not conflict with said eleven-league grant, and you will find for the plaintiff.

"If the proof does not satisfy you that said hackberries mentioned in the testimony are the ones called for and marked as a corner by the original surveyor, you will, from the whole

proof, so fix the unmarked or disputed lines called for in the grant as in your judgment most nearly harmonizes the calls with the known corners and the undisputed lines. And if from the proof, you fix these lines so as to include all or any part of the one-third league patented to Daws, you will find for the defendant. If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty from the proof, you may, taking the river as the base, and [*Query* so] extend the eastern and western lines as that a line run N. 70 W. (or S. 70 E.), connecting the extremities of said side lines, will embrace eleven leagues of land, and if said back line so run does not include any portion of the Daws ⅓ league, you will find for the plaintiff. If you can, from the proof, fix the lines of this grant in harmony with its calls and the known corners and undisputed line, the fact, if it be a fact, that said lines would include more than eleven leagues becomes wholly immaterial, and you will not consider the extent of the area further than as a circumstance to aid you in construing the other proof in the case. In seeking to fix these lines from the proof you will bear in mind that course controls distance, and marked trees control both course and distance."

The defendant "excepted to so much of the charge given as reads thus":

"If you are not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty from the proof, you may, taking the river as a base, so extend the eastern and western lines as that a line run N. 70° W. (or S. 70° E.), connecting the extremities of said side lines, will embrace eleven leagues of land, and if said back line so run does not include any part of the Daws ⅓ league, you will find for the plaintiff."

The defendant then asked the court to give the following charge, to wit:

"That a call for two small hackberries, at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind, and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for course and distance. And the jury are not authorized to consider any

evidence in this case about two small hackberries found by S. A. Bigham, and by him pointed out to various other persons, which are found more than a mile from the point where course and distance would place the N. E. corner of the 11-league grant."

The court refused to give said charge.

The defendant then asked the court to charge substantially as follows:

1st. That the rules adopted by the courts as to the calls in a grant, giving one call superiority over another, are adopted for the purpose of identifying the actual survey made by the surveyor—an invariable rule being that the footsteps of the surveyor must be followed, and wherever he established the lines and corners on the ground, there the survey must be located.

2d. That if the jury believe from the evidence that the Moreno survey was actually made on the ground, by commencing at the beginning corner, as called for in the grant, and actually running out and tracing with a chain the upper or western line, as called for (except the offset to avoid crossing the river); and that the northwest corner was fixed at a point on the course called for in the grant, at the end of the distance called for; and that from the northwest corner so established, the surveyor did actually run out and trace with the chain the distance called for, on the course called for, to the northeast corner, they must find for the defendant.

The court refused to give the charges so requested.

Leaving for after consideration the first exception, namely, that which was taken to a portion of the charge given by the court, and taking up in their order the several requests to charge, we observe, that the first request, relating to the call for two small hackberries, was properly overruled. Though the field notes of the survey did not describe them as being marked, and did not refer to other near objects as bearing upon them, yet they were natural objects actually called for at the end of the line of 12,580 varas "*as landmark for the third corner;*" and the presumption is that, being so referred to, they were actually marked as such, for that is the universal

custom of all surveyors; and if two such trees, answering the description, were afterwards found in the east line of the survey, properly marked, and situated at about the proper distance from the river San Andres, as called for in the survey, it was for the jury to say, in the light of all the evidence, whether said trees, so marked and so situated, were or were not the trees called for in the field notes; and, if they were, then they were such objects, and such a monument, as would control the call for course and distance. It is every day's experience in land trials, to establish by evidence the identity of both natural and artificial monuments called for in surveys. If the beginning point be at the mouth of a brook, or creek, where it empties into a river, evidence may be given, nay, must generally be given, to establish the identity of the brook; and when once established to the satisfaction of the jury, it has all the effect of any natural or artificial object called for in the survey, and will control courses and distances. In the present case the two hackberry trees relied on by the plaintiff were found in the acknowledged easterly line of the survey, in which they ought to be; (2) the evidence is that they were duly marked and blazed; (3) they were at about the proper distance from the river San Andres and from Cow Creek to correspond with the field notes of the survey, and to make the survey contain the quantity of eleven leagues, although they were nearly 4,000 varas south of the northeast corner of the tract as it would be fixed by giving to the first course of the survey its full length of 22,960 varas. Under these circumstances we think that the court was right in leaving it to the jury to determine whether the two hackberries relied on by the plaintiff were or were not the same which were called for by the survey, and in holding that if they were the same, then, as monuments, they would control the distance assigned by the field notes to the first course. It has been repeatedly held by the Supreme Court of Texas, as a general rule, that natural objects called for in a grant, such as mountains, lakes, rivers, creeks, rocks, and the like, control artificial objects, such as marked lines, trees, stakes, etc., and that the latter control courses and distances. *Stafford* v. *King*, 30 Texas, 257, 270; *Booth* v. *Strip-*

pleman, 26 Texas 436, 441; *Bolton* v. *Lann*, 16 Texas, 96, 111, 112. There are exceptional cases, however, in which courses and distances may control, as where mistakes have been made by the surveyor as to objects called for, or where the calls for monuments are inconsistent with each other and cannot be reconciled, or where some other clearly sufficient reason exists for disregarding the general rule. *Booth* v. *Upshur*, 26 Texas, 71; *Booth* v. *Strippleman*, 26 Texas, 441.

The request to charge that all rules have for their object the identification of the actual survey made by the surveyor, and that it is an invariable rule that the footsteps of the surveyor must be followed, and that the lines and corners must be located where he established them, was unnecessary, inasmuch as the court did charge substantially to that effect. The court expressly said: "Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with reasonable certainty, and where he cannot be tracked on the ground, we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made." We do not well see how it could be more plainly stated, that the main object to be reached by the whole inquiry was to ascertain and follow the actual footsteps of the surveyor.

The final request was, in substance, a request to charge that if the jury believed from the evidence that the survey was actually made on the ground according to the first and second courses and distances, they must find for the defendant. As there appears to have been no doubt from the evidence that if the lines were so run, the second line, that is, the north or back line, would take in the greater part of the lot claimed by the plaintiff, the request would have been a proper one had it been qualified with the condition that the two hackberry trees were not satisfactorily identified as those called for in the Moreno grant. But without being so qualified the proposed instruction would have had a tendency to withdraw the minds of the jury from the controlling effect which the identification of those trees as the true northeast corner would properly have had on the conclusion to be reached by the jury, as to the question whether

the two lines referred to were, or were not, run and measured according to the field notes. For it is perfectly clear that they could not have been so run and measured, if the two hackberry trees mentioned in the field notes were the same as those relied on by the plaintiff. The request, therefore, should have been, that if the jury did not believe the hackberries were the same, then, if they believed that the two lines were run according to the field notes, they must find for the defendant.

It still remains to consider the correctness of that part of the charge given which was excepted to by the defendants. The substance and effect of it was, that if the jury were not able to fix the disputed lines, or the disputed portions of the lines, with reasonable certainty, they might locate the back, or northerly line, so as to embrace eleven leagues between it and the river, and between the east and west lines as acknowledged by the parties. This was allowing the jury to make the location of the back line depend on the quantity of the land enclosed, if they could not fix it from the evidence. In this we think there was error in the charge. The whole context immediately connected with the passage excepted to, was in substance this: that if the testimony satisfied the jury that the two hackberries discovered were identical with those called for in the grant, the back, or north, line must start from, or end with, them, running in a course north 70° west, or south 70° east; but that if the testimony did not satisfy them as to the identity of the trees, then they must fix the unmarked or disputed lines so as most nearly to harmonize the calls with the known corners and the undisputed line (that is, the east line). If the jury were not able to fix the disputed lines, or the disputed portions of lines, then they might resort to quantity, that is, locate the back line between the two recognized side lines so as to take in eleven leagues.

Now, it seems to us, that the jury should have been told that if the testimony was not sufficient to identify the two hackberries with those called for in the grant, and could not fix the northeast corner nor the back line by any other marks or monuments, then they should fix it by the courses and distances of the first and second lines of the survey, except that the

second line should be extended so as to meet the recognized east line as marked and extended beyond the hackberries. This would have been in accordance with the rule, that course controls distance, and that course and distance control quantity, which is correctly laid down in *Stafford* v. *King*, 30 Texas, 257, and *Welder* v. *Hunt*, 34 Texas, 44.

The statement in the first part of the charge, that the jury should follow the tracks of the surveyor, so far as they could be discovered, and when these were not to be found, they should follow the course and distance which he gives, so far as not in conflict with tracks that are found, was correct. Had this proposition been followed in the subsequent part of the charge, it would not have been open to criticism. But when directions were given to the jury in greater detail, they were not referred to the courses and distances given by the surveyor, in case they were unable to identify his tracks (that is, in case the proof relating to the two hackberries was insufficient); but they were told thus: "you will, from the whole proof, so fix the unmarked or disputed lines called for in the grant as in your judgment most nearly harmonizes the calls with the known corners and the undisputed lines;" and if not able to fix these lines in this way, then to resort to the rule of quantity. This was putting the matter as if it depended on the judgment of the jury whether the lines could be run according to the survey; whereas, if not compelled by fixed monuments (such as the plaintiff claimed the hackberry trees to be) to run the second, or back line, in a particular manner, there was nothing in the way, so far as the evidence showed, of running the first and second lines according to the field notes,—only extending the second line so as to meet the east line, the position of which was known. If the northeast corner was not determined by the hackberries, there was nothing to interfere with the location of the Moreno grant in exact accordance with the field notes, except the one thing of extending the second line far enough to meet the conceded location of the eastern boundary.

It did not depend on anything requiring the exercise of judgment on the part of the jury; it was a matter of course. If the position of the eastern line had not been discovered at

all, and nothing had been known but the beginning corner, the field notes would have furnished the only guide for locating the survey. The position of that line being known, it controlled the survey only in respect to that line, which required the second line to be extended sufficiently to reach it. But if the two hackberry trees, in that line, were also identified as the true northeast corner, then the position of the north line, and the length of the first course, would be controlled by those trees.

We think there was error in not putting it to the jury with sufficient distinctness, that the course and distance of the first two lines of the survey must govern, if the evidence was not sufficient to fix the location of the northern line by identifying the two hackberries with those called for in the field notes for the northeast corner of the survey, or by some other marks or monuments.

The judgment must be reversed, with directions to grant a new trial.

CALIFORNIA ARTIFICIAL STONE PAVING COMPANY *v.* MOLITOR.

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

SAME *v.* SAME.

APPEAL FROM THE SAME COURT.

Submitted November 25, 1884.—Decided March 2, 1885.

A certificate of division of opinion under § 652 Rev. Stat., can be resorted to only when "a question" has occurred on which the judges have differed, and where "the point" of disagreement may be distinctly stated.

It cannot be resorted to for the purpose of presenting questions of fact, or mixed questions of fact and law, or a difference of opinion on the general case.

Opinion of the Court.

When there is reasonable ground to doubt as to the wrongfulness of the conduct of a defendant in a suit in equity to prevent the infringement of a patent, the process of contempt should not be resorted to to enforce the plaintiff's rights.

Plaintiff obtained a decree in equity against defendant as an infringer of plaintiff's rights under a patent for an improvement in pavements. Defendant continued to lay pavements. Plaintiff proceeded against him for contempt, alleging that he was still using plaintiff's process. Defendant denied the allegation, and answered that he was using a process different from that which had been adjudged to be an infringement. On this question there was a division of opinion in the court below. *Held*, That the process of contempt is not an appropriate remedy.

This was a suit to enjoin against the use of a patented invention and for an order to show cause why defendant should not be punished for contempt. The facts which make the case are stated in the opinion of the court.

Mr. M. A. Wheaton for plaintiff in error and appellant.

Mr. John L. Boone and *Mr. E. M. Marble* for defendant in error and appellee.

Mr. Justice Bradley delivered the opinion of the court.

A bill was filed by the appellant in this case against the appellee, complaining that the latter had infringed, and continued to infringe, certain letters patent granted to one John J. Schillinger, and which had been assigned for the State of California to the complainant. The patent was for an improvement in concrete pavement, and was originally issued July 19, 1870, and reissued May 2, 1871. The improvement, as described in the reissued patent, consisted in laying the pavement in detached blocks, separated from each other by strips of tar-paper, or other suitable material, so as to prevent the blocks from adhering to each other. As stated in the specification, "the paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may require, without injury to the adjacent blocks." Prior to this invention, it seems, from the statement of facts

made by the court, that concrete pavements had been made in one continuous sheet, without being divided into blocks, whence they were liable to crack in irregular directions, and to break up in such a manner as to render them useless. The specification of the reissued patent contained the following clause: "In such cases, however, where cheapness is an object, the tar-paper may be omitted, and the blocks formed without interposing anything between their joints as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid, each independent of the adjoining blocks:" but this clause had been disclaimed by filing a disclaimer in the Patent Office. The patent had two claims, as follows:

"1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

"2. The arrangement of tar-paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purposes set forth."

The defendant answered the bill, denying the validity of the patent and denying infringement, and declaring that the concrete pavements made by him were made under and in accordance with certain letters patent granted to one J. B. Hurlburt, April 20, 1875, the process of which is described in the answer, as follows:

"The said Hurlburt invention is a novel method of forming blocks of artifical stone or cement pavement, whereby they are prevented from becoming uneven by sinking below or rising above a common plane, and consists in bevelling the edges of the blocks so that they will measure more across their under side in one direction and less across their upper side than across their under side in the other or opposite direction; and also consists in the novel construction of a forming frame whereby the blocks are bevelled as devised by using the different sides of the frame alternately; and also in the novel construction of a parting strip, whereby the colors are kept separate, showing a straight line between the blocks and while forming their edges

in actual contact, the same strip being of great service to rest a straight edge upon while bevelling the block in process of formation, and that by said invention the process of laying cement pavements saves from 10 to 15 per cent. in cost of labor over any other known process, entirely dispenses with tar-paper or any equivalent and all other expensive superfluities, and makes a close-bevelled joint, it being impossible to raise, or attempt to raise, any separate piece of work without chiselling and digging and materially injuring adjacent work."

What the proof was as to the actual process employed by the defendant, whether it strictly accorded with Hurlburt's plan or not, does not distinctly appear. The appellee's counsel in his brief states that the respondent was originally adjudged to have infringed the rights secured by the patent, by reason of having pressed into the joints made by the cutting of the large sections into blocks with a trowel, a fine concrete which was held to be the equivalent of the tar-paper, as it accomplished the objects claimed to be gained by the patented invention, viz., producing a suitably tight joint and yet allowing the blocks to be raised separately without affecting the block adjacent thereto, and allowed the several blocks to heave separately from the effects of frost. But this fact is not shown by the record before us, and we are in the dark as to what particular form of pavement was adjudged by the court to have been an infringement of the patent sued on. We only know that, proofs having been taken and the cause heard, the Circuit Court, on September 10, 1881, decreed as follows:

"That the reissued letters patent No. 4364, granted and issued on the 2d day of May, A.D. 1871, to John J. Schillinger, of New York, being the patent referred to in the bill of complaint herein, are good and valid in law. . . . That the said defendant, Charles A. Molitor, has infringed said reissued letters patent, and upon the exclusive rights of the complainant under the same, that is to say, by making or selling one or more artificial concrete cement pavements within the State of California, and while the complainant was the owner of said reissued letters patent, as charged in said bill of complaint. . . . And that a perpetual injunction be issued in this suit against the said de-

fendant, Charles A. Molitor, restraining him, his agents, clerks, servants, and all claiming or holding under or through him, from making, selling, or using, or in any manner disposing of any artificial stone-block pavements embracing the invention and improvements described in the said reissued letters patent, pursuant to the prayer of the said bill of complaint."

Had the defendant continued to make concrete pavements in the manner set up in his answer, or in the manner in which it was proved he did make them, and which the court decided to be an infringement, there could have been no doubt that he would have violated the decree; but, it would seem, that he varied his mode of making the pavement by ceasing to make it in separate and detached blocks, and only making a mark or indentation on the surface whilst in a plastic state with a trowel or marker extending to a depth of from one-eighth of an inch to an inch, and thus giving the pavement the appearance of being made in detached blocks, and, in fact, answering all the purposes of detached blocks, the crease on the surface being sufficient to produce the results obtained by Schillinger's process.

In October, 1883, more than two years after the decree was entered, the complainant obtained a rule on the defendant to show cause why he should not be punished for a contempt of court in disobeying the decree; the alleged contempt consisting of the construction by the defendant of concrete pavements in the manner last mentioned, to wit, at Redwood City, in San Mateo County. Of course, the question was at once raised whether the process now used by the defendant was an infringement of the patent. The judges being opposed in opinion, a decree was made in conformity with that of the Circuit judge, declaring that the pavements thus constructed by the defendant did not infringe the patent, that there was no violation of the injunction, and that the order to show cause be discharged. A certificate was thereupon made, showing the points on which the judges disagreed, and the cause has been brought here both by appeal and by writ of error—brought in both ways, as counsel state, because of the uncertainty as to which was the right method.

For the purpose of showing how the points of disagreement arose, and of furnishing materials for deciding them, the cirtificate exhibits the record and facts upon which (it is stated) the matter was heard below, consisting of—

1st. The bill, answer, replication, decree and injunction, and the order to show cause why the defendant should not be punished for contempt.

2d. A statement of facts deduced by the court below from the evidence in the case, and the report of a master. This statement embraces a copy of the reissued patent of Schillinger, with the drawings annexed thereto, and a statement deduced from the testimony, describing amongst other things, the manner in which the defendant, after the entry of the decree, constructed a certain pavement in Redwood City, to wit, substantially as before mentioned. The statement closes with the following declaration, to wit:

"While the blocks laid in strict accordance with the specifications in the Schillinger patent can be more readily taken up, still the cutting and marking, or the mere marking of the surface with the marker alone, as described, affords, to a very large extent, the advantages mentioned obtained by the use of the Schillinger patent, the additional cutting with the trowel, during the process of formation, to a greater or less extent, increasing those advantages. The Exhibit C, offered as follows, is a photograph of the sidewalk as laid by defendant Molitor, claimed to be an infringement of the patent in question."

The photograph exhibit is annexed to the statement.

The certificate then concludes as follows:

"At the hearing of said order to show cause, at the present term of the court, upon said record, and upon the facts hereinbefore stated, there occurred as questions arising thereon—

"1. Whether the laying of said concrete pavement of plastic material on the ground in the manner stated, and dividing it into smaller blocks upon the surface by cutting across the surface of the larger blocks with a trowel, and afterwards running the marker along the line of the cutting with the trowel, in all respects as hereinbefore stated, constitutes an infringement of the patent to Schillinger set out in this certificate?

"2. Whether the laying of the said concrete pavement of plastic material on the ground in the manner stated, and dividing it into smaller blocks upon the surface, by cutting across the surface of the larger blocks by running the marker, without any other cutting with a trowel or other instrument than the marker described, across the blocks, on a line previously marked, as a guide, in all respects in the manner as hereinbefore stated, thereby controlling the line of cracking, and obtaining in a greater or less degree the advantages pertaining and belonging to the pavements laid in all respects in accordance with the specifications of said Schillinger patent, constitutes an infringement of said patent?

"3. Whether the defendant Molitor, by constructing the said pavement in all respects in the manner hereinbefore stated, is guilty of violating the injunction granted and made perpetual by the decree in this case?

"Upon which said several questions and upon each of them the judges were divided in opinion."

These are the questions which we are now called upon to answer.

We are met, however, at the outset, by a preliminary question, to wit, whether the points thus presented by the certificate of the judges below come within the meaning of the statute which authorizes this court to decide questions of law on which the judges of the Circuit Court are opposed in opinion. It is not a difference of opinion on the general case which may be thus certified. Such a difference would properly result in a decree for the defendant, or party holding the negative, subject to an appeal to this court in the ordinary course. It is only a difference on a special point of law which can be distinctly stated, that may be certified to this court under the statute. § 652 Rev. Stat. declares that when a judgment or decree is entered in a civil suit, in a circuit court held by two judges, in the trial or hearing whereof *any question* has occurred upon which the opinions of the judges were opposed, *the point* upon which they so disagreed shall be stated and certified, &c. The language is copied from the act of April 29, 1802, § 6, 2 Stat. 159, and shows that a certificate can only be resorted to when

"a question" has occurred on which the judges have differed, and where "the point" of disagreement may be distinctly stated. This court has frequently held that the "question" referred to must be a question of law, and must be capable of being presented in a single point. Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 20, said: "The law which empowers this court to take cognizance of questions adjourned from a circuit, gives jurisdiction over the single point on which the judges were divided, not over the whole cause." In *Dennistoun* v. *Stewart*, 18 How. 565, the matter is examined with precision. In that case the judges differed in opinion as to the charge which should be given to the jury upon the evidence adduced. The evidence was set forth in the certificate, and the points upon which the judges differed as to the charge to be given were stated. The court, speaking by Mr. Justice Daniel (p. 568), recapitulated the interpretations which had been given to the act in reference to the requisites of its jurisdiction on such certificates. 1. They must be questions of law and not questions of fact—not such as involve or imply conclusions or judgment by the judges upon the weight or effect of the testimony or facts adduced in the cause (referring to *Wilson* v. *Barnum*, 8 How. 258). And the *question* on which the judges differed must be stated; not, whether a demurrer made on several grounds should be sustained (referring to *United States* v. *Briggs*, 5 How. 208). 2. The points stated must be single, and must not bring up the whole case for decision (referring to *United States* v. *Bailey*, 9 Pet. 257; *Adams* v. *Jones*, 12 Pet. 207; *White* v. *Turk*, 12 Pet. 238; *Nesmith* v. *Sheldon*, 6 How. 41; *Webster* v. *Cooper*, 10 How. 54). And, inasmuch as the certificate in that case (*Dennistoun* v. *Stewart*) did not present a single or specific question of law arising in the progress of the cause, but referred to this court the entire law of the case as it might arise upon all the facts supposed by the court, the case was remanded to the Circuit Court to be proceeded in according to law, without any answer to the questions propounded.

The cases and points adjudged on the subject are very fully rehearsed by Mr. Justice Swayne in *Daniels* v. *Railroad Co.*,

3 Wall. 250. That was an action for an injury caused by a collision of railroad cars, and, after reciting the evidence, the certificate stated that this was *all* the evidence, and thereupon it occurred as a question whether, in point of law, upon the facts as stated and proved, the action could be maintained, and whether or not the jury should be so instructed; and, on this question, the judges were opposed in opinion. The court refused to consider the case, and dismissed the certificate.

The case of *Wilson* v. *Barnum*, 8 How. 258, is especially worthy of note in this connection. The question certified in that case was whether, upon the evidence given, the defendant infringed the complainant's patent. Chief Justice Taney, delivering the opinion of the court, said: "The question thus certified is one of fact, and has been discussed as such in the arguments offered on both sides. It is a question as to the substantial identity of the two machines. . . . The jurisdiction of this court to hear and determine a question certified from the Circuit Court is derived altogether from the act of 1802 [cited above], and that act evidently gives the jurisdiction only in cases where the judges of the Circuit Court differ in opinion on a point of law. . . . In the multitude of questions which have been certified, this court has never taken jurisdiction of a question of fact. And in a question of law it requires the precise point to be stated, otherwise the case is remanded without an answer." Pages 261–2. And the case was remanded for want of jurisdiction.

It seems to us that the certificate in the present case is obnoxious to the objections presented in the cases cited. The new controversy raised by the defendant's construction of the pavement in Redwood City is substantially a new suit on the patent; and we are asked to decide it. We are asked to say whether a pavement constructed in such and such a manner is an infringement of the patent as the Circuit Court has construed the patent. And this is a mixed question of fact and law. By the final decree in the case, made in 1881, the court decided that the pavements which the defendant had been theretofore making did infringe the patent. How those pavements were constructed we are not informed; and therefore

we do not know what was the precise construction given by the court to the patent. Whether the new pavement, constructed in Redwood City, is an infringement or not, is just as much a mixed question of law and fact (as the case is presented to us) as was the question whether the pavements formerly constructed by the defendant were an infringement. It is a question which the Circuit Court must decide for itself in the ordinary way. If the judges disagree there can be no judgment of contempt; and the defendant must be discharged. The complainant may then either seek a review of that decision in this court, or bring a new suit against the defendant for the alleged infringement. The latter method is by far the most appropriate one where it is really a doubtful question whether the new process adopted is an infringement or not. Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct.

The case must be dismissed, with directions to the Circuit Court to proceed therein according to law.

WINONA & ST. PETER RAILROAD COMPANY *v.* BARNEY & Others.

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

Argued December 4, 5, 1884.—Decided March 2, 1885.

If acts granting public lands to a State to aid in constructing railroads contain words of description to which it would be difficult to give full effect if they were used in an instrument of private conveyance, the court in construing the acts will look to the condition of the country when they were passed, as well as to the purpose declared on their face, and will read all parts of them together.

By the act of March 3, 1857, Congress granted to the then Territory of Minnesota in aid of the construction of certain railroads certain alternate sections of lands along the lines of the roads, and further provided that "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

Statement of Facts.

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 . . . so much land . . . as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of preëmption have attached as aforesaid," &c. *Held*, That the indemnity clause in this act covers losses from the grant by reason of sales and the attachment of preëmption rights previous to the date of the act, as well as by reason of sales and the attachment of preëmption rights between that date and the final determination of the route of the road.

Railroad Co. v. *Baldwin*, 103 U. S. 126, distinguished.

Leavenworth Railroad Co. v. *United States*, 92 U. S. 733, explained.

The act of March 3, 1865, 13 Stat. 526, enlarged the grant made to Minnesota by the act of March 3, 1857, from six sections per mile to ten sections; and the limits within which the indemnity lands were to be selected to twenty sections, and further provided, that "any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of the lands hereby granted." Prior to the act of 1865, a grant had been made to a railroad of lands located within the limits covered by said extension grant: *Held*, (1) That the grant by the act of 1857 was a grant of land in place, and not of quantity; (2) that the enlargement of the grant by the act of 1865 did not change its nature as to the six sections originally granted; (3) that as to the remaining four sections the grant was one of quantity, but to be selected along and opposite the completed road; (4) that where the earlier grant to aid in the construction of the Minnesota and Cedar Valley Railroad interferes with the extension grant to the plaintiff in error, the earlier grant takes the land, and the extension must be abandoned.

On the 3d of March, 1857, Congress passed an act, 11 Stat. 195, making a grant of lands to the Territory of Minnesota to aid in the construction of certain railroads, with their branches, and, among others, a railroad from Winona, a town on the Mississippi River, *via* St. Peter, to a point on the Big Sioux River, south of the 45th parallel of north latitude, which is in the present Territory of Dakota. The language of the act is, "That there be, and is hereby, granted to the Territory . . . 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 preëmption 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 preëmption have attached as aforesaid; which lands (thus selected in lieu of those sold and to which preëmption 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."

On the 22d of May, of the same year, the legislature of the Territory of Minnesota passed an act to execute the trust created by the act of Congress, and, among other things, authorized a corporation previously formed—known as the Transit Railroad Company—to construct and operate the railroad mentioned, with one or more tracks, from Winona to the Big Sioux River, south of the 45th parallel of north latitude, on the most direct and feasible route, by way of St. Peter, and granted to the company, in order to aid in the construction of the road, the interest and estate, present and prospective, of the Territory and future State in the lands ceded by the act of Congress, together with the rights, privileges and immunities conferred by it. This grant was made with a proviso that the land should be exclusively applied to the construction of the road, and to no other purpose. The Transit Railroad Company subsequently mortgaged to the State the lands it had thus received, together with its franchises, in order to obtain aid to construct the road and comply with the conditions on which the aid was given. It, however, made default, and the mort-

gage was foreclosed, and the property and franchises of the company were sold and bought in by the State. These proceedings took place before March 10, 1862.

The Territory of Minnesota became a State, and was admitted into the Union in 1857, and on the 10th of March, 1862, its legislature passed an act transferring to the Winona and St. Peter Railroad Company, the defendant below, the lands, property, franchises and privileges which the State had acquired from the Transit Railroad Company. Soon afterwards the defendant commenced the construction of the railroad, and before March, 1865, completed it from Winona to Rochester, a distance of forty-nine and a half miles.

By an act passed on the 3d of March, 1865, 13 Stat. 526, § 3, Congress increased the quantity of land granted to Minnesota by the act of 1857, to ten sections per mile for all of the roads and branches, subject to the same limitations attached to the original grant, and enlarged the limits within which indemnity lands were to be selected to twenty miles from the line of the roads. The third section provided "That any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted, and that any lands which may have been so granted shall be strictly applied in accordance with the terms and conditions of said act or acts unless subsequently modified by law." The sixth section provided that lands granted by the act, or previously granted to the Territory or State of Minnesota, "shall be disposed of by said State for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner, as a first-class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with this requirement, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite

to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said completed section of ten miles of road, and no further. And when the governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section, or with some other first-class railroad which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and situated opposite to and within the limit of twenty miles of the line of said completed section of road or roads, and extending the length of said section, and no further, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment; and so, from time to time, until said roads and branches are completed."

After the passage of this act the railroad company proceeded with the construction of the road westerly from Rochester, and before October 31, 1867, completed it to Waseca, one hundred and two miles and $\frac{79}{100}$ of a mile from Winona. Of this distance, as already stated, forty-nine and one-half miles were constructed before March, 1865, and the remainder, viz., fifty-three miles and $\frac{39}{100}$ of a mile were constructed afterwards.

Lands had previously been granted to Minnesota for the construction of the Minnesota and Cedar Valley Railroad, and that road intersected the road of the defendant below between Rochester and Waseca. Its lands at the intersection were located within the limits of the extension made by the act of 1865 to the original grant of 1857.

On the 31st of October, 1867, the railroad company agreed with the plaintiffs, upon sufficient considerations, to convey to them as many acres of land, previously granted by Congress to Minnesota, as the company should receive from the State by reason of the construction already had of the portion of the Winona and St. Peter Railroad, estimated to be one hundred and five miles (but in fact only 102 miles $\frac{79}{100}$ of a mile), extending westward from Winona, which amounted, as was sup-

posed, to about six hundred thousand acres, and which were to be selected as follows:

"Beginning at Winona, and from thence proceeding on each side of said railroad on a course running parallel therewith, and embracing each of the six, ten, fifteen and twenty-mile limits of the Congressional land grants, and in proceeding taking all lands within each and all of said limits which shall be received by said company under said acts of Congress, or either of them, it being understood that on each side of said railroad a uniform line of advance westwardly, embracing all the lands in said limits, shall be maintained as nearly as may be until as many acres shall have been selected and taken as the said company shall have received for the construction of the portion of said railroad now completed, which is estimated to be one hundred and five miles thereof, extending northerly and westwardly from Winona as aforesaid; it being understood that the said parties of the first part shall receive as many acres as shall be received by the party of the second part for the construction of said one hundred and five miles, or so much thereof as is now constructed, notwithstanding that under the acts of Congress the said lands are certified only upon the completion of sections of not less than ten miles of railroad, but reserving, excepting and deducting from the said numbers of acres all lands necessary for the track of said railroad, or the right of way, or depots or depot grounds, or other purposes incidental to the operation of said railroad. And the said party of the second part agrees to acquire the title of said lands as fast as it may be permitted to do under said acts of Congress, and to release and convey to the said parties of the first part, or to such person or persons, in such manner, and from time to time, as may be directed by the said parties of the first part, or their counsel, on the request of the said parties of the first part, or a majority of them."

The execution, validity and obligation of this contract are admitted. The present suit was commenced to enforce its specific performance, and the only question between the parties is as to the quantity of land to be conveyed under it. Before the suit was commenced the company had conveyed to the plain-

tiffs, in part performance of the contract, 317,094 acres and $\frac{72}{100}$ of an acre.

As to that part of the road which was constructed under the act of 1857 from Winona to Rochester, the court held that under the act of Congress, the legislation of the State, and the contract with the company, the plaintiffs were entitled to six full sections of land for each mile of the road, and that for any deficiencies existing when the route of the road was definitely fixed, arising from previous sales by the United States of portions of the land, or previous attachment of preëmption rights, whether such sales took place or preëmption rights attached before or after the passage of the act, equivalent lands were to be selected from the indemnity lands provided. And as to that part of the road which was constructed westerly from Rochester to Waseca after the passage of the act of 1865, the court held that the plaintiffs were entitled to ten full sections per mile without any deduction for the lands which were located at the intersection of defendant's road with the road of the Minnesota and Cedar Valley Railroad Company, and within the grant for the latter's construction; and as the result of these rulings the court decided that the plaintiffs were entitled to a conveyance of 197,111 acres and $\frac{93}{100}$ of an acre, and entered a decree accordingly. 6 Fed. Rep. 802. From this decree the defendant appealed to this court.

Mr. Thomas Wilson for appellant.

Mr. Gordon E. Cole for appellee.

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

Two questions are presented for our consideration by the appeal in this case. The first relates to the deficiencies in the sections designated as granted in the act of 1857, arising from sales and the attachment of preëmption rights previous to the final determination of the route of the road of the railway company, and the extent to which indemnity for these deficiencies may be supplied from other lands. The second relates to the reser-

vation from the operation of the act of 1865 of lands previously granted to Minnesota to aid in the construction of any railroad, which were located within the limits of the extension made by that act to the original grant, and its effect on the amount of lands claimed by the plaintiffs.

The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.

The act of 1857 grants lands to the State to aid the construction of several railroads. These were to be built through large districts of country sparsely settled. Though the termini of each were designated, it was impossible, in advance of surveys, to designate the specific route of any one, even approximately. In many instances, where the sections would fall along such route, sales of land had already been made by the United States, and preëmption rights of settlers had attached; and before the route would be definitely fixed by surveys and maps, many other sales of land falling within the sections would probably be made and other preëmption rights attach. It was not for the interest of the country that any portion of the public lands should be withheld from sale and settlement because, when the route of the roads was definitely determined, they might fall within the limits of the grants; nor was it the purpose of Congress to lessen the extent of its aid because it might ultimately be found that, at the time of its grant, or when the route was determined, portions of the land designated had already been disposed of or preëmption rights had attached to them. The policy of the government was to keep the public lands open at all times to sale and preëmption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The acts of Congress, in effect,

said: "We give to the State certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits." The encouragement to settlement by aid for the construction of railways was not intended to interfere with the policy of encouraging such settlement by sales of the land, or the grant of preëmption rights. It follows that in our judgment the indemnity clause covers losses from the grant by reason of sales and the attachment of preëmption rights previous to the date of the act, as well as by reason of sales and the attachment of preëmption rights between that date and the final determination of the route of road.

It is to no purpose to say, against this construction, that the government could not grant what it did not own, and therefore could not have intended that its language should apply to lands which it had disposed of. As already said, the whole act must be read to reach the intention of the law-maker. It uses, indeed, words of grant, words which purport to convey what the grantor owns, and, of course, cannot operate upon lands with which the grantor had parted; and therefore when it afterwards provides for indemnity for lost portions of the lands "granted as aforesaid," it means of the lands purporting to be covered by those terms. Nor is it to any purpose to cite decisions to the effect that the grant is *in præsenti*, passing an immediate interest to the State. Such is undoubtedly the case, except as the operation of the grant is affected by the limitations mentioned; that is to say, when the sections granted are ascertained, the title to them takes effect as of the date of the grant, and cuts off all intervening claimants except as to such portions as may have been sold, or to which pre-emption rights may have attached.

The language in *Railroad Co.* v. *Baldwin*, 103 U. S. 426, does not militate against this construction of the act. It ex-

presses the general purpose of the reservation to keep the lands open at all times to settlement and preëmption, and subject to appropriation for public uses until the route of the road is determined, but does not declare that lands previously sold, or to which the rights of preëmption had previously attached, are excluded from the indemnity clause. The court was there drawing attention to the difference between the two grants in the act of Congress of July 23, 1866—that of sections of land and that of the right of way, the former being a present grant, except as its immediate operation was affected by the reservations, the latter being a present absolute grant without any reservation or exception.

The language in *Leavenworth, Lawrence, &c., Railroad Co.* v. *United States*, 92 U. S. 733, is quoted as sanctioning the position of the appellant. The court, speaking of the indemnity clause in the grant then under consideration, said its purpose was to give sections beyond the limit designated for those lost within it by the action of the government between the date of the grant and the location of the road. But it did not say that this was its only purpose; and, if the language must be construed as meaning that, it was a mere dictum, not essential to the decision of the case. The question was, what lands could be taken for indemnity, not for what deficiencies indemnity could be had. And it was held that an Indian reservation did not pass by the grant, and could not be taken as indemnity for the lands otherwise lost from it. There was no question before the court for what deficiencies indemnity could be supplied.

As to the effect of the reservation in the third section of the act of 1865, of lands previously granted to Minnesota, for the purpose of aiding in the construction of any railroad, there should be little doubt. The grant by the act of 1857 is one of description, that is, of land in place and not of quantity. It is of every alternate section, designated by odd numbers, for six sections on each side of the road, that is, of particular parcels of land lying within certain defined lateral limits to the road and described by numbers on the public surveys. And the indemnity clause provides for loss from those parcels by sales or the

attachment of preëmption rights before the route becomes definitely fixed—the indemnity lands to be selected within fifteen miles from the line of the road. The act of 1865 enlarges the quantity granted from six sections to ten, and the indemnity limits from fifteen miles to twenty. The character of the grant, so far as the six sections are concerned, is not thereby changed from one of lands in place, or by description, to one of quantity. The use of the terms "quantity of lands granted" in the first section, in referring to the amount granted by the act of 1857, is of no significance. It is the same thing as though the act had used the words "six sections" instead of the word quantity, and had said they should be increased to ten sections. The four sections are to be selected by the Secretary of the Interior beyond the six and within the twenty miles limit; and as to them the grant may be regarded as one of quantity, though the coterminous principle applies to them, and they are to be selected along and opposite the completed road.

The reservation of the lands previously granted to Minnesota from the grant of the additional four sections, that is, from the extension of the original grant of 1857, was only a legislative declaration of that which the law would have pronounced independently of it. Previous grants of the same property would necessarily be excluded from subsequent ones. The only embarrassment in the construction of the section arises from the inapt words used to describe the land from which the previous grant is to be deducted. The language of the section is "that any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of such grant or grants, shall be deducted *from the full quantity of lands hereby granted.*" The only lands granted by the act of 1865 are the four sections for each mile additional to the original six, accompanied with a right to select indemnity lands within twenty miles of the road. The words, "the full quantity granted," only denote the entire extension. To the extent of the previous grant that extension must be reduced, even if the whole be taken. Those words do not transfer the loss from the ten sections within which the grant falls

to other sections along the line. The sections in which such grant falls are correspondingly reduced.

It follows that where the grant previously made to Minnesota to aid in the construction of the Minnesota and Cedar Valley Railroad interferes with the extension of the grant to the defendant by the act of 1865, the extension must be abandoned. The earlier grant takes the land which would otherwise be added to the original six sections. The court below therefore erred in holding that the Winona Company was entitled to ten full sections where such interference occurred, without deducting the lands previously granted to the State.

The cause must, therefore, go back that the proper deduction may be made by reason of this interference of the two grants, and the elder grant be deducted from the extension made by the act of 1865.

Decree reversed, and cause remanded, with directions to take further proceedings in accordance with this opinion.

KANSAS PACIFIC RAILWAY COMPANY *v.* DUNMEYER.

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

Argued November 6, 1884.—Decided March 2, 1885.

The line of definite location of a railroad, which determines the rights of railroad companies to land under land grant acts of Congress, is definitely fixed, within the meaning of those acts, by filing the map of its location with the Commissioner of the General Land Office at Washington.

Under the acts granting lands to aid in the construction of a line of railroad from the Missouri River to the Pacific Ocean, the claim of a homestead, or pre-emption entry, made at any time before the filing of that map in the General Land Office, had attached, within the meaning of those statutes, and no land to which such right had attached came within the grant.

The subsequent failure of the person making such claim to comply with the acts of Congress concerning residence, cultivation and building on the land, or his actual abandonment of the claim, does not cause it to revert to the railroad company and become a part of the grant. The claim having at-

Argument for Plaintiff in Error.

tached at the time of filing the definite line of the road, it did not pass by the grant, but was, by its express terms, excluded, and the company had no interest, reversionary or otherwise, in it.

The act of July 3, 1866, 14 Stat. 79, which authorized the Secretary of the Interior to withdraw certain lands from *sale*, on filing a map of the *general route* of the road with him, did not reserve such lands from entry under the *pre-emption* and *homestead* laws.

Suit for breach of covenant of warranty of title to a tract of land in Kansas. Plaintiff in error was defendant below. Its title was derived from grants of public land to aid in the construction of a railway to the Pacific, under the acts of July 1, 1862, 12 Stat. 489; July 2, 1864, 13 Stat. 356; and July 3, 1866, 14 Stat. 79. The tract was within the location of the railroad grants, but was excepted from those grants by reason of a homestead entry, and possession. Subsequent to this entry and possession, the party so in possession took title from the railroad company, and the homestead entry was cancelled. The alleged paramount adverse title was derived from a patent from the United States, issued on a homestead entry made subsequent to these proceedings. The Supreme Court of Kansas found that there was a breach of the warranty, and rendered judgment accordingly. This writ of error was brought to review that judgment.

Mr. J. P. Usher for plaintiff in error.—*Missouri, Kansas & Texas Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U. S. 491, goes far towards settling the construction of the acts of 1862 and 1864. They are there declared to be a single act, so far as the grants of land are concerned. Treating the acts as one, attention will now be directed to § 3 of the act of 1862, and § 4 of the act of 1864. In these sections are embraced the grant of lands and limitations. In § 3 the grant is described to be: "Every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely filed." § 4 of the act of

1864, after stating the amendments, goes on: "And any land granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim." It will be observed that by § 3 there was excepted from the grant, lands upon which a homestead claim had attached at the time the line of the road was definitely fixed. It is clear that Congress did not intend that the words "to which a homestead or pre-emption claim may not have attached," in § 2 of the act of 1862, should defeat the grant to the railroad company, unless the claim was perfected. The grant was of public lands. Lands entered under homestead and pre-emption laws remained public lands until the titles were perfected. *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Case*, 15 Wall. 77; *Shepley* v. *Cowan*, 91 U. S. 330; *Railroad Co.* v. *Baldwin*, 103 U. S. 426. To relieve the company from any possibility of loss by reason of a misconstruction of the meaning of the words, "*may not have attached*," in § 3 of the act of 1862, Congress, in § 4 of the act of 1864, was explicit in declaring the exceptions from the grant. The declaration was that the grant "shall not defeat or impair any pre-emption, homestead, swamp-land or other lawful claim." This exception was in favor of the homestead or pre-emption claimants, and was intended to define and make certain what was granted. Obviously it was the intention of Congress to grant all the odd sections of the public lands within the prescribed limits, though entries of parcels of them may have been made under the homestead or pre-emption laws, unless the parties making such entries should perfect their titles. If such parties voluntarily abandoned their possession and entries, and that fact came to the knowledge of the Department of the Interior, the duty was to correct the books and make the fact appear, and allow the lands to be selected by the railroad company, and upon completion of the railroad, to issue patents to the company for such lands. It should be noted that Dunmeyer does not claim title under the homestead entry of Miller. He repudiates all right of claim under his entry, maintains with the railroad company that it was invalid and therefore was cancelled, and that he was defeated in his

possession by a subsequent entry by G. B. Dunmeyer under the homestead laws. The decision of this court in *Bugbey's Case*, 96 U. S. 165, is much in point here. In that case a party was found in possession of the south half of section 16, town 10, range 8, when the survey of public lands in California was made, and was therefore within the exception of the grant to the State, and might have proceeded and perfected his title under the pre-emption laws. He omitted to make claim under the pre-emption laws and abandoned his possession. In respect to the transaction this court said, on page 167, "the settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed." It is difficult to perceive why the law laid down by this court in that case is not conclusive in favor of the railroad company in this.

No appearance for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Kansas.

The action was brought in that court on a covenant of warranty of title to two pieces of land, in a deed of conveyance made by the company to Dunmeyer. The land was sold by the company to George W. Miller, to whom a certificate of sale was given, which afterward came by assignments to Lewis Dunmeyer, to whom the company made a deed purporting to convey a good title. On this covenant for good title Dunmeyer brought the present action, alleging that the railroad company never had any title, and that the covenant was therefore broken. On this issue the case was tried. Several other defences were set up; among them, that the covenant was not broken, because Dunmeyer was in possession when he bought the certificate issued to Miller and when he took his deed, and has never been disturbed or ousted; that Miller was in possession when he bought of the company and transferred possession to Dunmeyer, and that this has been held ever since; and that Miller's purchase was a compromise of disputed rights, and he

and Dunmeyer are therefore estopped to maintain this action. But these and perhaps other points, decided against plaintiff in error, do not present questions of federal law which this court can review in a judgment of a State court.

Two such questions are presented by this record, which are said to be of great importance as covering controverted titles to many thousand acres of valuable land. The sum involved in this suit is but little over $300 and while the plaintiff in error has been represented here by able counsel and by oral arguments at two different hearings, we have no aid from the defendant, either by counsel or brief. This is very much to be regretted, but is without remedy, and only devolves on the court the duty of more than ordinary care in its own examination of the case.

The claim of title of the railroad company, which the Supreme Court of Kansas held to be no title, arises under two acts of Congress granting land to the Union Pacific Railroad Company and its branches, namely, the act of July 1, 1862, 12 Stat. 489, and the amendatory act of July 2, 1864, 13 Stat. 356, and another act of July 3, 1866, 14 Stat. 79.

The land, the title to which is in controversy in this suit, is part of an odd-numbered section, and lies within ten miles of the company's road, and the title of the company to it when it made the conveyance to Dunmeyer was perfect, under the grant found in the acts of Congress mentioned, unless it came within some of the exceptions contained in the language of the grant. The Supreme Court of Kansas based its decision on the ground that it did come within the language of such an exception. That language is as follows:

"§ 3. And be it further enacted, That there be, and hereby is, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said road, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United

States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." 12 Stat. 492. An exception of mineral lands follows in a proviso which does not affect the present question.

The record shows that on July 25, 1866, Miller made a homestead entry on this land which was in every respect valid, if the land was then public land subject to such entry. It also shows that the line of definite location of the company's road was first filed with the Commissioner of the General Land Office at Washington, September 21, 1866. This entry of Miller's, therefore, brought the land within the language of the exception in the grant as land to which a homestead claim had attached at the time the line of said road was definitely fixed. For we are of opinion, that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office.

The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or part of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the Commissioner, or rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party. Of course, as soon as possible, the Commissioner ought to send copies of this map to the registers and receivers through whose territory the line runs. But he may delay this, or neglect it for a long time, and parties may assert claims to some of these lands, originating after the company has done its duty

—all it can do—by placing in an appropriate place, and among the public records, where the statute says it must place it, this map of definite location, by which the time of the vestiture of their rights is to be determined. We concede, then, that the filing of the map in the office of the Commissioner is the act by which "the line of the road is definitely fixed" under the statute. *Van Wyck* v. *Knevals*, 106 U. S. 360.

It is strongly argued, by counsel for plaintiff in error, that the language of the excepting clause in the third section of the act of 1862 is modified or repealed by certain expressions found in § 4 of the amendatory act of 1864.

That section is intended to increase the grant of land made by the act of 1862 to double the quantity then granted. It does this by very peculiar language. It was evidently designed that the new grant should relate back for its date to that of the original grant, whereby it became retrospective as to all the lands added by the new act. It says that "five" in the old act shall read "ten," where the number of sections are mentioned. That "ten" shall read "twenty" where the limits within which the section may be found is described by miles. And it says that the term "mineral lands," in the exception in the grant, shall not be construed to mean coal or iron lands. Seeing, however, that this retrospective grant might affect rights already accrued or initiated, it is said in immediate connection, and in the same section, that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler, on any lands returned and denominated as mineral land." 13 Stat. 358.

It is difficult to see how this language, the main purpose of which was to prevent this retroactive grant from harming any kind of a claim to the lands granted which had taken effect before the statute was passed, can be construed as repealing the fundamental clause of the original act, in which the character of the grant and of its exceptions are fully defined.

This new provision may make other exceptions while enlarging the grant, and was undoubtedly intended to add further safeguards to the settler and further protection to the public. But how the clause can be supposed to narrow the original exception, or to be a substitute for that exception, or to repeal it, is not readily to be seen.

It had no such purpose. It had a very different purpose, and clearly leaves the original section, which it changes as to the limit of the grant, to stand as to the exception, save as further exceptions are added.

Another argument, which at first blush appears to rest on a stronger foundation, requires examination.

The record shows that while the company did not file its line of definite location until about two months *after* Miller made his homestead entry, it did designate the general route of said road, and file a map thereof in the General Land Office, July 11 of the same year, 1866, which was fifteen days *before* Miller's homestead entry. This latter map was filed in the office of the register and receiver on the 26th of July, one day after Miller made his entry.

It is argued that until this was done Miller's right of entry remained unaffected.

But we are of opinion that the duty of filing this map, as required by the act, like that of the line of definite location, is performed by filing it in the General Land Office, which is filing it with the Secretary of the Interior, and that whatever rights accrue to the company from the act of filing it accrue from filing it there.

What are those rights? This action does not, like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section with an odd number. It authorizes the Secretary to withdraw certain land from sale, pre-emption, &c. What if he fails to do this? What if he makes an order, as in this case, withdrawing a limit of twenty-five miles from sale, yet permits a party to enter and obtain a patent on some of this land?

Without answering these general questions, we proceed to

show that, by the statutes under which the company claims the land, the act of filing this map, did not withdraw the land from homestead entry.

By § 7 of the act of 1862 it is "provided, that within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from *pre-emption, private entry, and sale;* and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off, as fast as may be necessary for the purposes herein named."

At the time of the passage of the amendatory act of 1864, the general route of the road had not been designated, and, therefore, the fifth section of that act says "that the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completing of that part of the railroads, required by the terms of said act [of 1862], of each company, be, and the same is hereby, extended one year from the time in said act designated."

It appears that in the year 1866, though the time for the designation of the general route had expired a year before, it had not yet been done or completed. To relieve the company from this failure to comply with the law, Congress enacted, July 3, 1866, "that the Union Pacific Railway Company, Eastern division [which is the branch now called the Kansas Pacific Railway Company], is hereby authorized to designate the general route of their said road and file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from *sale* by order of the Secretary of the Interior."

It is under this latter statute that the railroad company, now plaintiff in error, filed its map of the general designation of the

route in the Department of the Interior, July 11, 1866, fifteen days before Miller's entry.

It will be observed that by the act of 1862, upon the filing of the company's map of designation of its general route, the Secretary was required to withdraw the lands within fifteen miles of said designated route from "*pre-emption, private entry, and sale.*" In the terminology of the laws concerning the disposition of the public lands of the United States, each of these words has a distinct and well-known meaning in regard to the mode of acquiring rights in these lands. This is plainly to be seen in the statutes we are construing. In the third section or granting clause there are excepted from the grant all lands which at the time the definite location of the road is fixed had been *sold*, *reserved*, or otherwise disposed of, and to which a *pre-emption* or *homestead* claim had attached. Here sale, pre-emption, and homestead claims are mentioned as three different modes of acquiring an interest in the public lands, which is to be respected when the road becomes located, and the words are clearly used because they were thought to be necessary. But a sale for money in hand, by an entry made by the party buying, is throughout the whole body of laws for disposing of the public lands understood to mean a different thing from the establishment of a pre-emption or homestead right where the party sets up a claim to a definite piece of land, and is bound to build on it, make fences, cultivate and reside on it for a period of time prescribed by law.

In the act of 1866, after the company had neglected for four years to make this designation of their general route, they were allowed six months longer, and no more, to file their map.

The statute did not give the Secretary the same directions when this should be done which the original act of 1862 gave him, but this act declared that the lands along the entire line, so far as the same may be designated, shall be reserved from *sale* by order of the Secretary of the Interior. The lands were, therefore, to be reserved from sale only, and not from pre-emption or homestead claims. The dropping of these words in the later enactment, when they had been carefully inserted both in the excepting clause of the original grant and in the

direction for withdrawal in the same act, on filing the designation of the general route, is sufficient of itself to show a purpose in leaving them out of the reserving clause of the act of 1866.

There is, however, a very obvious reason for it. The company had been negligent about filing this map. It was asking further time to do so as a favor. Congress said: We will grant you six months more, and when your map is filed the mere purchaser for money shall not be permitted to buy within the limit of your general route. He may be buying for speculation on the rise in value produced by the construction of your road. But we will no longer prevent the actual settler who resides upon and improves this land from locating on it and establishing a right either under the pre-emption or the homestead law. You have it in your power to put an end to this as soon as you will, by filing the map of your definite location of the road in the land office. Until you do this, the actual settler shall not be excluded from these lands.

We are, therefore, of opinion, in view of all the legislation on this subject, that the homestead claim of Miller had attached to the land in controversy when the line of the company's road was definitely fixed.

Another question of no little importance arises from the fact found in the record, that, while Miller made his homestead entry July 25, 1866, and entered upon the land within the time prescribed by law, erected a house on it, and brought his family to live on it, and made the tract his home until the spring of 1870, he afterwards abandoned his homestead claim, and bought the land of the railroad company, and paid for it, and sold the land and transferred the certificate of sale to Dunmeyer, who obtained the conveyance from the company. After all this Miller's homestead entry was cancelled, no doubt with Dunmeyer's consent, and G. B. Dunmeyer made a homestead entry which the land department held to be valid.

It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim,

so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception.

We are unable to perceive the force of this proposition. The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd-numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed." When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted. The grant

is limited, by its clear meaning, to the other odd sections, and not to these.

No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant.

Why should a different construction apply to lands, to which a homestead or pre-emption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land?

The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, &c., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations.

The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this

statute. Such is the clear and necessary meaning of the words that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that, if such rights have attached, they are not granted.

Though the precise question here presented may not have been previously decided by this court, we are of opinion that the principles which should govern it have been acted on in other cases.

In *Newhall* v. *Sanger*, 92 U. S. 761, the Western Pacific Railroad Company, which by subsequent legislation of Congress became entitled to the benefits of the acts of 1862 and 1864, already discussed, having filed a map of definite location, obtained from the United States a patent for lands supposed to be included in its grant. The land in controversy, however, was within the boundaries of a claim under a Mexican grant, which had been regularly presented and prosecuted by appeal, and was finally rejected February 13, 1865. The line of the route of the company's road had been filed before this, and the order withdrawing the land from private entry had been made.

The argument in favor of the company was, that the decision that the Mexican claim was invalid restored the land to the operation of the grant to the railroad company, and that the patent issued to the company was valid. But the court held that the land never became subject to the grant, and that the holder of a subsequent patent from the United States had the superior title.

A similar decision was made at the same term in the case of the *Leavenworth, Lawrence and Galveston Railroad Co.* v. *United States*, 92 U. S. 733, to the effect that the purchase by the United States of Osage lands of the Indians, after a similar grant to that company, did not make it subject to the grant of 1863 of every alternate section along the line of the road.

It is said that the case of the *Water and Mining Co.* v. *Bugbey*, 96 U. S. 165, should control the decision of this, and undoubtedly there are some analogies between them.

That case grew out of the act of Congress of March 3, 1853, 10 Stat. 244, which, in providing for the system of surveying

and disposing of the government lands in California, gave to that State, as it had done to others, every sixteenth and thirty-sixth section of a township for school purposes. No public surveys had at that time been made, and there was no probability that they could be made as fast as the tide of emigration would fill the country with settlers on these lands. To encourage these settlers and protect them against this grant of the school lands, it was provided in that act "that where any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth or thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof." 10 Stat. § 7, 247.

Bugbey had made a settlement on one of these sections, and was there when the survey of the land was completed, May 19, 1866, but he never made any declaration of that fact or sought to establish any right by reason of this settlement under the act of 1853, or under the general pre-emption law, and the register of the land office certified to the State land office, on the 28th of September, 1866, that no claim had been filed to this section sixteen, except by one Hancock, afterwards abandoned.

On the 22d of April, 1867, Bugbey purchased of the State the part of the section on which the premises in controversy in that suit were situated, and took a patent for it.

An act of Congress of July 26, 1866, 14 Stat. 251, gave the right of way for ditches and canals in all public lands when they were recognized by local customs, laws and decisions of the courts, and the water and mining company, having run their canal through this land, asserted the right to do so under this statute, which Bugbey resisted. This court said that, if the title to the land was in the United States at the passage of the act of July 26, 1866, it conferred the right claimed as against Bugbey, who purchased of the State in 1867. But it further held that the title was then in the State of California, for the reason that Bugbey had never asserted any claim as a pre-emptor, but had recognized the right of the State, and purchased of the State and was then relying on its patent.

The reasoning of the court was not elaborated, but it is clear, by its reference to the case of *Buick* v. *Sherman*, 93 U. S. 209, which it distinguishes from Bugbey's case by showing that Buick had prosecuted his right of pre-emption by asserting and perfecting his claim in the United States Land Office, that Bugbey's failure to assert, at any time or in any place, any right growing out of his settlement on the land prevented the mining company from asserting that the title was in the United States when the act of July 26, 1866, was enacted. It passed by the statute of 1853 to the State, and was ascertained to be a sixteenth section by the survey, the filing of which perfected the title to the State, unless a right of pre-emption was asserted and proved to be in existence at that time. No such claim was ever made and the title passed to the State.

In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds.

The difference in the two cases is obvious.

The judgment of the Supreme Court of the State of Kansas is affirmed.

SCHMIEDER *v.* BARNEY.

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

Submitted November 26, 1884.—Decided March 2, 1885.

The act of July 14, 1862, § 9, 12 Stat. 553, imposes, as a duty, "On all delaines . . . and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard:" *Held*, That the similarity required is a similarity in product, in adaptation to uses, and in uses, even though in commerce they may be classed as different articles; affirming *Greenleaf* v. *Goodrich*, 101 U. S. 278.

It is competent to inquire of a witness in a suit to recover back duties paid under this clause of the act of 1862 whether the words "of similar description" is a commercial term, and if so what is its commercial meaning; but it is not competent to inquire whether the particular goods, alleged to have been improperly subjected to duty, were of similar description to delaines.

The language of tariff acts is construed as having the same meaning in commerce that it has in the community at large, unless the contrary is shown. *Swan* v. *Arthur*, 103 U. S. 598, to this point, affirmed.

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

Mr. A. W. Griswold and *Mr. Sidney Webster* for plaintiffs in error.

Mr. Solicitor-General for defendant in error.

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

The only fact in issue in this case on the trial below was whether the "Saxony dress goods" imported by the plaintiffs in error were "goods of similar description" to "delaines," within the meaning of that term as used in the tariff act of July 14, 1862, ch. 163, § 9, 12 Stat. 553. To maintain this issue on their part, the plaintiffs in error called a number of merchants and commercial experts, by whom they offered to prove that, in trade, among merchants and importers, "Saxony woven dress goods" were not, in 1861 and 1862, and prior

thereto, "commercially known or considered as goods of similar description to delaines," "but commercially belonged to another class, that of woven dress goods, classed as different articles, and kept in a different department of goods from the family of printed dress goods, known as delaines." Other witnesses, who were commercial experts, were asked, in substance, whether, in their opinion, the goods which had been imported by the plaintiffs in error were known in trade among merchants, in 1861 and 1862, as goods of similar description to delaines. All this evidence was excluded by the court, and exception taken. 5 Fed. Rep. 150. That ruling is now assigned for error.

In *Greenleaf* v. *Goodrich*, 101 U. S. 278, decided by this court at the October term, 1879, after the trial below in the present case, it was held that it was not error to charge the jury (p. 283) "that the similarity referred to in the expression 'goods of similar description,' in the act of 1862, is a similarity in respect to the product, and its adaptation to uses, and to its uses, and not merely to the process by which it was produced, and that if a class of goods were not, in 1862, commercially known as delaines, it does not follow that they were not goods of similar description, within the meaning of the statute;" or to charge that "these words are to be taken and understood in their popular and received import, as generally understood in the community at large at the time of the passage of the act."

In reference to this, and other portions of the charge then under examination of a like import, this court said, speaking by Mr. Justice Strong (p. 284): "Notwithstanding the strenuous objections urged against such a submission to the jury, we think it was correct. At least it was quite as favorable to the plaintiffs as they had the right to demand. Reliance is placed upon the rule, which we admit to be established, that the commercial designation of an article among traders and importers, when such designation is clearly established, fixes its character for the purpose of the tariff laws. But the present is not a case of commercial designation of articles. The phrase 'of similar description' is not a commercial term, and, if it were, there is no evidence in the record to show what it is understood

to mean among merchants and importers." To this ruling we adhere, notwithstanding what is said in the able argument which has been presented to us on behalf of the present importers. It is quite true that, in the case then presented, the fact that delaines were "woven in the gray," that is to say, in the natural color of the materials of which they were composed, and not in colors, as was the case with "Saxony dress goods," was much relied on as showing that the dress goods were not of a similar description with delaines; but the real point for decision was whether goods must be commercially classified with delaines to make them of "similar description." It was there decided that if they were similar in product, in adaptation to uses, and in uses, they were of similar description, even though in commerce they might be classed as different articles. Upon that question the decision in *Greenleaf* v. *Goodrich* must be taken as conclusive.

It is contended, however, that in this case the plaintiffs in error went further than was done in that, and that they offered to prove that in commerce "Saxony dress goods" were not considered as of "similar description" to delaines. It is argued that this brings the case within what should be taken as an exception reserved in the former decision. The exception claimed is drawn from the following clause in the opinion: "The record exhibits nothing tending to show what was commonly understood among merchants as distinguishing goods, known in commerce as of a similar description with delaines, from all other goods. Nor was there any evidence that there were any goods known by merchants, or in commerce, as goods of similar description with delaines, much less was it in proof that being woven in the gray was regarded by merchants as determining that goods so woven were not of similar description with delaines. In regard to all these matters the record is silent. Composed, as the goods were, of the same materials as delaines, having a similar general appearance, and intended for the same uses, they might well have been of similar description with colored delaines, though there were differences in the process of manufacture."

Undoubtedly the language of tariff acts is to be construed

according to its commercial signification, but it will always be understood to have the same meaning in commerce that it has in the community at large, unless the contrary is shown. *Swan* v. *Arthur*, 103 U. S. 597, 598. The most that can be claimed for the alleged reservation in *Greenleaf* v. *Goodrich* is, that it would have been proper to inquire whether the phrase "of similar description" was a commercial term, and if so, what it was understood by merchants and importers to mean. That, however, is not what was attempted in this case. The witnesses were asked, in effect, not what the words "of similar description" were understood among commercial men to mean, but whether the goods of these importers were known in commerce as goods of similar description to delaines.

The effort was to put the opinion of commercial experts in the place of that of the jury upon a question which was as well understood by the community at large as by merchants and importers. This it was decided in *Greenleaf* v. *Goodrich* could not be done, and upon the point supposed to have been reserved in that decision this case stands just where that did. The testimony offered was, therefore, properly rejected.

The opinions of the collector of the port and of the board of official appraisers were no more admissible on this question than those of any other competent experts.

The judgment is *Affirmed.*

CAMP *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 27, 28, 1885.—Decided March 2, 1885.

When a regulation, made by the head of an executive department in pursuance of law, empowers subordinates, of a class named, to contract on behalf of the United States as to a given subject matter; and further directs that "any contract made in pursuance of this regulation must be in writing," a verbal executory contract relating thereto is not binding upon the United States.

Statement of Facts.

When an executive regulation directs officers of one class to make a contract on behalf of the United States, it confers no authority to make it upon officers of a different class, although employed about the same government business.

Independently of the question of authority, the record does not show that the contract set up in the plaintiff's petition was entered into.

The appellant brought this action on the 13th day of April, 1869, to recover a balance alleged to be due as compensation for collecting and delivering to the United States, in 1864, a large amount of cotton, in bales, which was captured and abandoned property within the meaning of the acts of Congress. He claimed to have performed the services in question under an arrangement or agreement with an agent of the Treasury Department, which the Secretary of the Treasury subsequently recognized as a valid contract with the government. He admitted certain payments on his claim, and asked judgment for the further sum of $80,000. The court below dismissed his petition.

The material facts, as found by the Court of Claims, were, in substance, as follows:

In the early part of 1864, one Hart, an assistant special agent of the Treasury Department for the district of Natchez, in the State of Mississippi, made a verbal arrangement with Camp, whereby it was understood and agreed between them that the latter should bring out and turn over to the United States, through their agent in Natchez, about twenty-two hundred bales of cotton, stored on the banks of Buffalo Bayou, in Adams County, Mississippi, within that district, and the property of one John K. Elgee, a resident of Alexandria, Louisiana, then within the lines of rebel occupation. "The agent," the findings of fact stated, "was then to represent the arrangement and business, whatever it might be, to the Secretary of the Treasury, and was likewise to represent that he had assured the claimant, by the arrangement, that the Secretary would allow to him twenty-five per cent. of the proceeds of the cotton at least. No bond of indemnity was given by the claimant. By the arrangement the claimant was also to pay to the agent, Hart, out of the proceeds when received by him, from

$5,000 to $10,000, provided the Secretary of the Treasury should see no impropriety in his, the agent's, accepting from the claimant a portion of the proceeds."

On or about March 31, 1864, Camp, representing himself as a treasury agent, engaged the services of a transport, which, under the protection of a gunboat, ascended Buffalo Bayou, took on board 572 bales of the Elgee cotton, and brought it to Natchez, where it was seized by General Tuttle, commanding the Federal military forces, on suspicion that the claimant intended to appropriate it to himself, and placed under guard in the government yard. Shortly thereafter Camp informed the supervising special agent and the assistant special agent of the treasury of what he had done.

By direction of the supervising special agent the cotton was forwarded to St. Louis, consigned to O. S. Lovell, an agent of the Treasury Department. After it reached that city, Elgee brought an action of replevin against Lovell in the Circuit Court of St. Louis County. The United States took charge of the defence, and on June 22, 1864, a stipulation was entered into between the Treasury Department and Elgee, whereby that action was removed to the Circuit Court of the United States, and the cotton was sold, the proceeds, after paying certain charges, being invested in bonds, which were held to abide the result of the litigation. In that suit a judgment was obtained by the government, which was affirmed by this court.

The appellant presented his claim for compensation to the Treasury Department, which, by its assistant secretary, on the 6th of December, 1865, directed the Commissioner of Customs to "state an account and make a requisition in favor of Benjamin F. Camp upon F. E. Spinner, treasury agent, to be paid from the proceeds of captured and abandoned property, for the sum of $30,000, being part of the proceeds of certain property known as the Elgee cotton, collected as captured or abandoned property by said Camp, for an interest therein, said sum being an advance to said Camp on account of his expenditures in relation to said cotton." This order recited that Camp had executed bond with surety to the United States, conditioned that he would repay the said sum on demand of the Secretary of the Treasury,

and fully indemnify the government against all loss and damage, by reason of such payment. In pursuance of that order the sum of $30,000 was paid to him. On the 7th of March, 1866, the further sum of $15,000 was paid to Wm. Prescott Smith (who had acquired a joint interest with the claimant), the order which directed the payment reciting that that amount was "an advance to Smith on account of his joint interest with Camp in said cotton."

The net proceeds of the sale of the cotton, with the interest that had accrued on the bonds in which they were invested—in all, $366,170.83—were covered into the treasury in pursuance of a joint resolution of Congress, approved March 30, 1868.

On the 20th of August, 1868, the heirs and representatives of Elgee brought suit against the United States in the Court of Claims, under the captured and abandoned property act, to recover those proceeds. That suit was pending and undetermined when the present action was commenced. The claim of Elgee's heirs and representatives was established, his loyalty having been shown only by proof that on the 2d day of May, 1864, he took the oath prescribed by President Lincoln's amnesty proclamation of December, 1863.

It was in evidence that twenty-five per cent. of the proceeds of captured cotton was the remuneration ordinarily allowed by the Treasury Department to contractors under the treasury regulations for collecting and bringing in such property.

Mr. O. D. Barrett, and *Mr. Benjamin F. Butler* for appellant.

Mr. Assistant Attorney-General Maury for appellee.

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

Pursuant to authority conferred by the act of March 12, 1863, 12 Stat. 820, the Secretary of the Treasury established and promulgated regulations providing for the appointment of supervising special agents, assistant special agents, and other

agents, for receiving and collecting abandoned and captured property found within their respective agencies, and within the lines of military occupation by the United States forces, except such as had been used, or was intended to be used, for carrying on war against the United States.

One of those regulations provided, that when property was liable to be lost or destroyed, in consequence of its location being unknown to the special agents, or from other causes, and parties proposed, for compensation, to collect and deliver it to such agents, at points designated by them, "supervising special agents may contract, on behalf of the United States, for the collection and delivery to them of such property in their respective agencies, on the best possible terms, not exceeding twenty-five per cent. of the proceeds of the property, which percentage must be full compensation for all expenses, of whatever character, incurred in collecting, preparing and delivering such property at the point suggested." But it was also provided, that, "prior to any such contract being made, the party proposing must submit *in writing* a statement of the kind and amount of property proposed to be collected, the locality whence to be obtained, and all the facts and circumstances connected with it, particularly as to its ownership;" that "any contract made in pursuance of this regulation must be *in writing*, and restricted to the collection and delivery of particular lots at named localities, or, when circumstances clearly justify it, to the general collection and delivery of all abandoned property in limited districts, not greater in any case than one parish or county, and not more than one district to be assigned to one contractor;" and that "should a case arise, in the opinion of the supervising special agent, justifying the payment of a larger percentage than one-quarter of the proceeds of the property, he will make a statement of the facts and circumstances, and the reasons in his opinion justifying such additional allowance, and refer the same to the Secretary for instructions." Regulation XII. By another regulation of the same series it is expressly enjoined, that no liability be incurred or assumed, *or contract be made*, on the part of the United States by such agents except as authorized. Regulation XIII.

These regulations were in force when the claimant made the before-mentioned verbal "arrangement" with Hart, who was merely an assistant special agent, and not, as alleged in the petition, a supervising special agent of the Treasury Department. Under them, only supervising special agents could bind the United States by contracts with parties proposing, for compensation, to collect and deliver captured and abandoned property. They could not allow more than twenty-five per cent. of the proceeds without referring the matter to the Secretary. And no contract of that character made even by them bound the government unless it was in writing. Plainly, therefore, the verbal arrangement, which Camp had with an assistant special agent, was not binding upon the United States, even had it been reduced to writing. It imposed upon the government no legal obligation whatever. *Whiteside* v. *United States*, 93 U. S. 247, 250.

It is equally clear that it was not otherwise understood by the claimant; for, Hart only agreed "to represent the arrangement and business, whatever it might be, to the Secretary of the Treasury," and to inform the latter that he "had assured the claimant, by the arrangement, that the Secretary would allow him twenty-five per cent. of the proceeds of the cotton at least." Camp, evidently, undertook to bring in the cotton and deliver it to the proper agent of the United States, in reliance upon such action as the Secretary of the Treasury, in the exercise of his discretion, might ultimately take touching his compensation, and not at all in the belief that he had a binding contract with the government. He must be held to have known that the Secretary was not compelled to accept the arrangement with Hart as obligatory upon the government, but was at liberty, without violating any legal rights that Camp had, to allow less compensation than was ordinarily allowed under written contracts made by supervising special agents. Indeed, had the Secretary, in view of the non-conformity of the proceedings to his regulations, determined not to allow any compensation whatever, it is not perceived how the jurisdiction of the Court of Claims could have been invoked by Camp, as upon contract, express or implied.

The counsel for appellant rely upon *Salomon* v. *United States*, 19 Wall. 17, and *Clark* v. *United States*, 95 U. S. 539. Those cases differ radically from the present one. In Salomon's case, the property appropriated and used by the government was admitted to belong to the claimant. In Clark's case, the government received the property from the claimant under such circumstances as precluded it from raising any question as to his title. In each case, the United States were held liable, as upon implied contract, to make compensation to the owner. But there is no claim that Camp ever owned the cotton which he delivered at Natchez; as between him and the United States it was the property of the latter; at any rate, he could not legally have withheld it from the United States; its seizure by the government was not a taking of his property; and as he did not conform to the regulations, prescribing the only mode in which the government could become bound, by contract, to make compensation for the recovery of the property, he was not in a position to demand compensation as matter of legal right. Any other view would lead to the conclusion that parties who voluntarily brought in and delivered to the United States captured and abandoned property were entitled, as upon implied contract, to be compensated for their services; for, the services rendered by Camp under an arrangement with an assistant special agent, who had no authority whatever to bind the United States in respect of compensation, present no stronger case, in law, for compensation, as upon implied contract, than if they were voluntarily rendered without such previous arrangement. An interpretation of the regulations in question different from that indicated would have resulted in transferring to the courts the determination of matters, which the acts of Congress committed entirely to the discretion of the Secretary of the Treasury.

But it is contended that the government, having availed itself of the labors of claimant, and the Treasury Department having made two payments on his claim to be compensated on the basis fixed by the arrangement with Hart, that arrangement must be deemed to have been ratified by the Secretary of the Treasury as a contract with the United States, binding

them to allow what was ordinarily paid by the department in such cases, or what was, under all the circumstances, reasonable.

The precise form in which appellant's claim for compensation was presented at the Treasury Department is not shown by the findings of fact. The orders, given in 1865, by the assistant secretary, for the statement of an account and a requisition in favor of the claimant, discloses the fact that Camp had collected the cotton "for an interest therein," and that the payment of $30,000 was intended as an advance to him, on account of his expenditures in relation to the cotton, while the payment of $15,000 to Smith was "on account of his joint interest with Camp in said cotton." But this falls far short of an agreement, by the department, to make further payment. These facts, at most, imply, necessarily, nothing more than that the department was willing, under the circumstances, to compensate him to the extent of the foregoing sums. Whether he should receive any compensation, or how much should be awarded him, were matters which depended, as we have seen, upon the discretion of the Secretary of the Treasury. No one, acting by his authority, had bound the government to make compensation. If the Secretary refused to pay anything, the claimant had no remedy except to apply to Congress for a special appropriation in his behalf. The mere payment of $45,000 on a claim for a much larger sum, as compensation for services rendered in delivering captured or abandoned property to the government—for which services it was under no legal obligation, express or implied, to make compensation—cannot be deemed a recognition of a legal liability to make further payments on such claim. We find in the record no evidence of any purpose, or agreement, upon the part of the Secretary of the Treasury to make compensation to claimant beyond that already allowed; and to say that the court may award such compensation as it deems just and proper, is to impose upon the government the obligations of a contract, in respect of captured or abandoned property, which, under the acts of Congress, only the Secretary of the Treasury, or such agents of the Department as he designated for that purpose, had authority to make.

Statement of Facts.

These views make it unnecessary to consider other questions argued by counsel, and lead to an affirmance of the judgment.

Judgment affirmed.

MAXWELL'S EXECUTORS *v.* WILKINSON & Others.

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

Submitted January 28, 1885.—Decided March 2, 1885.

A memorandum in writing of a transaction twenty months before its date, and which the person who made the memorandum testifies that he has no recollection of, but knows it took place because he had so stated in the memorandum, and because his habit was never to sign a statement unless it was true, cannot be read in aid of his testimony.

This is a writ of error by the executors of a former collector of the port of New York to reverse a judgment in an action brought against him by the defendants in error on January 11, 1855, to recover back the amount of duties paid by them on imported iron on October 23, 1852.

Upon a trial of that action on December 16, 1856, a verdict was taken for the plaintiffs by consent, subject to the opinion of the court upon a case to be made. On March 30, 1883, the plaintiffs moved to set aside that verdict, and the motion was afterwards granted, on their stipulating to waive interest from the date of the verdict to the date of the motion.

Upon a second trial, the main question was whether the duties had been paid under protest. The plaintiffs introduced evidence tending to show that the entry of the goods, to which any protest would have been attached, could not be found at the custom house, and called William S. Doughty, a clerk of their consignees, who produced a copy of a protest, purporting to be dated October 13, 1852, and to be signed by the consignees, and having upon it these two memoranda: First, in pencil, "Handed in on the 23d day of October, 1852." Second,

in ink, "The above protest was handed to the collector the 23d day of October, 1852. New York, June 16th, 1854. Wm. S. Doughty."

Doughty, on direct examination, testified that he handed the original, of which this was a copy, to the collector on October 23, 1852. Being then cross-examined by leave of the court, he testified that the memorandum in ink was written by him on June 16, 1854; that he had previously made the memorandum in pencil so as to be able to make a statement in ink at some future time; that he did not know when he made the pencil memorandum; that he could not tell, otherwise than as his memory was refreshed by the memorandum, that he ever filed a protest with the collector; that he had no recollection now that he filed such a protest; but that he must have done it because it was his duty to do it; and that he was willing to swear positively that he did so, because he had signed a statement to that effect, and his habit was never to sign a statement unless it was true. The witness then, by permission of the court, voluntarily stated as follows: "The fact that the statement was made two years after was when there was sufficient data for me unquestionably to make that statement at the time two years afterwards. Probably there were memoranda which were destroyed long ago."

The defendant's counsel thereupon objected to the admission in evidence of the alleged copy of the protest, "upon the ground that the witness testifies that he has no recollection of the fact of the service of the original upon the collector at or prior to the time of the payment in question, and that the memorandum referred to by the witness, as the basis of his willingness to swear to the fact without any recollection, was not made for nearly two years after the transaction to which it relates, and that the data upon which the witness made the memorandum to which he refers are not produced or shown."

The court overruled the objection, and admitted the copy of the protest in evidence, and, a verdict being returned for the plaintiffs, allowed a bill of exceptions to its admission.

Mr. Solicitor-General for plaintiffs in error.

Mr. A. W. Griswold for defendants in error.

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

The witness, according to his own testimony, had no recollection, either independently of the memoranda, or assisted by them, that he had filed a protest with the collector; did not know when he made the memorandum in pencil; made the memorandum in ink twenty months after the transaction, from the memorandum in pencil, and probably other memoranda, since destroyed and not produced, nor their contents proved; and his testimony that he did file the protest was based exclusively upon his having signed a statement to that effect twenty months afterwards, and upon his habit never to sign a statement unless it was true.

Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. *Nicholls* v. *Webb*, 8 Wheat. 326, 337; *Insurance Co.* v. *Weide*, 9 Wall. 677, and 14 Wall. 375; *Chaffee* v. *United States*, 18 Wall. 516.

It is well settled that memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been "presently committed to writing," Lord Holt in *Sandwell* v. *Sandwell*, Cqmb. 445; *S. C.* Holt, 295; "while the occurrences mentioned in it were recent, and fresh in his recollection," Lord Ellenborough in *Burrough* v. *Martin*, 2 Camp. 112; "written contemporaneously with the transaction," Chief Justice Tindal in *Steinkeller* v. *Newton*, 9 Car. & P. 313; or "contemporaneously or nearly so with the facts deposed to," Chief Justice Wilde (afterwards Lord Chancellor Truro) in *Whitfield* v. *Aland*, 2 Car. & K. 1015. See also *Burton* v. *Plummer*, 2 Ad. & El. 341; *S. C.* 4 Nev. & Man. 315; *Wood* v. *Cooper*, 1 Car. & K. 645; *Morrison* v. *Chapin*, 97 Mass. 72, 77; *Spring Garden Ins. Co.* v. *Evans*, 15 Maryland, 54.

The reasons for limiting the time within which the memorandum must have been made are, to say the least, quite as

strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum. *Halsey* v. *Sinsebaugh*, 15 N. Y. 485; *Marcly* v. *Shults*, 29 N. Y. 346, 355; *State* v. *Rawls*, 2 Nott & McCord, 331; *O'Neall* v. *Walton*, 1 Rich. 234.

In any view of the case, therefore, the copy of the protest was erroneously admitted, because the memorandum in ink, which was the only one on which the witness relied, was made long after the transaction which it purported to state; and its admission requires that the

Judgment be reversed, and a new trial ordered.

FLAGG & Another *v.* WALKER.

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

Argued January 16, 1885.—Decided March 2, 1885.

A, being embarrassed, conveyed by deed absolute several parcels of land in Illinois to B, among which were a tract known as "the pasture," encumbered by a mortgage to C; other tracts occupied by shops and tenements; and "the homestead," also encumbered with a mortgage. B agreed verbally to advance to A and wife $1,500 a year for four years; to dispose of the property conveyed to him; to apply the proceeds to the payment of A's debts; and to divide equally between himself and them what might remain at the end of four years. Subsequently B made and delivered, and they received and accepted, a written agreement substantially to that effect, and further providing that B's liability to C should not exceed the amount realized from sale of "the pasture;" that the deed to B was absolute for all purposes; and that B was to have the free and unobstructed control and ownership of the property. B remained for some time in possession; paid sundry debts due from A; made advances in cash for A's use and for taxes and repairs; and advanced money for and took an assignment to himself of the mortgage on "the homestead." A then resumed possession, and subsequently thereto the mortgage on "the pasture" was foreclosed and the property sold. *Held*, (1) That the relation of B to A and his wife was

Statement of Facts.

not that of mortgagee, but that of trustee, under the original deed and subsequent agreements; (2) That B was not bound to advance out of his own means money to pay the mortgage debt on the pasture tract; (3) That A was under no personal liability to B for advances made by him; (4) that the mortgage debt on "the homestead" was one of the debts which B had undertaken to pay out of the proceeds of the property, and that he was entitled to be reimbursed for advances for its purchase not merely out of the mortgaged premises, but out of the proceeds of all the property conveyed to him by A.

The time fixed by the decree in the court below for payment by appellant to appellee of a sum named in the decree, in order to secure a reconveyance of the property in litigation having expired pending the appeal, and without payment, and the appellants having given an appeal bond which superseded the decree, in affirming the judgment the court modifies the decree, so as to extend the time of payment.

William F. Flagg, one of the appellees, was the owner, in February, 1875, of real estate in and near the city of Bloomington, Illinois, which may be generally described as follows: 1. A large manufacturing establishment, known as the Empire Machine Works, and about three acres of land upon which it stood. 2. A tract of land containing about 69 acres, known as "the pasture," situate in the northeastern part of the city. 3. Block No. 1, in Flagg's third addition to the city of Bloomington, containing about five acres, on which stood his residence. This property is designated in the record as the "homestead." 4. A large number of lots in the city, most of them vacant, but on about ten of which were tenement houses. 5. A tract in Fayette County, Illinois, and lands in Pettis County, Missouri. He also owned a large amount of personal property, consisting mainly of the machinery and tools in the Empire Machine Works.

At the date mentioned he was embarrassed in business and owed over $50,000. The larger part of this indebtedness bore interest at the rate of ten per cent. per annum. Much of the real estate was covered by mortgages; his tenement houses were out of repair; he was largely in arrears for taxes and for interest on his indebtedness, and was in broken health. In this condition of his affairs he sent for the appellee, Samuel Walker, who resided in Massachusetts, and who was the brother

of his first wife, and made a statement to him of his financial condition and embarrassments.

On February 22, 1875, after a conference between Flagg, Maggie R. Flagg, his wife, Walker, and J. H. Rowell, who, up to that time, had been the counsel of Flagg, but who on that occasion, with the knowledge of Flagg, acted as attorney for Walker, Flagg agreed to convey all his real estate to Walker by deed, his personal property by bill of sale, and his choses in action by assignment.

Although there is some conflict in the testimony on this point, it plainly appears that these transfers were to be made to enable Walker to control and dispose of the property as he saw fit. Its management and the disposition of the proceeds were left entirely to his judgment and discretion, both Mr. and Mrs. Flagg having full confidence in his business ability and integrity; but their understanding was that the proceeds of the property were to be applied to the payment of Flagg's debts, and Walker was to advance money temporarily for that purpose.

The effect of the proposed transfer was explained to Mr. and Mrs. Flagg by Rowell. On the next day, February 23, Flagg and wife executed to Walker deeds of conveyance, absolute on their face, of all the real estate above mentioned, and Flagg gave him a bill of sale of all his personal property and an assignment of his choses in action. Walker at once took possession of all the property, except the "homestead," which by agreement was to be left in the occupancy of Mr. and Mrs. Flagg.

In the following April Walker stated to Mrs. Flagg that he would allow her $1,500 per year for four years; that, at the end of that time, he thought he would be able to dispose of the property and would give a bond that whatever was left, after paying all the indebtedness and the expenses of disposing of the property, he would divide equally between himself and Mr. and Mrs. Flagg. This proposition was accepted.

Afterwards Walker executed and delivered to Mrs. Flagg (Mr. Flagg being absent from home) a writing, which opened with the following recital:

Statement of Facts.

"This agreement, made this 12th day of April, 1875, between Samuel Walker, of the first part, and William F. Flagg, of the second part, witnesseth, that the said Flagg and wife have heretofore conveyed to the said Walker all the real and personal property of the said Flagg."

The writing then declared that, in consideration of such conveyance, Walker agreed, in addition to the moneys already advanced by him for Flagg, to pay him $1,500 per year for four years, and pay off all the ascertained indebtedness of Flagg which had at that time been made known to him, and that Flagg should occupy his residence for one year free from any interference by sale of the same or otherwise. But Walker, by the same instrument, limited his liability to pay the sum of $25,000 due to Hiram Sibley, secured by trust deed to Corydon Weed, "to the amount realized out of the lands mortgaged to secure the same." He further agreed that, after "a disposition" of the property conveyed to him by Flagg, if anything should remain of the proceeds after reimbursing Walker for payments for Flagg, and paying the expenses of the management and sale of the trust property, he would pay to Flagg, or his legal representatives, the one-half of such excess.

The writing then stated, and was signed and witnessed, as follows:

"It being the express understanding that the conveyance heretofore made to said Walker is absolute for all purposes; that the said Walker is to have the free and unobstructed ownership and control of said property; that he will dispose of such property at pleasure, and according to his best judgment; and in all things be the sole judge of time and manner of using and disposing of said property, both real and personal; and this agreement is to include the property known as the Empire Machine Works, as well as the other property of said Flagg. The said Flagg, by his acceptance of this contract, agrees to its terms and consents to all its parts. Witness our hands the day and year first above written.

SAM'L WALKER.

"Witness: J. H. Rowell and John M. Hamilton."

Statement of Facts.

There is no doubt that the agreement of Walker embodied in this paper was accepted by Mr. and Mrs. Flagg, and was for a time acted on by both them and Walker.

Walker, upon the transfer above mentioned by Flagg of the property of the latter, paid off all, or nearly all, of the unsecured debts of Flagg, and furnished Mrs. Flagg with money to pay the taxes which were due and interest due and unpaid on the residue of Flagg's debts, and supplied Flagg with money to take a journey for the improvement of his health. The money so advanced amounted on August 27, 1875, to over $11,000.

Among the other indebtedness of Flagg there was due from him to one Soper about $5,000 in notes and on open account. Walker, acting upon the advice of Flagg, sold to Soper the tools and machinery in the Empire Machine Works, and as part consideration therefor Soper acknowledged payment of the debt due to him from Flagg, and gave his notes for the residue. Walker also leased to Soper, by the advice and with the consent of Flagg, one-half of the Empire Machine Works buildings for $1,500 per year. Walker began repairing the tenement houses so as to put them in good condition for renting. Having appointed one Du Bois as his agent to look after the property, superintend the repairs which he had begun, and collect the rents, he returned to his home in Massachusetts.

When the transfer of his property was made by Flagg to Walker in February, 1875, there was a deed of trust on the sixty-nine acre tract, known as "the pasture," to Corydon Weed, trustee, to secure $25,000 due to Hiram Sibley, bearing interest at the rate of ten per cent. per annum, payable semi-annually, and there was a mortgage on the "homestead" for $9,000, bearing like interest. In November, 1876, the interest on the debt due to Sibley being in arrear, Weed, the trustee, by virtue of a power contained in the deed of trust, advertised "the pasture" for sale, and on the day mentioned in the notice sold it at public sale to Hiram Sibley for $10,500.

The mortgage for $9,000 on the homestead was purchased by Walker on July 1, 1876, the amount paid, principal and interest, being $9,976.77.

Statement of Facts.

After these events, on September 25, 1878, the original bill in this case was filed by Mrs. Flagg against Walker, Sibley, Weed, the trustee, and her husband, William F. Flagg. It alleged that since the conveyances made by her husband to Walker, in February, 1875, the former had by mesne conveyances transferred and conveyed to her "all his interest, right, and title in and to said real estate above mentioned," referring to the real estate conveyed by Flagg to Walker, "and all personal property appertaining thereto, or that went into the hands of Samuel Walker." The bill set out the transfer to Walker by Flagg and his wife of the real and personal estate of Flagg, and in reference thereto made the following averments:

"That the said deeds were intended by said William F. Flagg and oratrix to secure the said Samuel Walker for his advances to be made by him, as above set forth, and as a further security for a reasonable compensation to be paid to him for the rendition of such services, and that he might out of the sale of a portion of said property be reimbursed for such advances and compensation. It was also agreed . . . that when the purpose for which such conveyance had been made was fully completed the said Samuel Walker was to reconvey to William F. Flagg, or to oratrix, as they might elect, at least one-half of the property remaining unsold and undisposed of, and should keep for himself and for his compensation a portion of said lands, not exceeding one-half of the residue, after payment of all debts." The bill also averred "that shortly after receiving the said deeds of conveyance the said Samuel Walker executed a statement, in writing, in which he set forth and stated to your oratrix the use and purpose, both set forth, upon which the said Samuel Walker had received the said property in trust." The bill charged "that said deeds of conveyance made to Samuel Walker, while, in fact, warranty deeds," were, "in equity, no more or less than mortgages, made to secure said Samuel Walker for his advances to be made by him, and said advances were to be sufficient in amount to pay all indebtedness of said William F. Flagg to other persons than said Samuel Walker; and that said Samuel Walker was to reimburse himself out of the sales to be made by him."

Statement of Facts.

The bill alleged that Walker neglected and refused to furnish money to pay the interest on the debt to Sibley, secured by the trust deed to Weed on "the pasture," which was well worth $80,000, and that, had it not been for the conveyance thereof by Flagg to Walker, Flagg would have been able to raise money to pay the interest on the debt as it accrued, or could have made a new loan and paid off Sibley's claim in full; but by reason of the conveyance to Walker he was unable to do so; and that Walker knowingly and wilfully permitted Sibley, by Weed, his trustee, to sell the premises at a forced sale for about $10,000, when its real value, at the time of the sale, was $80,000.

The bill further charged as follows: "That Walker, as to the real estate conveyed to him by Flagg, is to be taken and deemed as mortgagee thereof; . . . and that by reason of the execution of said instrument in writing by Walker, as the purpose for which he received said conveyance," said conveyance "is to be taken and deemed in equity as a trust deed on said lands;" and that Walker should "be charged with the value of all the real estate which, in fault of his said trust, he has permitted to be sold, and thereby alienated from said William F. Flagg or the plaintiff, and is likewise to be charged with a reasonable rental value of all said premises."

The prayer of the bill was as follows: That Walker might be charged with all the waste committed or permitted by him on the property conveyed to him by Flagg, and with "the value of property allowed by him to be alienated;" the amount of taxes and interest paid by Flagg or the plaintiff, with interest thereon; and that he might be credited with what he had paid out for Flagg or the plaintiff, with interest, "and that the difference between the said 'items' should be charged to said Samuel Walker by reason of his failure to act as trustee as aforesaid; that said mortgage by him now held upon the homestead of your oratrix, should be cancelled; that if there be any outstanding claims against the said William F. Flagg which were liens" [or] "encumbrances at the time of the conveyance to him, that they should be satisfied and paid out of the decree so awarded against said Samuel Walker, and the prop-

erty above mentioned now remaining in the name of said Samuel Walker be thereby free, clear, and released from all encumbrances and liens, and that said Samuel Walker should be decreed by this court to reconvey the residue, or such portion thereof as the court shall decree your oratrix is entitled to, by proper deeds of conveyance."

Walker filed his answer alleging that he came to Illinois at the request of Flagg and his wife, and upon examination of Flagg's affairs found that he was deeply in debt; that his real estate was heavily encumbered, and that he owed a large floating debt and was out of funds, and that all of his property was likely to be taken from him if it should be forced to sale; but that, after a full investigation, he became satisfied that Flagg's property, with good management, was worth more than his indebtedness, and that he proposed that Flagg should convey all his property to him, and let him manage his business for him; that Walker agreed that he would take the property without any future right of control, management or ownership remaining in Flagg, and would pay off the debts of Flagg specified in a list furnished to him by Flagg.

This list did not include the debt due to Sibley, and he refused to assume that debt, and would not agree to pay it, but promised that he would use the rents and profits of the land towards keeping down the interest on the Sibley debt and the taxes, and if he could sell the property so as to pay the debt he would do so, or he would convey the same to any parties to whom Flagg might sell.

He denied waste or mismanagement, and averred that the conveyance to him was absolute and not a mortgage.

He alleged that he had paid out of his own means on the indebtedness of Flagg $10,000 more than he had realized out of the personal property transferred to him by Flagg, in addition to the money paid for the trust deed or mortgage on the "homestead" property. He further alleged that the whole property now held by him would not bring the money paid out by him and the accumulated interest, and that the amount was growing larger because he was deprived of the rents and profits of the property.

Statement of Facts.

On June 28, 1878, Walker filed a cross-bill, to which he made William F. Flagg, Maggie R. Flagg and Hiram Sibley defendants, and in which he set up substantially the same facts as in his answer, and prayed for a decree that his title to the premises be confirmed, and that the claim of the defendants to any title thereto be declared null and void; and that if, upon the final hearing, his title should be held to be a mortgage, an account might be taken of the amount of money paid out by him in consideration of said conveyances, and that the amount of the same, together with the interest, should be declared a lien upon said real and personal property, and that in default of payment thereof a strict foreclosure might be granted.

To this cross-bill, by leave of court, the original bill of Maggie R. Flagg was made to stand as an answer.

A large mass of evidence having been taken, the court, on August 5, 1879, made an interlocutory decree, in which it was found that Walker held said real and personal property, conveyed and transferred to him by Flagg, in trust for the purposes expressed in the declaration of trust made by Walker on April 12, 1875, and for the purpose of security to himself for all moneys paid out by him for Flagg, or for or on behalf of the property of Flagg; that Walker had expended large sums of money in paying off the indebtedness of Flagg, and in taking care of and repairing the property, and in necessary expenses in the execution of the trust, in paying off and discharging liens and encumbrances upon the property, for all of which he was entitled to a first lien upon said real estate and upon all the personal property conveyed to him; that Walker assumed no portion of the debt due and owing by Flagg to Sibley, beyond what the land covered by the mortgage to secure it might be sold for, and that Walker was not liable for any damages growing out of said indebtedness on said mortgage. The decree declared that the acts of Walker were approved, and referred the case to a master, to state an account beween Walker and William F. Flagg and Maggie R. Flagg; and directed that the master, in stating the account, should not charge anything for any failure on the part of Walker to sell

any of the real estate, or on account of any depreciation of the value thereof.

On the 5th of September, 1879, the master filed his report, in which he credited Walker with the sum of $28,996.63, and charged him with the sum of $3,789.50, leaving a balance due to Walker of $25,207.13.

On the 4th of October, 1880, the court entered a final decree in the cause, in which it was found that there was due to Walker the sum of $25,207.13, and that said snm was a first lien upon the property conveyed by Flagg to Walker and remaining unsold; that said property was scant security for said indebtedness; that said William F. Flagg was insolvent; and that a large part of said property was unoccupied and deteriorating in value. It was therefore decreed that Flagg should pay to Walker the sum of $25,207.13, with six per cent. interest, and also the costs of suit, on or before the first day of April, 1881; that such payment being made, Walker should re-convey all said real estate and personal property by quit-claim deed and cancel and discharge the indebtedness of record; and that in default of such payment on or before the first of April, 1881, the title of Walker to all of the real estate and personal property conveyed to him by Flagg and not already disposed of should become absolute, and the title of William F. Flagg and Maggie R. Flagg be forever barred and foreclosed.

From this decree Maggie R. Flagg and William F. Flagg brought this appeal.

Mr. P. S. Grosscup (*Mr. Leonard Swett* was with him) for appellants.—I. Walker, in accepting the conveyance of the real and personal property of William F. Flagg, became a trustee for the purpose of managing the property and paying off the debts that were encumbrances upon said property, as well as those that were general and floating, and should be held to the duties and liabilities of such trustee. The trust capacity in which Walker took the conveyance of the real and personal property, cannot be defeated by the fact that the evidence of such trust is merely by parol. A trust can be shown by parol, except where, by the statute of frauds of a particular State, it

is specifically provided that no express trust shall be established except in writing; but in Illinois, where such a provision of the statute of frauds exists, it has uniformly been held that the statute must be pleaded in order to defeat the parol trust alleged. *Kinsie* v. *Penrose*, 2 Scam. 515; *Dyer* v. *Martin*, 4 Scam. 146; *Tarleton* v. *Vietes*, 1 Gil. 470; *Switzer* v. *Skiles*, 3 Gil. 529; *Warren* v. *Dickson*, 27 Ill. 115; *Chambers* v. *Rowe*, 36 Ill. 171. The agreement of April 12, 1875, constituted a declaration of trust. *Walsh* v. *Brennan*, 52 Ill. 193. See also *Fast* v. *McPherson*, 98 Ill. 496; *Kingsbury* v. *Burnside*, 58 Ill. 310; *Cumberland* v. *Graves*, 9 Barb. 595; *Starr* v. *Starr*, 1 Ohio, 321; *Jackson* v. *Moore*, 6 Cow. 706.—II. The Circuit Court erred in finding that Walker was not liable for any damages arising out of the indebtedness of Flagg to Sibley upon the trust deed for $25,000, and in excluding the master from inquiring into any damages that Flagg had suffered by reason of Walker's breach of trust in neglecting to look after and provide for the interest upon the said trust deed, and in allowing the said sixty-nine acre tract of land to go to sale without any personal attention from himself, in consequence of which the said land was sold for $10,500, when it ought, if properly managed, to have brought in the neighborhood of from $60,000 to $100,000. *Litchfield* v. *White*, 3 Sand. Sup. Ct. 545; *S. C.* on appeal, 7 N. Y. 438.—III. The court erred in decreeing a strict foreclosure of these premises to Walker, thus cutting off the statutory right of redemption and the benefits arising from competition at a public sale. The Circuit Court assumed that the conveyance to Walker was "by way of a mortgage" to secure the advances made by him, and that he had all the rights of a mortgagee to a strict foreclosure. We contend that Walker's relation to this land was not solely that of a mortgagee, and that this conveyance ought not to be treated as a mortgage at all. But if the conveyance is treated as a mortgage, and Walker as entitled to all the rights of a mortgagee, yet under the facts of this case and the rules of law governing the foreclosure of mortgages in the State of Illinois, he was not entitled to a strict foreclosure of the premises. In the case of *Farrell* v. *Parlier*, 50 Ill. 274, it was held as follows:

"It is only in strong cases which form exceptions that there could be decreed a strict foreclosure or a sale without redemption, and then only in rare cases, when, perhaps, the property is of less value than the debt for which it is mortgaged, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of the debt. But it is not proper when there are other encumbrances upon the property, or creditors, or purchasers of the equity of redemption." *Hollis* v. *Smith*, 9 Bradwell, App. Ill. 109; *Miller* v. *Davis*, 5 Bradwell, App. Ill. 474; *Murphy* v. *Stith*, 5 Bradwell, App. Ill. 562; *Rourke* v. *Coulton*, 4 Bradwell, App. Ill. 257; *Boyer* v. *Boyer*, 89 Ill. 447; *Sheldon* v. *Patterson*, 55 Ill. 507. A strict foreclosure cannot be sustained, because: First, the value of the lands securing the debt found due was much greater than the debt itself. Second, because it was not shown affirmatively by the party asking for such strict foreclosure that the property securing the mortgage debt is insufficient to pay the debt. Third, because there were creditors other than Walker, who had a lien upon this property. Fourth, because Walker not merely a mortgagee, but stood also in the relation of a trustee, and the policy of the law does not give a trustee the extraordinary power of a strict foreclosure. *Tennant* v. *Trenchard*, 4 L. R. Ch. App. 537.—IV. The court erred in consolidating the amount found to be due to Walker on account of the advances and expenses in the management of the said estate, with the amount of the mortgage upon the homestead of which he had become the owner by purchase from the mortgagee, and decreeing that the whole sum, as an entirety, was a first lien upon the property other than the homestead, as well as upon the homestead itself, and granting a strict foreclosure of all the property for such sum.

Mr. Jonathan H. Rowell (*Mr. A. E. Stevenson* was with him) for appellee.

Mr. Justice Woods delivered the opinion of the court. He recited the facts as above stated, and continued:

The appellants make no objection to that part of the decree

which finds the balance due to Walker. It must, therefore, be accepted as a fact in the case, that the sum so due, over and above all moneys received by Walker from the property conveyed to him by Flagg, was, on October 4, 1880, $25,207.13. Nor upon this appeal is there any charge of waste or other mismanagement by Walker of Flagg's property, except in his failure to furnish money to pay the accruing interest on the Sibley debt, and in allowing the property mortgaged to secure it to be sold at a sacrifice, as is alleged, under the trust deed. It is, therefore, virtually conceded by the appellants that, in all other respects, Walker's administration of the trust was honest and faithful.

But the appellants complain of the decree upon the following grounds:

First. Because it does not hold Walker liable for his breach of trust in not providing for the payment of the interest on the Sibley debt, secured by trust deed upon the "pasture," and in allowing it to be brought to sale without competition or any personal attention from himself, and to be sold for $10,500, when it ought to have brought from $60,000 to $100,000.

Second. Because it orders a strict foreclosure, as the appellants call it, of the premises to Walker.

Third. Because it consolidates the advances made and expenses incurred by Walker in the management of the estate with the amount of the mortgage or trust deed upon the homestead, and decrees a strict foreclosure for the whole sum upon all the property.

We do not think either of these grounds for reversal well founded. The evidence makes it perfectly clear, that the terms upon which Walker took the conveyance, as set out in the writing executed by him on April 12, 1875, were assented to by Flagg and his wife. Neither of them ever objected to the writing, or after its execution expressed the slightest dissent from its provisions. On the contrary, although both Mr. and Mrs. Flagg were examined as witnesses, neither of them says that the writing was not satisfactory to them, or that they did not accept it as showing the terms upon which the transfer of Flagg's property was made to Walker. In fact, the execution

of this paper is referred to in the original bill, and made in part the basis of the relief therein prayed for by Mrs. Flagg; and her counsel, in their brief, quote it at length, and insist that it shows the trust character in which Walker accepted the conveyance, and the consideration thereof. Of course Walker is bound by his written admission of the terms upon which the property was transferred to him.

By this writing Walker agreed to pay off all the ascertained indebtedness of Flagg, except the Sibley debt, and as to that he was only to pay so much of it as could be made out of a sale of the lands mortgaged to secure it. Walker did in fact pay off all the other indebtedness of Flagg. The complaint made against him is, that he did not furnish money to pay the Sibley debt, or sufficient to keep down the interest, but made default in the payment of interest, and thus allowed the property to be sacrificed at a forced sale.

It must be conceded that in accepting the conveyance of the property Walker became a trustee to manage the property and pay off the debts of Flagg according to the terms of the trust, and should be held liable for a faithful discharge of his trust. But this liability was imposed upon him on the condition and with the understanding that he was to be allowed the undisturbed possession and management of the property transferred to him, and reception of the rents and profits, which the testimony shows exceeded $3,000 per annum. It was to give him this undisturbed possession and control that the transfer of the property was made to him.

The evidence shows that Walker, after the conveyance to him, did furnish money sufficient to pay off the interest for six months due on the Sibley debt. It also shows that Flagg, having been absent from home for five or six weeks in the spring of 1875, returned with greatly improved health, in the latter part of April. He at once claimed as his own all the property which he had conveyed or transferred to Walker. He stopped the repairs which Walker had begun on the tenement houses, drove off the workmen, refused to recognize DuBois, the agent appointed by Walker to take care of the property and collect the rents, and before the first of August he had resumed pos-

session of all the property he had conveyed and delivered to Walker, both real and personal, and from that time on until the filing of the original bill on September 25, 1878, had collected and enjoyed all the rents and profits of the real estate except of such part as Flagg and wife had undertaken to sell and dispose of, or such as had been sold under mortgage or other encumbrances. In short, within less than five months after Flagg had transferred his property to Walker and put him in possession thereof, and after Walker had paid a large sum upon Flagg's indebtedness, the latter repudiated, as far as he could, the transfer of the property, and resumed possession of it as if no conveyance thereof had been made. Since that time he had, with Walker's consent, sold and disposed of a large part of the property conveyed to Walker and appropriated the proceeds, and, until the date of the final decree, he had enjoyed and managed the residue without interference from Walker or his agents. By the tacit consent of Walker the management of the property was recommitted to Flagg; he was allowed the undisturbed control of it; he was permitted to contract for the sale of a large part of the trust property, and Walker made deeds therefor whenever requested by Flagg, until only sufficient was left to afford what the Circuit Court found to be but a scant security for Walker's advances.

It was after Flagg had himself in this manner interfered with the execution of his trust by Walker, and, in effect, had released Walker from all duty as trustee, that he called upon the latter to provide money to pay another instalment of interest on the Sibley debt. This Walker declined to do; but, at Flagg's request, he executed a conveyance of a lot, part of the property transferred to him, and out of the proceeds Flagg paid one instalment of the interest due on the Sibley debt.

It was in November, 1876, about sixteen months after Flagg had resumed possession of his property and undertaken its management, and was in receipt of its rents and profits, that the "pasture" was sold by Weed, the trustee, at public sale, for default in the payment of interest due on the Sibley debt.

It is clear that under the declaration of trust of April 12, 1875, Walker was not bound to advance, out of his own means,

money to pay the principal or interest on the Sibley debt. He was only bound to apply the rents and profits to the satisfaction of interest. Upon what ground, therefore, any just complaint can be made against him for not keeping down the interest, or paying the principal of the debt after Flagg had resumed the possession and management of his property, and was receiving its rents and profits, it is not easy to see. But if Walker had agreed to advance money out of his own means to keep down the interest, the conduct of Flagg in disregarding his conveyance to Walker, and in resuming possession of the property, would have released Walker from his engagement.

We do not, therefore, find it necessary to examine the question whether the property was sold at a sacrifice or not. There is great conflict in the testimony on this subject; but, as Walker, under the circumstances which we have stated, was under no obligation to carry out an agreement which Flagg had repudiated and made impossible of performance, that question is immaterial. Walker was not liable for any loss, if there was a loss resulting from the sale of the property covered by the trust deed to secure the Sibley debt. The proceeds of the property by which the debt was secured have been applied to its payment, and that is all that Walker agreed, in any event, should be done.

The next ground upon which the decree of the Circuit Court is complained of is that the court decreed "a strict foreclosure of the property to Walker, thus cutting off the statutory right of redemption, and also cutting off the benefits of a public sale."

The contention of appellants' council is that if Walker is to be considered as a mortgagee, and entitled to the rights of a mortgagee, the court should have decreed a sale, and not a strict foreclosure.

The provisions of the statute law of Illinois on which this assignment of error is based are as follows:

Rev. Stat. ch. 77, § 16: "When any real estate is sold by virtue of an execution, judgment, or decree of foreclosure of mortgage, or enforcement of mechanic's lien, or vendor's lien, or for the payment of money, it shall be the duty of the sheriff,

master in chancery or other officer, instead of executing a deed for the premises sold, to give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor, or, if purchased by the person in whose favor the execution or decree is, the amount of his bid, the time when the purchaser will be entitled to a deed, unless the premises shall be redeemed, as provided in this act."

§ 18 provides, in substance, that any defendant, his heirs, administrators, or assigns, or any person interested in the premises under the defendant, may redeem the property so sold by paying to the purchaser, or the officer who sold the same, for the benefit of the purchaser, the sum of money for which the premises were bid off, with interest from the time of sale, and upon such payment the sale and certificate shall be void.

It will be observed that it is only in the case where the court orders a sale that there is any right of redemption. So that this assignment of error is resolved into the contention, that it was the duty of the court to order a sale, so as to give the plaintiff a chance to redeem.

But it has been repeatedly held by the Supreme Court of Illinois that the courts of that State may under certain circumstances decree a strict foreclosure. *Johnson* v. *Donnell*, 15 Ill. 97; *Wilson* v. *Geisler*, 19 Ill. 49; *Weiner* v. *Heintz*, 17 Ill. 259; *Stephens* v. *Bicknell*, 27 Ill. 444; *Farrell* v. *Parlier*, 50 Ill. 274; *Boyer* v. *Boyer*, 89 Ill. 447. A mortgagor, or other creditor, has not, therefore, in every case the right to insist that the court shall order a sale.

It is settled by the decisions of that court, that when the property is of less value than the debt for which it is mortgaged, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of the debt, the court is justified in decreeing a strict foreclosure, unless there are other encumbrancers, purchasers of the equity of redemption, or creditors to object.

The evidence satisfies us that a public sale for cash of the trust property now remaining undisposed of would fall short of paying the advances of Walker, which now amount to near $30,000, and that Flagg is insolvent. He does not appear to

be the owner of any assets, and Sibley has an unsatisfied judgment against him for $18,685.22, with interest from February 8, 1878. Flagg is under no personal liability to Walker for the advances made by the latter, and if Walker gets title to the property in question under the decree of the Circuit Court, he is entitled to no other relief against Flagg. The property satisfies his demand. There are no other encumbrancers, and no purchasers of the equity of redemption, and Sibley is the only creditor, and he, although a party to the decree of the Circuit Court, has not appealed. This is, therefore, a case where, if the suit was for the foreclosure of a mortgage, the court might, according to the local law, decree a strict foreclosure.

But there is no mortgage in this case, and this suit is not brought for the foreclosure of a mortgage, or other lien, or to enforce the payment of money by sale. The original bill filed by Mrs. Flagg was for the settlement of a trust and the redemption of real estate in the hands of the trustee from liens alleged to be in the nature of a mortgage for money advanced by him for the purpose of the trust. The claim of the bill was, that although the defendant Walker had advanced money to pay the debt of Flagg, which was a lien upon the property held by him in trust, yet he had neglected his trust and wasted the trust estate, and that the money lost to the trust property by his neglect and waste should be charged against the moneys advanced by him, and that upon a just and fair settlement there would be nothing due the trustee for his advances, and the prayer was for a reconveyance by the trustee.

The cross-bill of Walker averred that the conveyance by Flagg to him was absolute, and prayed that it might be confirmed, and his right to the peaceable and quiet enjoyment established; but if the court should be of opinion that his title to the property was to be considered a mortgage, that the amount due him from Flagg might be declared a lien thereon, and if the sum so due was not paid within a day to be fixed by the court, the conveyance already made to him of the property should be declared absolute.

In view of the declaration of trust made by Walker on April

12, 1875, it is clear that the transaction between Flagg and Walker was not a mortgage. A mortgage is a deed whereby one grants to another lands, upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified, at a day certain, the grant shall be void. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Montgomery* v. *Bruere*, 1 Southard, 260, 268; *Erskine* v. *Townsend*, 2 Mass. 493, 495; *Lund* v. *Lund*, 1 N. H. 39, 41. In this case there was a conveyance by Flagg to Walker of certain property to be administered and sold by the latter, and in consideration of the conveyance Walker agreed to pay certain specified debts owing by Flagg, and if, after the payment of the debts there was any residue resulting from the sale of the property, to pay Flagg one-half of such residue. The conveyance was made to secure neither the payment of any money, nor the performance of any act, by Flagg. All the money to be paid was to be paid by Walker; all the acts to be done were to be done by him. There was no agreement by Flagg to pay Walker any money in any event. Flagg never owed Walker any money by reason of the matters shown by the record in this case, and never came under any obligation to him. Walker was to reimburse himself out of the property conveyed to him by Flagg, and the parties never contemplated a reconveyance by Walker to Flagg of the property in question. We are not required to apply to such a transaction the rules prescribed by the statute of Illinois for the foreclosure of a mortgage. It is the case of a trust. The bill was filed for settlement of the trust, and the question we are to decide is whether, under the circumstances shown by the testimony, the appellants are entitled, as matter of equity and right, to have a sale of the premises.

The only interest which remained to Flagg in the property conveyed by him to Walker was his right to receive one-half the net proceeds of its sale, after repayment to Walker of all the moneys advanced by him for Flagg, and the expenses incurred in the administration of the trust. But the decree of the Circuit Court has in effect given the appellants the entire net proceeds of the property after the payment of Walker's advances; for, on the payment by Flagg within six months of

the sum found due to Walker, it directs a re-conveyance of all the trust property remaining unsold. Upon the averments of their bill they have no right to demand a sale. The property was conveyed to Walker to dispose of "at pleasure and according to his best judgment," and he was "in all things to be the sole judge of the time and manner of using and disposing of said property." The right thus to dispose of it he had bought and paid for, and he could not be deprived of it unless he was wrongfully using it to the damage of the Flaggs. There is no charge in the bill that he has abused that discretion, or that the neglect to sell at the present time would result in loss to the appellants.

The prayer of the original bill was not for a sale, but for a reconveyance by Walker to the appellants of the trust property still remaining in his name. The decree of the Circuit Court is in accordance with their prayer, first, however, requiring a repayment to Walker of his advances. It does not, therefore, lie in the mouths of the appellants to object that the decree does not order a sale, which they did not pray for, and which they have not shown themselves to be entitled to demand as a matter of right.

The last objection to the decree of the Circuit Court is, that it included the amount paid by Walker for the mortgage or trust deed upon "the homestead," with the advances made by him and the expenses incurred in the management of the trust, and decreed a strict foreclosure for the whole sum upon all the property. The contention of appellants is, that for the sum paid by Walker for the purchase of this mortgage he should be limited for his security to the property covered by the mortgage. But there is no warrant for this claim in the declaration of trust of April 12, 1875. The mortgage on the homestead was one of the debts which Walker had expressly agreed to pay, and it was the understanding that he was to be reimbursed for his advances, not merely out of the mortgaged premises, but out of the proceeds of all the property conveyed to him by Flagg, so far as they might be necessary. For the purpose of securing Walker the whole property was regarded and treated by the parties as an entirety. The fact

that Walker's payment of the mortgage debt took the form of a purchase of the mortgage lien does not deprive him of that security.

We find no error in the proceedings and decree of the Circuit Court. But as the time limited by the decree, to wit, April 1, 1881, for the payment to Walker by W. F. Flagg, or some one of the defendants to the cross-bill, of the said sum of $25,207.18, with interest, has passed, we think the time for such payment should be extended. The appellants, while they were litigating their rights with Walker in this court, having given an appeal bond which superseded the decree of the Circuit Court, were not required to make the payment.

We therefore direct that the decree of the Circuit Court be so modified as to extend the time for the payment of the sum coming to Walker for the period of six months from the filing of the mandate of this court in the Circuit Court; and, as so modified, the decree of the Circuit Court is affirmed.

BLAKE *v.* SAN FRANCISCO.

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

Argued January 30, 1885.—Decided March 2, 1885.

The second claim in the reissued patent of September 18, 1877, to Charles E. Blake, assignee of the administratrix of Thomas H. Bailey, deceased, for an improvement in relief valves for water cylinders, is for a combination of an automatic valve with a pinhole and pin to effect the desired object; and, as automatic valves had been previously used for that purpose in other combinations, it is not infringed by a combination of such a valve with a screw, sleeve or cap to effect the same objects.

The adaptation of an automatic valve, a device known and in use before the plaintiff's patent, to a steam fire engine, is not such invention as will sustain a patent.

Where the public has acquired the right to use a machine or device for a particular purpose, it has the right to use it for all like purposes to which it can be applied, unless a new and different result is obtained by a new application of it.

Opinion of the Court.

Bill in equity to restrain the infringement of a patent for an invention. The facts which make the case are stated in the opinion of the court.

Mr. George W. Dyer for appellant.

Mr. William Craig for appellee.

Mr. Justice Woods delivered the opinion of the court.

This is an appeal from a decree dismissing a bill filed by the appellant to restrain the infringement by the appellees of reissued letters patent granted to the appellant, as the assignee of original letters patent issued to Thomas H. Bailey. The original patent was dated February 9, 1864, and the reissue September 18, 1877. They were for "a new and improved valve for the water cylinders of steam fire engines and other pump cylinders." The specification, which was substantially the same in both patents, stated that previous to the invention therein described the only valve used to relieve the pressure upon fire hose to prevent them from bursting was one operated by hand. To obviate the defects of such a valve, the inventor applied, at some point between the engine or pump and the hose nozzle, a valve which opened automatically by the pressure in the hose or the pump cylinder, so as to discharge an additional stream, and thereby relieve the pressure.

The specification then minutely described an automatic relief or safety valve, and added: "To enable the valve to be screwed down to bring all practical pressure upon the pump and hose in a trial of an engine, there is a hole d' drilled through the upper part of the screw-cap D and valve stem d, when the valve is down in its seat, for the reception of a pin, by the insertion of which the valve stem and cap can be connected rigidly, so that by slightly turning the cap the valve may be screwed down close to its seat."

The reissued patent contains two claims, the second of which only is found in the original. They are as follows:

1. The combination, with a pump cylinder and hose of a fire engine of an automatic relief valve, arranged relatively thereto, substantially as specified.

2. The combination of the valve C, stem *d'*, spring E, adjustable cap D, and pin-hole *d*, whereby the valve may be either held upon its seat with a variable yielding pressure, or may be elevated therefrom, or held immovably thereon, as an ordinary screw-plug.

The answer of the defendants denied infringement, denied that Bailey was the original inventor of the devices described in his patent, and averred that his alleged invention had been in notorious public use many years before the application of a patent therefor by Bailey.

The appellant does not contend that the appellees infringe the first claim of the reissued patent. He bases his demand for relief on the alleged infringement of the second claim only.

We think that the proper construction of this claim is that it covers an automatic valve in combination with a contrivance consisting of a pin-hole and pin, by which the valve may be raised from its seat, so as to leave the valve hole permanently open, or by which the valve may be rigidly closed upon its seat, making a closed or plug valve.

The evidence shows that Bailey was not the first to conceive the idea of a device for opening or closing rigidly an automatic valve. The same thing had been done by means of wedges and screws and other devices. He cannot, therefore, cover by his patent all the devices for producing this result, no matter what their form or mode of operation. The claim must be confined to the specific device described in the specification and claim, namely, a pin-hole and pin. If this construction of the claim be adopted, it is clear that no infringement is shown, for the appellees do not use a pin-hole and pin for holding their valve open or closed, but a screw, sleeve or cap; and, therefore, one of the elements of the combination, covered by the second claim of appellant's patent, is wanting in the device used by the appellees. *Prouty* v. *Ruggles*, 16 Pet. 336. See also *Rowell* v. *Lindsay*, *ante*, page 97, and cases there cited.

But if it be contended that the device covered by the second claim of the appellant's patent is infringed, simply by the use of an automatic relief valve, which can be converted at will into an open or closed valve, the evidence in the record is abundant

to show that long before the application of Bailey for the original patent, automatic safety valves, which could be thus rigidly opened or closed, were in common use for the purpose of relieving pipes and cylinders from the pressure of steam or water, and that the valve of the appellant did not materially differ from those which were in common use. This was virtually conceded by the appellant when, being under examination as a witness in his own behalf, he was asked by counsel for the appellees in what respect the valve, described in his patent, differed from any other automatic relief valve, he replied: "It is about the same as others." "It is similar to other automatic steam pump valves."

Upon this state of facts it was plain that the mere employment by the defendant of the old and well-known automatic safety valve afforded no ground upon which to base the relief prayed for in the appellant's bill. Appellant's counsel, therefore, disclaimed any right to the exclusive use of an automatic safety valve, and said: "We do not claim the valve any further than in this combination with a steam fire engine."

If it be conceded, therefore, that the second claim of appellant's patent covered the use of an automatic relief valve applied to a steam fire engine and hose, the question is presented whether the appellant's patent thus construed is valid.

"It is settled," says Mr. Justice Gray, speaking for the court, "by many decisions of this 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 before been contemplated." *Pennylvania Railroad Co.* v. *Locomotive Truck Co.*, 110 U. S. 490, and cases there cited.

It follows from this principle that, where the public has acquired in any way the right to use a machine or device for a particular purpose, it has the right to use it for all the like purposes to which it can be applied, and no one can take out a patent to cover the application of the device to a similar purpose.

If there is any qualification of this rule, it is that if a new

and different result is obtained by a new application of an invention, such new application may be patented as an improvement on the original invention; but if the result claimed as new is the same in character as the original result, it will not be deemed a new result for this purpose. For instance, an automatic relief valve, used to relieve the pressure of steam, produces no new result in character when used to relieve the pressure of water, unless some further effect besides the mere relief of pressure is obtained. This qualification, therefore, will not affect the present case, because no new result in character is accomplished by the supposed invention of the plaintiff. Besides, it appears from the evidence that before Bailey's patent was applied for, relief valves were in common use, both on land and at sea. They were commonly used on the steam feed-pumps of steamships. These pumps were usually fitted with nozzles for the attachment of hose, so that the feed-pump could, in case of need, be used as a steam fire engine. It is, therefore, plain that in this state of the art Bailey could not obtain a valid patent for applying a similar valve to a portable steam fire engine. He could not do this for two reasons: first, because the public had the right to use the valve for all similar purposes for which it was adapted; and, second, because the application of a valve, which had been used on a stationary steam fire engine on ships, to a portable steam fire engine on land, did not require any ingenuity or involve invention.

It is no answer to this to assert that the application of a relief valve to a portable steam fire engine is the invention of a new combination. There was no invention; the combination was already in public use on steamships. The application of the valve to a similar use on land was not a new combination or a new invention.

We are of opinion, therefore, that construing his patent as the appellant has been compelled by the testimony to do, Bailey invented nothing but the pin-hole and pin mentioned in his specification, and this is not used by the appellees.

The decree of the Circuit Court is affirmed.

FOURTH NATIONAL BANK *v.* STOUT & Others.

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

Submitted January 12, 1885.—Decided March 16, 1885.

When separate creditors unite in a suit in equity, each claiming his proportionate share of property of the common debtor in respondent's hands, and each recovers a separate decree for his *pro rata* share, the jurisdiction of this court, on appeal, is, as to each creditor's appeal, to be determined by the amount in dispute in his case.

This was a suit in equity begun by Stout, Mills & Co., judgment creditors of the Yeager Milling Company, to recover from the Fourth National Bank their *pro rata* share of certain property of the debtor company which was in the hands of the bank. The bank claimed a superior right to the property, and denied its liability to account to creditors therefor. The only questions in the case, as made by the bill, were: (1) whether the bank held the property, or the proceeds thereof, in trust for the creditors of the company; and if so (2) what was the *pro rata* share of the complainants. No decree was asked for any more than this share. The bank in its answer did not seek affirmative relief.

Upon the hearing, the court found that the bank did hold certain property in trust for the creditors, and sent the case to a master to ascertain the share of the complainants therein. In the interlocutory decree to this effect, leave was given other creditors to intervene *pro interesse suo* for the recovery of their respective *pro rata* shares of the trust property. Upon the coming in of the master's report a final decree was entered—

"That the said complainants, and the several intervenors severally have and recover of defendant, the Fourth National Bank of St. Louis, the several sums hereinafter stated, being the several *pro rata* shares, as ascertained by the said report of the special master *pro hac vice*, in the assets of the Yeager Milling Company, heretofore found by the interlocu-

tory decree herein of October 30, 1882, to have been wrongfully appropriated by said Fourth National Bank, as follows:

Stout, Mills & Temple	$3,591 32
Kidder, Peabody & Co	2,658 72
R. Hunter, Craig & Co	1,072 26
Anton Kufike	749 66
Merchants' Bank of Canada	391 23
The First National Bank of Chicago	527 41
	$8,990 60

And to have each his several execution therefor, with his costs."

The bill was also dismissed as to all the defendants except the bank, and as to the bank except to the extent of the decree in favor of the several creditors as above, such dismissal being "without prejudice to any claims or rights and claims of any defendant as against each other connected with the matters set forth in the master's report."

From this decree the bank appealed, and the appellees, the several creditors in whose favor the decree was rendered, moved to dismiss, because the value of the matter in dispute between the bank and the several appellees does not exceed $5,000.

Mr. B. D. Lee for appellant.—The complainant admits an indebtedness from the company to the bank of $120,000, and the proof shows one still greater. The accounting on which the decree is based undertakes to settle this question forever, and the decree from which the appeal is taken confirms that report and settles and adjusts the rights of all the parties.

The cases cited by respondents in their brief, in support of their motion to dismiss, are not applicable to this case. In the case of *Schwed* v. *Smith*, 106 U. S. 188, complainants claimed that the whole fund arising from the sale of the attached property had been obtained, by the defendant, by fraud, and that the defendant had no legal or equitable right to hold the same as against the complainants; whereas in the case at bar, the

bill of complaint proceeds upon the theory that the fund appropriated by appellant, was one in which all the creditors, including the appellant, had a common right, and tenders an issue which made it absolutely necessary that the affirmative rights of appellant, as against the milling company and the other defendants, should be determined. And appellant cannot be denied its right of appeal because the court below saw fit, after the adjustment of these rights, to dismiss the suit as to all of the other defendants. The appellant's rights having been raised by the bill, cannot be taken away from it by a dismissal as to the other defendants in a case where the decree in its entirety reaches beyond the mere adjustment of complainants' demand.

Mr. Frederick N. Judson and *Mr. John H. Overall* for appellees.

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

The motion is granted on the authority of *Seaver* v. *Bigelows*, 5 Wall. 208, and *Schwed* v. *Smith*, 106 U. S. 188. The appellees have separate and distinct decrees in their favor depending on separate and distinct claims. If none of the other creditors had intervened, and the decree had been rendered in favor of Stout, Mills & Temple alone upon their bill as filed, in which they sought to recover only their *pro rata* share of the assets of their debtor in the hands of the bank, it certainly could not be claimed that an appeal would lie if their recovery was for less than $5,000. The suit was instituted, not for the whole property in the hands of the bank, but only for the complainants' *pro rata* share. After the suit was begun the intervening creditors were allowed to come in each for his separate share of the assets. On their intervention the case stood precisely as it would if each creditor had brought a separate suit for his separate share of the fund. The decree in favor of the several creditors has precisely the same effect, for the purposes of an appeal, that it would have had, if rendered in such separate suits.

Since the bill was dismissed as to the other parts of case

without prejudice to the rights of the defendants among themselves, the report of the master is binding on the parties only so far as it fixes the amounts due the several appellees. In its effect the decree binds no one except the parties to the appeal in respect to the right of the several appellees to their recovery.

Dismissed.

DAVIES *v.* CORBIN & Another.

GAINES *v.* CORBIN & Another.

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

Submitted March 3, 1885.—Decided March 18, 1885.

The docketing by the defendant in error of a cause in advance of the return day of the writ of error, does not prevent the plaintiff in error from doing what is necessary while the writ is in life, to give it full effect.

Unless there is some color of a right to a dismissal, the court will not entertain a motion made to affirm.

Motions to dismiss or affirm.

A statement of the litigation in *Davies* v. *Corbin*, is contained in 112 U. S. 36, which was also a motion to dismiss. The grounds for the motion in *Gaines* v. *Corbin*, are substantially the same as those in the other case.

Mr. W. Hallett Phillips, with whom were *Messrs. B. C. Brown*, *E. W. Kimball* and *C. P. Redmond*, for the motions.—I. The writ of error in the case of *Davies* v. *Corbin* was never perfected. The record fails to show that any bond was given. That in the absence of a bond the writ of error will be dismissed, has often been decided. *Sage* v. *Railroad Co.*, 96 U. S. 712; *National Bank* v. *Omaha*, Id. 712.—II. Davies and Gaines are not entitled to prosecute writs of error. The mandamus to the county court constituted the judgment; the orders on the

rules to show cause against the tax collector, clerk and other officers, were merely in *enforcement* of that judgment. 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. *Labette Co.* v. *Moulton*, 112 U. S. 225. Surely every one of the officials of the State who may have any action to take in the assessment, collection and payment of the tax, cannot prosecute a separate writ of error and make a separate "case" here, every time there is a levy attempted to be enforced under the writ of mandamus.—III. The judgments should be affirmed even if the cases are not dismissed. The writs of error are brought in the face of the repeated decisions of this court, to the effect, that it is no answer to a writ of mandamus from a United States court commanding a collection of a tax, for the tax officer to allege that he had been enjoined by a State court. It is plain the cases are brought here for delay only.

Mr. A. H. Garland opposing.

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

This is the second time a motion has been made to dismiss the case of *Davies* v. *Corbin*. The ground of the present motion is that the security required by § 1000 Rev. Stat. has never been given. Against this it is shown that a supersedeas bond was accepted by the judge who signed the citation on the 8th of April, 1884. The judgment brought under review by the writ of error was rendered on the 11th of February, 1884. The writ of error was sued out and served on the 7th of March, in the same year, and the citation was also signed and served on that day. The cause was duly docketed in this court by the defendant in error on the 22d of March, in advance of the return day of the writ. On the same day the defendant in error filed his motion to dismiss for other reasons than that now relied on. The plaintiff in error was notified that the motion would be presented to the court on the 14th of April. When the motion was filed the security had not been given, but before the time fixed for hearing it was tendered in proper form

and accepted. Early in the present term that motion was overruled.

The docketing of the cause by the defendant in error in advance of the return day of the writ did not prevent the plaintiff in error from doing what was necessary while the writ was in life to give it full effect. The present motion to dismiss is, therefore, overruled.

The original rule allowing a motion to affirm to be united with a motion to dismiss was promulgated May 8, 1876, 91 U. S. VII., and in *Whitney* v. *Cook*, 99 U. S. 607, decided during the October Term, 1878, it was ruled that the motion to affirm could not be entertained unless there appeared on the record at least some color of right to a dismissal. This practice has been steadily adhered to ever since, and, in our opinion, prevents our entertaining the motion to affirm in this case. That motion is consequently *Denied.*

In *Gaines* v. *Corbin and Another*, there is a motion to dismiss, with which is united a motion to affirm.

These motions are denied. There is not sufficient color of right to a dismissal to make it proper for us to entertain a motion to affirm.

BOYER *v.* BOYER & Others, County Commissioners.

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

Submitted January 9, 1885.—Decided March 2, 1885.

The laws of Pennsylvania exempted from local taxation, for county purposes, railroad securities; shares of stock held by stockholders in corporations which were liable to pay certain taxes to the State; mortgages; judgments; recognizances; moneys due on contracts for sale of real estate; and loans by corporations, which were taxable for State purposes, when the State tax should be paid. The pleadings in this case admitted, in detail, large amounts of exempted property under these heads in the State: *Held*, That, under these circumstances, this constituted a discrimination in favor

of other moneyed capital against capital invested in shares in national banks, which was inconsistent with the provision in § 5219 Rev. Stat., that the taxation by State authority of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

The previous decisions of this court respecting State and local taxation of shares in national banks considered and reviewed.

The former decisions of this court do not sustain the proposition that national bank shares may be subjected, under the authority of the State, to local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempted from such taxation.

While exact uniformity or equality of taxation cannot be expected under any system, capital invested in national bank shares was intended by Congress to be placed upon the same footing of substantial equality in respect of taxation by State authority as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise.

Bill in equity commenced and tried in the State courts of Pennsylvania to prevent the collection of a tax levied under an assessment alleged to be in violation of the statutes of the United States. The facts which raise the federal question are stated in the opinion of the court.

Mr. Charles W. Wells for plaintiff in error.

Mr. W. J. Whitehouse for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error brought this suit in a State court of Pennsylvania for an injunction restraining the commissioners of Schuylkill County from levying *a county tax* for the year 1883 upon certain shares in the Pennsylvania National Bank—an association organized under the National Banking Act. The suit proceeds upon the ground that such levy violates the act of Congress prescribing conditions upon State taxation of national bank shares, in this that "other moneyed capital in the hands of individual citizens" of that county is exempted, by the laws of Pennsylvania, from such taxation. A demurrer to the bill was sustained, and the suit was dismissed. Upon appeal to the Supreme Court of Pennsylvania that judgment

was affirmed, on the ground that the laws of the State, under which the defendants sought to justify the taxation, were not repugnant to the act of Congress.

State taxation of national bank shares was permitted by the act of Congress of June 3, 1864, 13 Stat. 111, ch. 106, § 41, subject to the restriction that it should not be at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens of the same State. But that section contained a proviso to the effect "that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." The case of *Lionberger* v. *Rouse*, 9 Wall. 468, arose under that act. The question there was whether shares in a national bank were exempt from State taxation merely because two State banks of issue, organized before the national banking act was passed, and which held a very inconsiderable portion of the banking capital of the State, had by their charter the right to pay a certain per cent. on the amount of their capital stock in full of all State bonus and taxes—an amount less than that imposed upon national bank shares. The shares of other associations in the State, having the privileges of banking, except the power to emit bills, were taxed like the shares in national banks. It was held that Congress meant, by reference in the act of 1864 to taxation of State bank shares, to require, as a condition to taxation by the State of shares in national banks, that she should, unless restrained by valid contract, tax in like manner the shares of banks of issue of her own creation. There was no question in that case of discrimination against capital invested in national bank shares in favor of moneyed capital which was invested otherwise than in bank stock.

But the act of 1864 was so far modified by that of February 10, 1868, 15 Stat. 34, ch. 7, that the validity of such State taxation was thereafter to be determined by the inquiry, whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares

in State banks. The effect, if not the object, of the latter act was to preclude the possibility of any such interpretation of the act of Congress as would justify States, while imposing the same taxation upon national bank shares as upon shares in State banks, from discriminating against national bank shares, in favor of moneyed capital not invested in State bank stock. At any rate, the acts of Congress do not now permit any such discrimination. § 5219 of the Revised Statutes is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association, owned by non-residents of any State, shall be taxed in the city or county where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

Whether the proposed taxation for *county* purposes of the plaintiff's shares of national bank stock is at a greater rate than is assessed, for like purposes, on other moneyed capital in the hands of individual citizens, is the single question upon which depends the affirmance or reversal of the judgment.

Before examining the statutes of Pennsylvania upon the subject of taxation, it will be well to ascertain how far the decisions of this court have fixed the true meaning of the words "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The Supreme Court of Pennsylvania is of opinion that the commissioners are fully sustained by the decision in *Hepburn* v. *The School Directors*, 23 Wall. 480. In that case, the question was, whether the owner of national bank shares, re-

siding in Cumberland County, Pennsylvania, was exempt from a local tax by reason of a statutory exemption from all taxation in that county, except for State purposes, of "mortgages, judgments, recognizances, and money owing upon articles of agreement for the sale of real estate," except mortgages, judgments, and articles of agreement given by corporations. Laws Penn. 1868, p. 61. The value of such securities (if they could all be properly so described), as compared with other moneyed capital in the hands of individual citizens in that locality, did not appear in that case. What the court had to decide, and all that it did decide, was whether the exemption from local taxation, of mortgages, judgments, recognizances, and money due upon agreements for the sale of real estate, in the hands of individuals, was a partial exemption only; that is, whether it was so substantial in its nature and operation as to affect the integrity of the general assessment for local purposes. The court, after observing that money at interest was not the only moneyed capital to which the national banking act had reference, and that the words "other moneyed capital" included investments in bank shares and other stocks and securities, said: "This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation, both of property and debts secured upon it. Necessarily, there may be other moneyed capital in the locality than such as is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." That case is authority for the proposition that a *partial* exemption by a State, for local purposes, of moneyed capital in the hands of individual citizens does not, of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction. But it is by no means an authority for the broad proposition that national bank shares may be subjected to local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens, within the same jurisdiction or taxing district, is exempted from such taxation. Indeed, such an

interpretation of the statutes might entirely defeat the purpose that induced Congress to confine State taxation of national bank shares within the limit of equality with other moneyed capital; for, it would enable the States to impose upon capital invested in such shares materially greater burdens than those to which other moneyed capital in individual hands is subjected.

The case of *Adams* v. *Nashville*, 95 U. S. 19, is also relied upon to support the judgment below. The question there raised was whether an alleged exemption from municipal taxation, under an ordinance of a city, of its interest-bearing bonds, operated to exempt from like taxation the shares in a national bank located in the same city. The court held that as the ordinance had been abrogated by subsequent legislation of the State, no such exemption existed. However, considering the question on its merits, it was said that the act of Congress did not intend "to cut off the power to exempt particular kinds of property, if the legislature chose to do so." In illustration of this view reference was made to exemptions of homesteads, household furniture, school-houses, academies, and libraries—regulations sustained, as a general rule, upon grounds of policy and humanity, or because the property exempted is employed for objects more or less connected with the public welfare. And it was observed that the discretionary power of the legislature over such subjects remained as before the act of 1868, the intention of that statute being to protect corporations formed under its authority from *unfriendly* discrimination by the States in the exercise of their taxing power. "That particular persons or particular articles are relieved from taxation is not a matter to which either class can object." It is scarcely necessary to say that this language leaves untouched the question as to the power of the State to subject the shares of national banks to taxation, when a very material portion of other moneyed capital in the hands of individual citizens and corporations, is exempted from like taxation.

The court has had occasion to examine the provisions of the national banking act in several other cases recently determined. *People* v. *Weaver*, 100 U. S. 539; *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S.

153; *Supervisors* v. *Stanley*, 105 U. S. 305; *Evansville Bank* v. *Britton*, 105 U. S. 323.

From these cases may be deduced certain rules for the construction of that act:

1. That the words "at a greater rate than is *assessed* upon other moneyed capital in the hands of individual citizens" refer to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the act of Congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital.

2. That a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the tax-payer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital.

These decisions show that, in whatever form the question has arisen, this court has steadily kept in view the intention of Congress not to permit any substantial discrimination in favor of moneyed capital, in the hands of individual citizens, as against capital invested in the shares of national banks. In *People* v. *Weaver*, the court said: "As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against that class of property as compared with other moneyed capital. In permitting the States to tax these shares it was foreseen that the States might be disposed to tax the capital invested in these banks oppressively. This might have been prevented by fixing

a limit on the amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said: You may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented."

We come now to consider whether the laws of Pennsylvania, under which defendants propose to levy a tax for county purposes, upon the plaintiff's shares of stock, are open to the objection that they violate the principle of equality, which the act of Congress intended to establish between capital invested in such shares, and other moneyed capital?

By a law of that State, passed March 31, 1870—upon which the defence mainly rests—it is provided, "That all the shares of national banks, located within this State, and of banks and savings institutions incorporated by this State, shall be taxable for State purposes at the rate of three mills [subsequently, four] per annum upon the assessed value thereof; and for county, school, municipal and local purposes at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of this State." Laws of Penn. 1870, p. 42. This act suggests, upon its face, the inquiry as to what moneyed capital, in the hands of individual citizens, is subject to taxation for county and other local purposes; for, such capital, if exempted from local taxation at the date of the passage of that act, remains exempt, unless the legislature of the State has since subjected it to taxation. Evidently, in respect of taxation for local purposes, the legislature did not intend, by the act of 1870, to remove the then existing exemptions, and subject all moneyed capital, of whatever description, to such taxation; but only to establish a uniform rate of local taxation as between capital invested in national bank shares, and such, and only such, moneyed capital as was then, or might hereafter be, subjected to taxation.

To ascertain what moneyed capital was at the passage of the act of 1870, or has since become exempted in Pennsylvania from taxation for county purposes requires an examination of several statutes commencing with the one passed in 1844. The latter subjected to taxation, "for all State and county purposes whatsoever," the following personal property: mortgages; money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; articles of agreement and accounts bearing interest, except notes or bills for work and labor done, and bank notes; shares or stock in any bank, institution or company then or thereafter incorporated by or in pursuance of any law of the State, or of any other State or government; shares of stock or weekly deposits in unincorporated saving fund institutions; public loans or stocks, except those issued by the State; money loaned or invested on interest in any other State. 2 Brightly's Purdon's Dig. 1380; Laws Penn. 1844, p. 497.

In 1850 shares of stock in State banks, created after the State banking act of 1850, were relieved from taxation for county purposes. Laws Penn. 1852, p. 443; 1 Grant, 35. And in 1854 all bonds or certificates of loan of any railroad company incorporated in the State were declared liable to taxation "for State purposes only." 2 Brightly's Purdon's Dig. 1369, § 81.

By an act approved April 12, 1859, it was provided that thereafter the capital stock of all banks, savings institutions, and companies whatever of the State, "shall be subject to and pay a tax into the treasury of the commonwealth annually, at the rate of one half mill for each one per cent. of dividend made or declared by such bank, savings institution, or company;" and in case of no such dividend being declared, then three mills upon a valuation of the capital stock, agreeably to the above act of 1844. The same act exempted from tax upon dividends any institution or company (except banks of issue) then liable for tax on capital stock. It was further declared that that act should not be so construed as to make building associations, plank road or turnpike companies liable for any tax to the commonwealth, when such companies make or de-

clare no dividends. Laws Penn. 1859, p. 529. And by an act passed January 3, 1868, it was declared that from and after its passage the shares of stock held by any stockholder in any institution or company incorporated under the laws of the State, which in its corporate capacity is liable to, and pays into the State treasury the tax imposed by the act of April 12, 1859, "shall not be taxable in the hands of said stockholder personally, for State, county, or local purposes;" so much of the act of 1844 as imposed a tax for State or county purposes upon any stockholder in his individual capacity being repealed in terms, without relieving such corporations from any tax then imposed by law, or their real estate from any State, county, or local tax to which it then was or might thereafter be subjected. Laws Penn. 1868, p. 1318.

Then followed the act of 1879, by the third section of which every incorporated company or association doing business in Pennsylvania, or having capital employed there in the name of any other company or corporation—except foreign insurance companies, banks, and savings institutions—was required to pay a certain annual tax on its capital stock into the State treasury. Laws Penn. 1879, p. 112.

This brings us to the act of June 10, 1881, whereby mortgages; moneys owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; articles of agreement and accounts bearing interest—except notes or bills for work and labor done; obligations to banks for money loaned; bank notes; shares of stock in banks, banking or saving institutions or companies, then or thereafter incorporated under any law of Pennsylvania; public loans or stocks, except those issued by that State or the United States; money loaned or invested in any other State, and all other moneyed capital in the hands of individual citizens of that State; are declared "to be, and are hereby, taxable for State purposes, at the rate of four mills on the dollar of the value thereof annually; *provided*, that all mortgages, judgments, and recognizances whatsoever, and all moneys due or owing upon articles of agreement for the sale of real estate, shall, after the passage of this act, be exempt from all taxation except for State purposes; *provided*,

the provisions of this act shall not apply to building and loan associations," the money loaned by them being subjected to the same tax as money loaned by individuals. By the second section of the same act, all corporations paying interest on a loan or loans, taxable for State purposes, whether secured by bond, mortgage, recognizance, or otherwise, are required to report to the auditor-general, annually, the amount of such indebtedness owned by residents of Pennsylvania, and to pay into the State treasury four mills upon every dollar of such indebtedness, such tax to be deducted by the corporation paying it from the interest on such indebtedness; whereupon, "such indebtedness, whether secured by bond, mortgage, judgment, or otherwise, shall be exempt from other taxation in the hands of the holders thereof." Laws Penn. 1881, p. 99.

Unless we greatly misapprehend the effect of this legislation, a very large amount of property made subject by the act of 1844 to taxation for both State and county purposes, has since been relieved from the burdens of county taxation; while the imposition by the act of 1870 upon national bank shares of local taxation at the same rate as was at the latter date, or has been since, imposed upon other moneyed capital in the hands of individual citizens of the State, leaves such shares subject to taxation as provided in the act of 1844. The burden of county taxation, imposed by the latter act, has, at all events, been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which, in its corporate capacity, is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments, and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans however made by corporations which are taxable for State purposes when such corporations pay into the State treasury the required tax on such indebtedness.

As the present case comes before us upon demurrer to the bill, we have, excepting the allegations of the latter, no means of determining the value of the capital thus exempted from the county taxation which is imposed upon capital invested in

national bank shares. After referring to the acts of 1870 and 1881, the bill charges:

"That for the year 1881, as is shown by the public report and by the books of the auditor-general of Pennsylvania, the sum of $1,692,938.66 was paid into the State treasury as tax upon the capital stock of such corporations by them in their corporate capacity, which sum of money was paid upon a gross capital stock of the corporations paying the same, of the value, approximately stated of 564 millions of dollars.

"That it appears, as is shown by the books and published report of the secretary of internal affairs for the year 1881, that the total valuation throughout the State for that year of 'all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes), and all public loans or stocks whatsoever, except those issued by this State or the United States, and all moneys loaned or invested on interest in any other State and all other moneyed capital in the hands of individual citizens of the State,' amounts to $74,931,765;

"That for the same year, as is shown by the books and published reports of the auditor-general, a tax was paid into the State treasury upon corporation and municipal loans not probably included in the foregoing sum, upon an aggregate valuation of $51,404,162.50;

"That by the provisions of section 1 of the act of 10 June, 1881 (P. L. 99), all mortgages, judgments and recognizances whatsoever, and all moneys due or owing upon articles of agreement for the sale of real estate were exempt from all taxation except for State purposes;

"That the section 2 of said act of 1881, exempts from local taxation in the hands of the holders thereof, all loans issued by corporations paying interest thereon, where such corporations pay into the State treasury the State tax of four mills on each dollar thereof, and by act of 1 May, 1854 (P. L. 535), 'all bonds or certificates of indebtedness of any railroad company incor-

porated by this Commonwealth be and the same shall be liable to taxation for State purposes only;'

"That the total paid-in capital of all the State banks and savings institutions in said Commonwealth, other than national banks, as appears by the books and published reports of the auditor-general for the year 1881, is $7,161,740.68, while the total paid-in capital of the national banks located within said State, in said year, amounted to $57,452,051."

The demurrer, of course, admits these allegations of fact to be true. Their materiality is not affected by the circumstance that they are stated to appear, also, upon the books and published reports of the auditor-general and the secretary of internal affairs of Pennsylvania. Upon such facts, and in view of the revenue laws of the State, it seems difficult to avoid the conclusion that, in respect of county taxation of national bank shares, there has been, and is, such a discrimination, in favor of other moneyed capital against capital invested in such shares, as is not consistent with the legislation of Congress. The exemptions in favor of other moneyed capital appear to be of such a substantial character in amount as to take the present case out of the operation of the rule that it is not absolute equality that is contemplated by the act of Congress; a rule which rests upon the ground that exact uniformity or eqality of taxation cannot in the nature of things be expected or attained under any system. But as substantial equality is attainable, and is required by the supreme law of the land, in respect of State taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere.

The Supreme Court of Pennsylvania, after referring to *Hepburn* v. *The School Directors*, cited above, as having involved the same question that is now presented, and observing that the exemption is here, as there, only partial, says: "Not only is some other moneyed capital of a miscellaneous character taxable for local purposes, but all such capital of the same character as that which you desire to exempt; that is to say, the shares of State banks and savings institutions." Again: "The General

Assembly has authorized the taxation of the shares of these banks in no other manner and at no higher rate than other capital of a similar character." If by this language it is meant that an illegal discrimination against capital invested in national bank shares cannot exist where no higher rate or heavier burden of taxation is imposed upon them than upon capital invested in State bank shares, or in State savings institutions, we have to say that such is not a proper construction of the act of Congress. Capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority, as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise. As the act of Congress does not fix a definite limit as to percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality. But unless we have failed to comprehend the scope and effect of the taxing laws of Pennsylvania, and unless the allegations of the bill be untrue, the present case is not of that class.

Our attention is called by counsel for the defendants to the fact that Pennsylvania derives, probably, her principal revenues from railroads, and therefore has good reasons to look to her interests, as a Commonwealth, in respect of such improvements. To this fact he refers the legislation which makes railroad securities liable to taxation for State purposes only, and exempts them from local taxation. Upon like grounds he defends the exemptions made, in respect of local taxation, in favor of the bonds and shares of other corporations, that pay an annual tax into the State treasury. It is quite sufficient, in respect of such matters, to say that this court has no function to deal with the considerations of public policy which control that Commonwealth in the assessment of property for purposes of revenue. We have no duty beyond that of ascertaining the intention of Congress in its legislation permitting the several States to tax the shares of institutions organized under national

authority, for the purpose of providing a national currency secured by United States bonds. If the principle of substantial equality of taxation under State authority, as between capital so invested and other moneyed capital in the hands of individual citizens however invested, operates to disturb the peculiar policy of some of the States in respect of revenue derived from taxation, the remedy therefor is with another department of the government, and does not belong to this court.

We are of opinion that upon the allegations of the bill the defendants should have been put to their answer. The facts may then disclose a case quite different from that made by the bill. What we have said relates to the case as now presented.

The judgment must, therefore, be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SOON HING *v.* CROWLEY.

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

Submitted December 16, 1884.—Decided March 16, 1885.

The decision in *Barbier* v. *Connelly, ante*, 27—that a municipal ordinance prohibiting from washing and ironing in public laundries and wash-houses within defined territorial limits, from ten o'clock at night to six in the morning, is a police regulation within the competency of a municipality possessed of ordinary powers—affirmed.

It is no objection to a municipal ordinance prohibiting one kind of business within certain hours, that it permits other and different kinds of business to be done within those hours.

Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws.

When the general security and welfare require that a particular kind of work should be done at certain times or hours, and an ordinance is made to that effect, a person engaged in performing that sort of work has no inherent right to pursue his occupation during the prohibited time.

Statement of Facts.

This court cannot inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the acts, or be inferrible from their operation, considered with reference to the condition of the country and existing legislation.

The petitioner in the court below, the plaintiff in error here, was arrested by the defendant, who is chief of police of the city and county of San Francisco, for an alleged violation of an ordinance of the Board of Supervisors of that municipality, approved on the 18th of June, 1883; and while in custody of the officer applied to the Circuit Court of the United States for a writ of *habeas corpus*, in order to obtain his discharge. The Circuit Court refused to issue the writ; the judges of the court being divided in opinion, and that of the presiding judge controlling.

The ordinance was adopted to regulate the establishment and maintenance of public laundries and wash-houses within certain limits of the city and county of San Francisco. It recited that the indiscriminate establishment of such laundries and wash-houses, where clothes and other articles were cleansed for hire, endangered the public health and public safety, prejudiced the well-being and comfort of the community, and depreciated the value of property in their neighborhood. It then ordained, pursuant to the authority vested in the board, that after its passage it should be unlawful for any person to establish, maintain, or carry on the business of a public laundry or a public wash-house within certain designated limits of the city and county, without having first obtained a certificate of the health officer of the municipality that the premises were properly and sufficiently drained, and that all proper arrangements were made to carry on the business without injury to the sanitary condition of the neighborhood; and also a certificate of the Board of Fire Wardens of the municipality that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons were in good condition, and that their use was not dangerous to surrounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance defining the fire limits of the city and county, and making regulations concerning the erection and

use of buildings therein. The ordinance requires the health officer and the Board of Wardens, upon the application of any one desirous to open or conduct the business of a public laundry, to inspect the premises in which it is proposed to carry on the business, in order to ascertain whether they are provided with proper drainage and sanitary appliances, and whether the provisions of the fire ordinance have been complied with; and if found satisfactory in all respects, to issue to the applicant the required certificates, without charge for the services rendered.

Its fourth section declares that no person owning or employed in a public laundry or a public wash-house within the prescribed limits shall wash or iron clothes between the hours of ten in the evening and six in the morning, or upon any portion of Sunday; and its fifth section declares that no person engaged in the laundry business within those limits shall permit any one suffering from an infectious or contagious disease to lodge, sleep, or remain upon the premises. The violation of any of these provisions is declared to be a misdemeanor, and penalties are prescribed according to the nature of the offence. The establishing, maintaining or carrying on the business without obtaining the certificate is punishable by a fine of not more that $1,000, or by imprisonment of not more than six months, or by both. Carrying on the business outside of the hours prescribed, or permitting persons with contagious diseases on the premises, is punishable by a fine of not less than $5 or more than $50, or by imprisonment of not more than one month, or by both such fine and imprisonment.

The petitioner was arrested by the chief of police upon a warrant of a police judge of the municipality, issued upon a complaint under oath, that the petitioner had washed and ironed clothes in a public laundry within the prescribed limits between the hours of ten o'clock in the evening of the 25th of February, 1884, and six o'clock in the morning of the following day, thereby violating the provisions of section four of the ordinance.

The petition for the writ of *habeas corpus* presented to the judges of the Circuit Court set forth the arrest and detention

of the petitioner by the chief of police, the ordinance under which the arrest was made, the complaint before the police judge, and the issue of the warrant under which he was taken into custody. It then proceeded to state that the petitioner had for several years been engaged in working for hire in a public laundry in the city and county of San Francisco, and had in all respects complied with the laws of the United States and of California, and the ordinances of the city and county, except in washing at the hours mentioned; that the business of carrying on a laundry was a lawful one in which a large number of the subjects of the Emperor of China had been and were engaged in the said city and county within the limits prescribed by the ordinance; that there had been for several years great antipathy and hatred on the part of the residents of that city and county against the subjects of China residing and doing business there; that such antipathy and hatred had manifested themselves in various ways and under various forms for the purpose of compelling the subjects of China to quit and abandon their business and residence in the city and county and State; that owing to that feeling, and not otherwise, and not for any sanitary, police, or other legitimate purpose, but in order to force those subjects engaged in carrying on the business of a laundry in the city and county of San Francisco to abandon the exercise of their lawful vocation, and their only means of livelihood, the supervisors passed the ordinance in question; that the petitioner had been and was earning his living exclusively by working at washing and ironing for hire, and in order to gain a livelihood was obliged to work late in the night, and had no other lawful vocation; that on the first of January, 1884, his employer paid the license collector of the city and county six dollars, the amount required by the ordinance to obtain a license to carry on the business of a laundry, and obtained from him a license to carry on the business at a designated place within the prescribed limits. The petition also averred that section four of the ordinance was in contravention of the provisions of the Burlingame Treaty, and of the Fourteenth Amendment to the Constitution of the United States, in that it deprived them of the equal protection of the laws.

On the hearing of the application for the writ certain questions arose, upon which the judges of the Circuit Court were divided in opinion. They were as follows:

1. Whether section four of the ordinance mentioned is void on the ground that it is not within the police power of the Board of Supervisors of the city and county of San Francisco.

2. Whether said section is void on the ground that it discriminates between those engaged in the laundry business and those engaged in other classes of business.

3. Whether said section is void on the ground that it discriminates between the different classes of persons engaged in the laundry business.

4. Whether said section is void on the ground that it deprives a man of the right to labor at all times.

5. Whether said section is void on the ground that it is unreasonable in its requirements, in restraint of trade, or upon any other ground apparent upon the face of the ordinance, or appearing in the petition.

The opinion of the presiding judge being that the said section was valid and constitutional, the application for the writ was denied; and the judgment entered upon the denial was brought to this court for review.

Mr. David McClure and *Mr. Thomas D. Riordan* for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Field, after making the foregoing statement of facts, delivered the opinion of the court.

The ordinance of the Board of Supervisors of the city and county of San Francisco, the legislative authority of that municipality, approved on the 25th of June, 1883, is similar in its main features to the ordinance under consideration at this term in *Barbier* v. *Connolly*, *ante*, page 27. It differs in the designation of the limits of the district of the city and county within which its provisions are to be enforced, but not otherwise in any essential particular. The fourth section is identical in both. The

prohibition against labor on Sunday in this section is not involved here, as it was not in that case; and the provision for the cessation of labor in the laundries within certain prescribed limits of the city and county during certain hours of the night is purely a police regulation, which is, as we there said, within the competency of any municipality possessed of the ordinary powers belonging to such bodies. Besides, the Constitution of California declares that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Art. XI., § 11. And it is of the utmost consequence in a city subject, as San Francisco is, the greater part of the year, to high winds, and composed principally within the limits designated of wooden buildings, that regulations of a strict character should be adopted to prevent the possibility of fires. That occupations in which continuous fires are necessary should cease at certain hours of the night would seem to be, under such circumstances, a reasonable regulation as a measure of precaution. At any rate, of its necessity for the purpose designated the municipal authorities are the appropriate judges. Their regulations in this matter are not subject to any interference by the federal tribunals unless they are made the occasion for invading the substantial rights of persons, and no such invasion is caused by the regulation in question. As we said in *Barbier* v. *Connolly*, "the same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed." No invidious discrimination is made against any one by the measures adopted. All persons engaged in the same business within the prescribed limits are treated alike and subject to similar restrictions.

There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others, certainly not as great as where fires are constantly required to carry them on. The specific regulations for one kind of busi-

ness, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.

But counsel in the court below not only objected to the fourth section of the ordinance as discriminating between those engaged in the laundry business, and those engaged in other business, but also as discriminating between different classes engaged in the laundry business itself. This latter ground of objection becomes intelligible only by reference to his brief, in which we are informed that the laundry business, besides the washing and ironing of clothes, involves the fluting, polishing, blueing, and wringing of them; and that these are all different branches, requiring separate and skilled workmen, who are not prohibited from working during the hours of night. This fluting, polishing, blueing, and wringing of clothes, it seems to us, are incidents of the general business, and are embraced within its prohibition. But if not incidents, and they are outside of the prohibition, it is because there is not the danger from them that would arise from the continuous fires required in washing; and it is not discriminating legislation in any invidious sense that branches of the same business from which danger is apprehended are prohibited during certain hours of the night, whilst other branches involving no such danger are permitted.

The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times is equally without force. However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws. Par-

ties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing and what may be verbally made, and on what days they may be executed, and how long they may be enforced if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States.

The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their

motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence.

It follows that the several questions certified must be answered in the negative and the judgment be affirmed;

And it is so ordered.

UNITED STATES, Intervenor, *v.* INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY.

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

Submitted January 28, 1885.—Decided March 16, 1885.

Interest on bonds of a railroad corporation earned by the company during the year 1871, but payable by the terms of the coupon January 1, 1872, is not subject to the tax authorized by § 15, act of July 14, 1870, 16 Stat. 260, to be levied and collected for and during the year 1871.

The facts are stated in the opinion of the court.

Mr. Solicitor-General for appellant.

Mr. John T. Dye for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought to foreclose certain mortgages given to secure bonds issued by the Indianapolis and St. Louis Railroad Company. A final decree of foreclosure having been passed, the mortgaged property was sold, and the sale was

confirmed by the court. The United States intervened by petition, and asked that certain sums, alleged to be due to the government on account of taxes, be first paid out of the proceeds.

It appeared that certain interest coupons of the bonds of the company were payable, and were paid, on the first days of September and November, 1870, and that certain other interest coupons of the same company were payable on the first day of January, 1872, and were then paid out of its earnings made prior to that date and during the year 1871.

The court below held: 1. That the act of July 14, 1870, 16 Stat. 260, ch. 255, § 15, did not impose an internal revenue tax on interest coupons of the bonds of the railroad company payable and paid during the last five months of that year. 2. That the law did not impose an internal revenue tax on interest coupons of such bonds, payable and paid on the 1st day of January, 1872.

The United States acquiesces in the judgment in respect of the first of these claims, but contends that the act of July 14, 1870, imposed a tax upon interest coupons that were paid out of the corporation earnings for 1871, although such payment was not due nor made until January 1, 1872. The question depends upon the construction of § 15 of the act of 1870, which provides, "That there shall be levied and collected, *for and during the year* 1871, a tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section hereinafter enumerated [railroad corporations being among the number], and on the amount of all dividends of earnings, income or gains hereafter declared . . . whenever and wherever the same shall be payable, . . . and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund," &c.

In construing this section in *Railroad Co.* v. *United States*, 101 U. S. 543, 550, the court said: "The interest in this case was neither payable nor paid in 1871, and, as the tax is not leviable or collectible until the interest is payable, we see no

way in which the company can be charged on this account. The tax is not on the interest as it accrues, but when it is paid. No provision is made for a *pro rata* distribution of the burden over the time the interest is accumulating, and as the tax can only be levied for and during the year 1871, we think, if the interest is in good faith not payable in that year, the tax is not demandable, either in whole or in part."

This decision covers the present case. The claim of the United States is not for a tax on dividends or gains, but is distinctly for a tax on interest accruing on the bonds of the railroad company, and which was not payable nor paid until after the year 1871, for and during which the act directed it to be levied and collected. We do not perceive that the liability of the corporation for tax on this interest, as such, is affected by the circumstance that the interest was paid out of the earnings made in the previous year.

Judgment Affirmed.

Ex parte FISK.

ORIGINAL.

Argued January 6, 1885.—Decided March 2, 1885.

The principle that in actions at law the laws of the States shall be regarded as rules of decision in the courts of the United States, § 721 Rev. Stat., and that the practice, pleadings, and forms and modes of proceedings in such cases shall conform as near as may be to those of the courts of the States in which the courts sit, § 914, is applicable only where there is no rule on the same subject prescribed by act of Congress, and where the State rule is not in conflict with any such law.

The statute of New York, which permits a party to a suit to be examined by his adversary as a witness at any time previous to the trial in an action at law, is in conflict with the provision of the Revised Statutes of the United States which enacts that "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." § 861.

None of the exceptions afterwards found in §§ 863, 866 and 867 provide for such examination of a party to the suit in advance of the trial as the statute of New York permits.

Statement of Facts.

The courts of the United States sitting in New York have no power, therefore, to compel a party to submit to such an examination, and no power to punish him for a refusal to do so.

Nor can the United States court enforce such an order made by a State court before the removal of the case into the Circuit Court of the United States.

Where a person is in custody, under an order of the Circuit Court, for contempt in refusing to answer under such an order, this court will release him by writ of habeas corpus on the ground that the order of imprisonment was without the jurisdiction of that court.

This was an application on the part of Clinton B. Fisk for a writ of habeas corpus, to be directed to the marshal of the Southern District of New York, in whose custody the petitioner was held under an order of the Circuit Court for that district.

The history of the case which resulted in this order, so far as it is necessary to the decision of the matter, may be briefly stated as follows:

Francis B. Fogg brought suit in the Supreme Court of the State of New York against Fisk to recover the sum of $63,250, on the allegation of false and fraudulent representations made by Fisk in the sale of certain mining stocks.

In the progress of the suit, and before the trial, the plaintiff obtained from the court the following order:

"Ordered, that the defendant, Clinton B. Fisk, be examined and his testimony and deposition taken as a party before trial, pursuant to sections 870, 871, 872, 873, &c., of the Code of Civil Procedure, and that for such purpose he personally be and attend before the undersigned, a justice of this court, at the chambers thereof, to be held in the new county court-house, in the said city of New York, on the 31st day of January, 1883, at 11 o'clock in the forenoon of that day." A motion to vacate this order was overruled and the judgment finally affirmed by the Court of Appeals.

Thereupon the defendant appeared before the court and submitted to a partial examination, answering some questions and objecting to others, until, pending one of the adjournments of the examination, he procured an order removing the case to the Circuit Court of the United States.

In that court an order was made to continue the examination before a master, to whom the matter was referred. The de-

fendant refusing to be sworn and declining to be examined, he was brought before the Circuit Court on an application for attachment for a contempt in refusing to obey the order.

Without disposing of this motion, the Circuit Court made another order, to wit:

"It is hereby ordered and adjudged that the motion to punish the said defendant for such contempt stand adjourned to the next motion day of this court, to wit, on the 28th day of March, 1884.

"It is further ordered, that the defendant, Clinton B. Fisk, be and he is hereby directed and required to attend personally on the 14th day of March, 1884, before the Honorable Addison Brown, one of the judges of this court, at a stated term thereof, at his chambers in the post-office building, in said city of New York, at eleven o'clock in the forenoon of that day; then and there, and on such other days as may be designated, to be examined and his testimony and deposition taken and continued as a party before trial, pursuant to section 870 *et seq.*, of the Code of Civil Procedure, and for the purposes mentioned in said order of January 12, 1883, and February 12, 1884, heretofore made in this action."

The defendant appeared before the court in pursuance of this order, and, stating that he was advised by counsel that the court had no jurisdiction to require him to answer in this manner to the questions propounded to him by the counsel for plaintiff, he refused to do so.

For this, on further proceeding, he was held by the court to be in contempt, and fined $500, and committed to the custody of the marshal until it was paid.

It was to be relieved of this imprisonment that he prayed here the writ of habeas corpus.

Mr. Wheeler H. Peckham for petitioner.

Mr. John R. Dos Passos opposing.—I. A writ of habeas corpus cannot be issued to review the proceedings of the Circuit Court. That court had jurisdiction over the person and subject matter, and had power to punish for contempt. Rev.

Stat. § 725. When a court commits a party for contempt, the adjudication is a conviction, and the commitment, in consequence, is execution. *Ex parte Kearney*, 7 Wheat. 38. This court can take cognizance of such a case only upon a certificate of division of opinion. *New Orleans* v. *Steamship Co.*, 20 Wall. 387; *Hayes* v. *Fischer*, 102 U. S. 121. See also *Williamson's Case*, 26 Penn. St. 924. If the Circuit Court had refused the motion to compel defendant to submit to examination, no writ of error or appeal would lie. The writ now applied for, if granted, will be an exercise of appellate jurisdiction from an interlocutory decree of a Circuit Court. The proceeding to examine the petitioner is a right given by the New York Code. If, when taken, the deposition is offered in evidence, then objections can be made and exceptions taken, and the question can be examined on writ of error, Rev. Stat. § 691; *Sawin* v. *Kenny*, 93 U. S. 289, or it may be raised upon a certificate of division. On petition for habeas corpus a court will not review questions which can be properly heard on appeal or by writ of error. *Hayes* v. *Fischer*, 102 U. S. 121. The only case in which this court has reviewed, by writ of habeas corpus, proceedings of the Circuit Court committing a party for contempt, is *Ex parte Rowland*, 104 U. S. 604. The court placed its decision upon *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Virginia*, 100 U. S. 339; and *Ex parte Siebold*, 100 U. S. 371. None of these were commitments for contempt. In the first in was held that the court was *functus officio* when it undertook to impose sentence on the petitioner; in the second, the court refused the writ because the court in which the indictment was pending had jurisdiction to determine whether the act charged in the indictment was a crime; and in the third and fourth the court denied the writ on the ground that the act complained of was constitutional. In this case the petitioner deliberately put himself in contempt, in order to raise the question of the power of the court to commit for it. —II. The Circuit Court had jurisdiction to make the order in question, requiring defendant to submit to an examination as a party before trial. This power can be upheld under two distinct statutes: 1st, the act of June, 1872, § 914 Rev. Stat.,

which provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding;" or 2d, under the act of March 3, 1875, § 4, 18 Stat. 471, which provides, "that when any suit shall be removed from a State court to the Circuit Court of the United States. . . . all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." The examination of a party under the Code of New York, either for the purpose of enabling a party to frame a complaint, *Kenney* v. *Stedwell*, 64 N. Y. 120, or for the prosecution or defence of the action, *Fogg* v. *Fisk*, 93 N. Y. 562, is a substitute for the old Chancery bill of discovery. The evidence so taken may or may not be used on the trial. The practice is in no wise in conflict with the statutes of the United States. The object of § 861 Rev. Stat. is to provide a mode of proof on the trial of an action; but it does not refer to this proceeding, in the nature of discovery, conducted in accordance with the practice prevailing in New York. See Mr. Justice Miller's opinion in *Flint* v. *Crawford County*, 5 Dillon, 481. The act of March 3, 1875, § 4, provides that all orders made in the suit prior to removal shall stand. The order to take the petitioner's testimony was made before removal. This order is by the act made to stand, and even if the evidence cannot be used on the trial of this action, as a deposition, it can be used in other suits; and even in this it can be used as a declaration of the party. The transfer of a suit from a State court does not vacate what has been done there. The Circuit Court takes it up where the State court left it. *Duncan* v. *Gegan*, 101 U. S. 810; *Akerly* v. *Vilas*, 3 Bissell, 332; *Williams Mower Co.* v. *Raynor*, 7 Bissell, 245; *Bills* v. *New Orleans, St. Louis & Chicago Railroad Co.*, 13 Blatchford, 227; *Werthein* v. *Continental Railway & Trust Co.*, 20 Blatch-

ford, 508; *Harrison Wire Co.* v. *Wheeler*, 11 Fed. Rep. 206; *Sonstiby* v. *Keeley*, 11 Fed. Rep. 578. We do not know an instance where a case has been removed from a State to a federal court, in which orders made previous to its removal have not been carried out and maintained.

Mr. Justice Miller delivered the opinion of the court. He stated the facts as above recited, and continued:

The jurisdiction of this court is always challenged in cases of this general character, and often successfully. There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments, and orders necessary to the due administration of law, and the protection of the rights of suitors.

When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make "inquiry into the cause of the restraint of liberty." § 752 Rev. Stat.

That the case as made by the petitioner comes, for the purposes of this inquiry, within the jurisdiction of this court, under the principles above mentioned is established by the analogous

cases: *Ex parte Rowland*, 104 U. S. 604; *Ex parte Lange*, 18 Wall. 163.

But did the court transcend its jurisdiction in fining the petitioner for contempt? Or rather, did it have the power to make the order requiring him to submit to the preliminary examination? For, if it had that power, it clearly could enforce obedience to the order by fine and imprisonment, if necessary. The record of the entire proceeding in this branch of the case, both in the State court and the Circuit Court, is before us, and we are thus enabled to form an intelligent opinion on the question presented.

The power of the court to continue the examination of the defendant, after the removal of the case into the court of the United States, is asserted on two grounds:

1. That the order for his examination, having been made by the Supreme Court of New York, under its rightful jurisdiction, while the case was pending in it, is still a valid order partially executed, which accompanies the case into the Circuit Court; and that in that court it cannot be reconsidered, but must be enforced.

2. That if this be not a sound proposition, the Circuit Court made an independent order of its own for the examination of the defendant, which order is justified by the principle that the Code of Civil Procedure of New York, under which both orders were made, is a part of the law governing the courts of the United States sitting within that State.

We will inquire into the latter proposition first, for the points to be considered in it lie at the foundation of the other also.

The general doctrine that remedies, whose foundations are statutes of the State, are binding upon the courts of the United States within its limits, is undoubted. This well-known rule of the federal courts, founded on the act of 1789, 1 Stat. 92; Rev. Stat. § 721, that the laws of the several States, except when 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, was enlarged in 1872 by the provision found in § 914 of the Revision. This enacts that "the practice, pleadings, and forms and modes of proceeding in civil

causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, anything in the rules of court to the contrary notwithstanding."

In addition to this, it has been often decided in this court that in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the States prevail in those courts.

The matter in question here occurred in the court below in regard to a common-law action. It was in regard to a method of procuring and using evidence, and it was a proceeding in a civil cause other than equity or admiralty.

We entertain no doubt of the decision of the Court of Appeals of New York, that it was a proceeding authorized by the statutes of New York, under which, in a New York court, defendant was bound to answer.

The case, as thus stated, is a strong one for the enforcement of this law in the courts of the United States. *Ex parte Boyd*, 105 U. S. 647.

But the act of 1789, which made the laws of the States rules of decision, made an exception when it was "otherwise provided by the Constitution, treaties, or statutes of the United States."

The act of 1872 evidently contemplates the same exception by requiring the courts to conform to State practice *as near as may be*. No doubt it would be implied, as to any act of Congress adopting State practice in general terms, that it should not be inconsistent with any express statute of the United States on the same subject.

There are numerous acts of Congress prescribing modes of procedure in the Circuit and District Courts of the United States at variance with laws of the States in which the courts are held. Among these are the modes of empanelling jurors, their qualifications, the number of challenges allowed to each party. Two chapters of the Revised Statutes, XVII. and XVIII., embracing §§ 858 to 1042, inclusive, are devoted to the subjects of evidence and procedure alone.

Opinion of the Court.

The case oefore us is eminently one of evidence and procedure. The object of the orders is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that State. There can be no doubt that if the proceeding here authorized is in conflict with any law of the United States, it is of no force in the courts of the United States. We think it may be added further in the same direction, that if Congress has legislated on this subject and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the States in the same matter.

A striking illustration of this effect of an act of Congress in prescribing rules of evidence is to be found in § 858 of the Revised Statutes, originally enacted in an appropriation bill in 1864, and the amendment to it passed in 1865.

It now reads: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This act of Congress, when passed, made competent witnesses in the courts of the United States many millions of colored persons who were not competent by the laws of the States in which they lived, and probably as many more persons, as *parties* to suits, or interested in the issues to be tried, who were excluded by the laws of the States. It has never been doubted that this statute is valid in all the courts of the United States, not only as to the introduction of persons of color and parties to suits; but, in the qualification made by the proviso where its language differs from provisions somewhat similar in State statutes, the act of Congress, critically construed, has always been held to govern the court. *Monongahela Bank* v.

Jacobus, 109 U. S. 275; *Potter* v. *The Bank*, 102 U. S. 163; *Page* v. *Burnstine*, 102 U. S. 664; *King* v. *Worthington*, 104 U. S. 44.

Coming to consider whether Congress has enacted any laws bearing on the question before us, we find the following sections of the Revised Statutes, in chapter XVII., on evidence, which we here group together:

"SEC. 861. The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

"SEC. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court, by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or infirm." The remainder of this section, and §§ 864 and 865, are directory as to the officer before whom the deposition may be taken, the notice to the opposite party, and the manner of taking, testifying and returning the deposition to the court.

"SEC. 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States."

§ 867 authorizes the courts of the United States, in their discretion, and according to the practice in the State courts, to admit evidence so taken; and §§ 868, 869 and 870 prescribe the manner of taking such depositions, and of the use of the *subpœna duces tecum*, and how it may be obtained.

No one can examine these provisions for procuring testimony to be used in the courts of the United States and have any reasonable doubt that, so far as they apply, they were intended

to provide a system to govern the practice, in that respect, in those courts. They are, in the first place, too complete, too far-reaching, and too minute to admit of any other conclusion. But we have not only this inference from the character of the legislation, but it is enforced by the express language of the law in providing a defined mode of proof in those courts, and in specifying the only exceptions to that mode which shall be admitted.

This mode is "by oral testimony and examination of witnesses in open court, except as hereinafter provided."

Of course the mode of producing testimony under the New York Code, which was applied to petitioner, is not oral testimony and examination of a witness in open court, within the meaning of this act of Congress. This obviously means the production of the witness before the court at the time of the trial, and his *oral* examination then; and it does not mean proof by reading depositions, though those depositions may have been taken before a judge of the court, or even in open court, at some other time than during the trial. They would not, in such case, be oral testimony. The exceptions to this section, which all relate to depositions, also show that proof by deposition cannot be within the rule, but belongs exclusively to the exceptions.

We come now to inquire if the testimony sought to be obtained from petitioner by this mode comes within the exception referred to in § 861. These exceptions relate to cases where it is admissible to take depositions *de bene esse* under § 863, or *in perpetuam rei memoriam* and *under a dedimus potestatem* under § 866.

In the first of these, the circumstances which authorize depositions to be taken in advance for use on the trial are mentioned with great particularity. They all have relation to conditions of the witness; to residence more than a hundred miles from the court, or bound on a sea voyage, or as going out of the United States or out of the district, or more than a hundred miles from the place of trial before the time of trial, or an ancient or infirm witness.

None of these things are suggested in regard to petitioner,

nor were they thought of as a foundation of the order of the State court or of the Circuit Court. The statute of New York, under which both courts acted, makes no such requirements as a condition to the examination of the party. It is a right which, if the judge may possibly refuse to grant, he is in that matter governed by none of the conditions on which the deposition may be taken under the act of Congress.

Nor does the case come within the principle or profess to be grounded on the power conferred by § 866, which is another exception to the rule established by § 861. It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel to extract something which he may then use or not, as it suits his purpose. This is a very *special* usage, dependent wholly upon the New York statute.

Nor is it in any manner made to appear that this examination "was necessary in order to prevent a delay or failure of justice in any of the courts of the United States," nor is any such proposition the foundation of the court's action.

These are the exceptions which the statute provides to its positive rule that the mode of trial in actions at law shall be by oral testimony and examination of witnesses in open court. They are the only exceptions thereinafter provided. Does the rule admit of others? Can its language be so construed?

On the contrary, its purpose is clear to provide a mode of proof in trials at law to the exclusion of all other modes of proof; and because the rigidity of the rule may, in some cases, work a hardship, it makes exceptions of such cases as it recognizes to be entitled to another rule, and it provides that rule for those cases. Under one or the other all cases must come. Every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides. There is no place for exceptions made by State statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this. Not only is no such power conferred, but it is prohibited by the plain language and the equally plain purpose of the acts of Congress, and espe-

cially the chapter on Evidence of the Revision. The New York statute would, if in force, repeal or supersede the act of Congress.

It does not require much deliberation to see, that if the acts of Congress forbid the use of this kind of testimony in the courts of the United States, no order for taking it made in the State court while the case was pending in that court, with a view to its use on a trial there, can change the law of evidence in the Federal court. Without deciding now, for the question is not before us, whether the testimony actually given under that order and transmitted with the record of the case to the Circuit Court, can be used when the trial takes place, we are well satisfied that the latter court cannot enforce the unexecuted order of the State court to procure evidence which, by the act of Congress, is forbidden to be introduced on the trial, if it should be so taken.

The provision of § 4 of the act of March 3, 1875, 18 Stat. 470, declares orders of the State court, in a case afterwards removed, to be in force until dissolved or modified by the Circuit Court. This fully recognizes the power of the latter court over such orders. And it was not intended to enact that an order made in the State court, which affected or might affect the mode of trial yet to be had, could change or modify the express directions of an act of Congress on that subject.

Nor does the language of the court in *Duncan* v. *Gegan*, 101 U. S. 810, go so far. When it is there said that "the Circuit Court has no more power over what was done before the removal than the State court would have had if the suit had remained," it is in effect affirmed that it has at least that much power. There can be no doubt that on a proper showing before the State court it could have discharged the order for this examination or suspended its further execution. In acting on such a motion as this it would have been governed by the laws of the State of New York. In deciding whether it would continue the execution of this order or decline to execute it further, the Circuit Court was governed by the federal law. If the law governing the Circuit Court gave it no power to make or continue this examination, but in fact forbade it, then it could not enforce the order.

The petitioner having removed his case into the Circuit Court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed.

This precise point is decided, and in regard to this very question of the differing rules of evidence prevailing in the State and Federal courts, in *King* v. *Worthington*, 104 U. S. 44.

In that case, after it had been once heard on appeal in the Supreme Court of Illinois, it was removed into the Circuit Court of the United States.

The Supreme Court had reversed the judgment of the inferior court, because, among other things, the evidence of witnesses had been received whom that court held to be incompetent.

On the trial in the Circuit Court they were held to be competent and admitted to testify, notwithstanding the decision of the Supreme Court of the State, on the ground that § 858 of the Revised Statutes of the United States, already copied in this opinion, made them competent, and, although it differed in that respect from the statute of Illinois on the same subject, it must prevail in the Circuit Court.

It was strongly urged here that this was error, and as to that case the decision of the Illinois court, made while it was rightfully before it, should control. But this court held otherwise, and said: "The Federal Court was bound to deal with the case according to the rules of practice and evidence prescribed by the acts of Congress. If the case is properly removed the party removing it is entitled to any advantage which the practice and jurisprudence of the Federal Court give him."

The Circuit Court was, therefore, without authority to make the orders for the examination of petitioner in this case, and equally without authority to enforce these orders by process for contempt. Its order fining him for contempt and committing him to the custody of the marshal was without jurisdiction and void, and the prisoner is entitled to his release.

Syllabus.

It is supposed that the announcement of the judgment of the court that he is entitled to the writ will render its issue unnecessary. If it shall prove otherwise,

The writ will be issued on application to the clerk.

COOPER MANUFACTURING COMPANY *v.* FERGUSON & Another.

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

Argued October 23, 1884.—Decided March 16, 1885.

The right of a State to prescribe the terms upon which a foreign corporation shall carry on its business in a State has been settled by this court.

A State act which imposes limitations upon the power of a corporation, created under the laws of another State, to make contracts within the State for carrying on commerce between the States, violates that clause of the Constitution which confers upon Congress the exclusive right to regulate that commerce.

A corporation organized under the laws of one State does not, by doing a single act of business in another State, with no purpose of doing any other acts there, come within the provisions of a statute of the latter forbidding foreign corporations to carry on business within it, except upon filing certificates showing their place or places of business, their agents, and other matters required by the statute.

The Constitution of Colorado provided that no foreign corporation should do any business within the State without having one or more known places of business, and an authorized agent or agents in the same upon whom process might be served. The legislature of the State enacted that foreign corporations, before being authorized to do business in the State, should file a certificate with the Secretary of State, and the recorder of the county in which the principal business was carried on, designating the principal place of business and the agent there on whom process might be served. A corporation of Ohio, without filing a certificate, contracted in Colorado to manufacture machinery at its place of business in Ohio, and to deliver it in Ohio. *Held*, that this act did not constitute a carrying on of business in Colorado, and was not forbidden by its Constitution and law.

An act, in execution of a constitutional power, passed by the first legislature after the adoption of the Constitution, is a cotemporary interpretation of the latter, entitled to much weight.

Section ten of article fifteen of the Constitution of the State of Colorado, adopted in 1876, and still in force, provides as follows: "No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."

To carry into effect this clause of the Constitution, the legislature of Colorado, in the year 1877, in an act entitled "An Act to provide for the formation of corporations," enacted as follows:

"SEC. 23. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporation shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

Section 26 of the same act provided that a failure to comply with the provisions of section 23 should render the officers, agents, and stockholders of the corporation individually liable on all its contracts made while the corporation was so in default.

These provisions of the organic and statute law of the State being in force, the plaintiff in error, which was a corporation organized and existing under the laws of the State of Ohio, and having its principal place of business at Mount Vernon, Ohio, on February 21, 1880, at the county of Larimer, in the State of Colorado, entered into a contract in writing of that date with the defendants, who were citizens of Colorado, by which it was agreed that the plaintiff should sell to the defendants, and deliver to them on the cars at Mount Vernon, in the

State of Ohio, a steam engine and other machinery, in consideration whereof, the defendants were to pay the plaintiff the price stipulated in the contract for such machinery.

This suit was brought by the plaintiff on August 10, 1880, to recover of the defendants damages for their breach of the contract.

The defendants, among other defences, pleaded: First. That when the contract was entered into, the plaintiff had not made and filed the certificate required by § 23 of the act of 1877. Second. That at the time of making the contract, the plaintiff did not have a known place of business in the State of Colorado, and did not have an authorized agent or agents in the State upon whom process might be served.

The plaintiff demurred to both these answers, because they did not state facts sufficient to constitute a defence to the action. Upon the hearing of the demurrer the judges of the Circuit Court were divided in opinion, and the presiding judge being of opinion that the demurrer should be overruled, it was overruled accordingly, and the plaintiff electing to stand by its demurrer, judgment was entered against it dismissing its suit, and for costs. By the present writ of error the plaintiff brought that judgment under review.

The certificate of division of opinion recited the facts above set forth, and stated the question upon which the judges differed to be: "Whether the tenth section of article sixteen" (fifteen) "of the Constitution of the State of Colorado, and the twenty-third section of an act of the general assembly of the State of Colorado, passed in the year A.D. 1877, entitled an 'Act to provide for the formation of corporations,' were, or either of them was, under all the circumstances stated, and the various acts passed by the legislature of Colorado, a bar in this action."

Mr. Walter H. Smith, October 23, 1884, argued for plaintiff in error.

No appearance at that hearing for defendant in error.

The court having ordered a reargument, the cause was sub-

mitted, on the 19th day of December, on behalf of plaintiff in error by *Mr. Smith* on his former oral argument and his briefs.

Mr. Thomas M. Robinson for defendants in error, at the same time submitted on his brief and his printed argument, in which he contended as follows: It is well settled that the power of a corporation created by the laws of one State, to do business in another, depends upon the comity of the State in which the business is to be transacted. The laws of Colorado in this respect are absolutely prohibitory. Until their requirements have been complied with, a foreign corporation is without power to do any business within the limits of the State. *Utley* v. *Clark-Gardner Mining Co.*, 4 Colorado, 369. In that case the Supreme Court of Colorado says, after holding these provisions of the Constitution and law to be prohibitory, "What meaning and what limits are to be assigned to the statutory phrase 'to do business,' is a matter of elaborate argument by counsel. . . . Taking the language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations, and acquires rights." It is submitted that this opinion of the State court should be accepted here, as a correct interpretation of these provisions of its laws. It is said by counsel "that the making of such a single isolated contract is not doing business in the State in the sense contemplated by the foregoing provisions." If it is not doing business, how many isolated contracts are required to constitute "any business" within the meaning of the prohibition? The most extensive business that may be carried on is made up of individual transactions or isolated contracts. If the continued and regular business is unlawful, how can any one in the series of contracts of which the continued and regular business is composed be lawful? No sound argument can be made from the hardship of the case. Each State determines its own policy in this respect: and "when the interest or policy of any State

require it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end." *Bank of Augusta* v. *Earle*, 13 Pet. 519, 590. Colorado has declared its will in unmistakable terms. A contract made by a foreign corporation before complying with the conditions imposed by the statute of the State in which the contract is made, is void. *The Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520; *The Cincinnati M. H. A. Co.* v. *Rosenthal*, 55 Ill. 85; *National Mutual Fire Insurance Co.* v. *Pursell*, 10 Allen, 232; *Roche* v. *Ladd*, 1 Allen, 441; *Thorne* v. *The Traveller's Ins. Co.*, 80 Penn. St. 15; *Bank of British Columbia* v. *Page*, 6 Oregon, 431; *In re Comstock*, 3 Sawyer, 218. It is necessary to give this construction to the act in order to make it harmonize with the provisions of § 26 of the same act, which impose penalties upon officers, agents, and stockholders of foreign corporations, and make them personally liable on the contracts of the corporation. If a statute imposes a penalty on the doing of an act, it is as much a prohibition of the act, as if it were in terms prohibited. *Miller* v. *Post*, 1 Allen, 434, 455; *Allen* v. *Hawks*, 13 Pick. 82; *Ætna Insurance Co.* v. *Harvey*, 11 Wisc. 394; *Thorne* v. *Traveller's Ins. Co.*, 80 Penn. St. 15. Now, as the prohibition which is implied from the provisions of section 26, *supra*, is against the making of any contract (which may certainly be a single and isolated one), and as this section is a part of the same act as section 23, it must be evident that the intent of the lawmakers was that the prohibition implied from each should be co-extensive; and it follows that if a strict construction would so limit the operation of section 23 as to make it fall short of that implied in section 26, it should not be applied. The subject has been considered in several States, always with one result—that a contract made by a foreign corporation in a State, without having first complied with the conditions of the statute permitting it to do business in the State, is void. *In re Comstock*, 3 Sawyer, 218, the question arose upon the statute of Oregon, which is substantially the same as our act, and was discussed so fully by the learned District Judge as to leave little room for further argument. The court held the contract made in Oregon by the foreign cor-

poration, before a compliance with the statutory requirements, to be void. This case is cited with approval by the Supreme Court of Colorado in *Utley* v. *Clark-Gardner Mining Company*, 4 Colo. 369, in discussing the foregoing provisions of the Constitution and statutes of Colorado. The opinion of the Colorado court in Utley's case shows clearly the view they entertain—that the doing of business by the foreign corporation is prohibited, except upon the performance of conditions precedent. The right of the corporation to sue was upheld, because it was not doing business within the meaning of the prohibitory provisions, as they define the terms employed; but their definition does include the exercise of corporate power to contract. The Oregon statute was again considered in *Bank of British Columbia* v. *Page*, 6 Oregon, 431, and the same conclusion reached by the Supreme Court of that State as in the Comstock case, *supra*, and the opinion of Deady, J., in the last-mentioned case adopted as their own. In *The Cincinnati Mutual Assurance Co.* v. *Rosenthal*, 55 Ill. 85, it was held that an action could not be maintained upon a promissory note taken. The same conclusion is reached in *Ætna Ins. Co.* v. *Harvey*, 11 Wisc. 412 (394 Vilas & Bryant's Ed.). In Pennsylvania, the same doctrine prevails. *Thorne* v. *Traveller's Ins. Co.*, 80 Penn. St. 15. It is settled law in Massachusetts, *Williams* v. *Cheney*, 3 Gray, 215, and it is maintained in *Paul* v. *Virginia*, 8 Wall. 168. In none of these cases was it made to appear that the contract in question was other than an isolated and single transaction.

Mr. Justice Woods delivered the opinion of the court. He recited the facts as above stated, and continued:

The right of the people of a State to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this court. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410. The plaintiff in error does not deny this right, but insists that, upon a proper construction of § 10 of article 15 of the Constitution of Colorado, and of § 23 of the act of 1877, its

contract with the defendants was valid, and that its suit should have been maintained.

As the clause in the Constitution and the act of the legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together. *Eskridge* v. *The State*, 25 Ala. 30.

The act was passed by the first legislature that assembled after the adoption of the Constitution, and has been allowed to remain upon the statute book to the present time. It must therefore be considered as a contemporary interpretation, entitled to much weight. *Stuart* v. *Laird*, 1 Cranch, 299; *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264; *Adams* v. *Storey*, 1 Paine, 79, 90.

It must be conceded that if the contract on which the suit was brought was made in violation of a law of the State, it cannot be enforced in any court sitting in the State charged with the interpretation and enforcement of its laws. *Bank of the United States* v. *Owens*, 2 Pet. 527; *Groves* v. *Slaughter*, 15 Pet. 448; *Harris* v. *Runnels*, 12 How. 79; *Brown* v. *Tarkington*, 3 Wall. 377; *Davidson* v. *Lanier*, 4 Wall. 447; *Hanauer* v. *Doane*, 12 Wall. 342; *Wheeler* v. *Russell*, 17 Mass. 258; *Law* v. *Hodson*, 11 East, 300; *Little* v. *Poole*, 9 B. & C. 192; *Thorne* v. *Travellers' Insurance Co.*, 80 Penn. St. 15; *Allen* v. *Hawks*, 13 Pick. 79, 82; *Roche* v. *Ladd*, 1 Allen, 436, 441; *In re Comstock*, 3 Sawyer, 218.

So far as appears by the record the plaintiff had no principal place of business nor any place of business whatever in the State of Colorado, and the making of the contract set out in the complaint was the only business ever done by it, or that it ever purposed to do in that State.

The question, therefore, is whether, upon a true construction of the Constitution and statute, the making of the contract which the plaintiff seeks to enforce was, under the circumstances stated, forbidden.

The contention of the defendants in error is that the prohibition against the doing of any business in the State by a foreign corporation, except upon the prescribed condition, includes the doing of any single and isolated act of business what-

ever. Thus broadly stated, it is clear that the interpretation of the defendants cannot be sustained. In a case involving the construction of the statute, the Supreme Court of Colorado held that a foreign corporation might, without complying with the provisions of the statute, maintain an action in the courts of the State to recover damages for trespass to its real estate. The court said: "The prohibition extends to doing business before the compliance with the terms of the statute. We do not think this an abridgment of the right of a foreign corporation to sue. It extends only to the exercise of the powers by which it may be said to ordinarily transact or carry on its business. To what *extent* the exercise of these powers is affected we do not decide." *Utley* v. *The Clark-Gardner Mining Co.*, 4 Colorado, 369. So it is clear the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the State for carrying on commerce between the States, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several States. *Paul* v. *Virginia*, 8 Wall. 168. The prohibition against doing any business cannot, therefore, be literally interpreted.

Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the State, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution requires the foreign corporation to have one or more known places of business in the State before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the State. To have known places of business it must be carrying on or intending to carry on business. The statute passed to carry the provision of the Constitution into effect, makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the State where the business of the corporation is to be carried on. The meaning of the phrase "to

carry on" when applied to business is well settled. In Worcester's Dictionary the definition is: "To prosecute, to help forward, to continue, as to carry on business." The definition given to the same phrase in Webster's Dictionary is: "To continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade." The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado.

The obvious construction, therefore, of the Constitution and the statute is, that no foreign corporation shall begin any business in the State, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the State, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the State, would be unreasonable and incongruous.

The case of *Potter* v. *The Bank of Ithaca*, 5 Hill, 490, tends to support this conclusion. The charter of the bank provided that its operations of discount and deposit should be carried on in the village of Ithaca, and not elsewhere. The cashier discounted a note in the city of New York, for the purpose of securing a demand due the bank, and the fact that the note was discounted in New York City was set up as a defence to a suit on the note. In giving judgment for the bank, Nelson, Chief Justice, said, the statute "obviously relates to the regular and customary business operations of the bank, and does not apply to a single transaction like the one in question." A similar ruling was made in *Suydam* v. *The Morris Canal and Banking Company*, 6 Hill, 217. See also *Graham* v. *Hendricks*, 22 La. Ann. 523.

We base the conclusion that the demurrer to the defendant's answer should have been sustained upon the interpretation we have given to the Constitution and statute, and do not find it

necessary to decide whether their provisions invade the exclusive right of Congress to regulate commerce among the several States. We have examined all the cases cited by the defendants to suport their interpretation.* In none of them was the statute construed, similar in its language or provisions to the Constitution or statute under consideration, and the cases can have no controlling weight in the present controversy.

We are of opinion that there was error in the judgment of the Circuit Court. The judgment must therefore be reversed, and the cause remanded for further proceedings, in conformity with this opinion;

And it is so ordered.

MR. JUSTICE MATTHEWS.

Mr. Justice Blatchford and myself concur in the judgment of the court announced in this case, but on different grounds from those stated in the opinion.

Whatever power may be conceded to a State, to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the States; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress.

In the present case, the construction, claimed for the Constitution of Colorado, and the statute of that State passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another State, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and to

* *In re Comstock*, 3 Sawyer, 218; *Bank of British Columbia* v. *Page*, 6 Oregon, 431; *Thorne* v. *The Travellers' Ins. Co.*, 80 Penn. St. 15; *Roche* v. *Ladd*, 1 Allen, 441; *The Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520; *National Mut. Fire Ins. Co.* v. *Pursell*, 10 Allen, 231; *Cincinnati Mutual Assurance Co.* v. *Rosenthal*, 55 Ill. 85; *Ætna Insurance Co.* v. *Harvey*, 11 Wisc. 394, Vilas & Bryant's Ed. 412.

prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicil in that State, and to prohibit it from carrying on within that State its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States.

In *Paul* v. *Virginia*, 8 Wall. 168, the issuing of a policy of insurance was expressly held not to be a transaction of commerce, and, therefore, not excluded from the control of State laws; and the decision in that case is predicated upon that distinction. It is, therefore, not inconsistent with these views.

CARTER *v.* BURR, Administratrix.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 24, 25, 1884.—Decided March 16, 1885.

On the facts in this case, it is decided that the promissory note held by the appellee, secured by mortgage of premises in the city of Washington, executed by D., the maker of the note, to the appellant, was not paid by the transactions set forth in the opinion of the court, but remained in force, with the right to participate in the proceeds arising from a sale under the mortgage.

The facts which make the case are stated in the opinion of the court. The case was argued at the same time with *Carter* v. *Carusi*, 112 U. S. 478, which related to another note secured by the same mortgage.

Mr. H. O. Claughton for appellant.

Mr. R. Ross Perry for appellee.

Opinion of the Court.

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

The following facts are either conceded by both parties or fully established by the evidence:

On the 29th of May, 1873, Joseph Daniels bought of John E. Carter certain parts of lots 1 and 24, in square 514, of the city of Washington, for which he paid $4,000 cash in hand, and gave his three promissory notes for $4,000 each, payable respectively in one, two and three years from date, with interest at the rate of eight per cent. per annum. The notes were secured on the property by a deed of trust to Dorsey E. W. Carter, trustee. When the first note fell due, in 1874, Daniels was unable to meet it, and John E. Carter, who then held it, pressed him for payment. On the 7th of July, 1874, he entered into a contract with Seth A. Terry, by which he assigned to Terry his interest in what were known as the "Eight-hour Law Cases" and the "Twenty per cent. Cases," for the consideration of $10,000, of which $5,000 was paid in hand, and the remaining $5,000 was to be paid by taking up, on or before the first day of September then next, certain notes of Daniels secured by a deed of trust of his homestead. The notes, when taken up, were to be held by Terry for three years from the date of the contract, if the "Eight-hour Law" and "Twenty per cent." cases were not paid before that time. If the cases were paid within the three years, the notes were to be given up to Daniels, but if not so paid, Terry was authorized to enforce their collection by a sale of the property covered by the deed of trust.

Among the notes to be taken up by Terry under this contract was that given to John E. Carter payable one year after date, and secured with the other two notes by the deed of trust to Dorsey E. W. Carter. In order to comply with the contract, Terry was under the necessity of borrowing $3,000 from C. C. Burr, to secure which he agreed to pledge the Carter note as collateral when he took it up.

On the 6th of May, 1874, John E. Carter left the Daniels note with the Farmers' and Mechanics' National Bank of Georgetown, for collection when it fell due. The note remained

in that bank until August 29, 1874, when it was returned to Carter unpaid.

Burr did not have the money on the first of September which he had agreed to loan Terry, but he expected to receive it soon. Terry, therefore, arranged with the Second National Bank of Washington to advance the $3,000 for a few days, and about the first of September he went to the store of Dorsey E. W. Carter, where John E. Carter then was, and, with money of his own, paid to John E. Carter all that was due on the note except $3,000. He told Carter if he would call at the Second National Bank in the course of the day the bank would pay him that sum. Carter then gave Terry the note uncancelled and indorsed in blank. The note shows only one indorsement of payment, and that is as follows: "Interest on the within paid to September 29, 1874."

Terry, after he got the note from Carter, took it to the Second National Bank and left it there, the bank agreeing to pay Carter the $3,000 when he called. Carter did call in the course of the day and got his money. A few days afterwards Burr went to the bank, paid the sum which had been advanced to Carter, and took the note away. No entries of the transaction were made on the books of the bank; but Terry paid the interest on the advance made by the bank from the time the money was given to Carter until it was repaid by Burr. Terry had not paid his debt to Burr when the decree below was rendered.

After the first note had got in this way into the possession of Burr, Dorsey E. W. Carter obtained from John E. Carter the second Daniels note under circumstances which, in the opinion of the court below, postponed his lien under the trust deed to that of Nathaniel Carusi, who had previously bought the third note from John E. Carter. The court at special term found that the note held by Mrs. Burr, as administratrix of C. C. Burr, who had deceased, had been paid and cancelled, and, after finding the amount due Dorsey E. W. Carter and Carusi, respectively, on the second and third notes, ordered a sale of the property under the trust deed, and an application of the proceeds, first, to the payment of the amount due Carusi, and,

second, of that due to Dorsey E. W. Carter. From this decree Mrs. Burr appealed to the general term. Pending that appeal the property was sold under the decree of the court in special term to Dorsey E. W. Carter for $8,990. This sale was confirmed in special term, with the consent of all the parties, on the 26th of November, 1878.

The appeal of Mrs. Burr came on for hearing at the general term, and on the 23d of December, 1880, a decree was entered reversing the decree of the special term so far as it ordered the payment of the proceeds of the sale to Dorsey E. W. Carter, after satisfying the amount due on the note held by Nathaniel Carusi, in preference to Mrs. Burr, and directing that Mrs. Burr, be "admitted to participate to the amount of $2,748.47 in the fund" arising from the sale to Dorsey E. W. Carter. The court further found that, after the decree at special term, the fund in court had been distributed, and that Dorsey E. W. Carter had received the money which of right belonged to Mrs. Burr. It therefore ordered Carter to pay the amount belonging to Mrs. Burr, with interest from the date of the decree. From this decree in favor of Mrs. Burr, Carter took the present appeal. None of the parties to the suit are parties to the appeal except Mrs. Burr, as administratrix of the estate of her deceased husband, and Dorsey E. W. Carter.

As the case comes to us, the only question to be determined is whether what was done by John E. Carter and Terry, when Terry got possession of the note now held by Mrs. Burr, was a payment of the note by Daniels to Carter through Terry as the agent of Daniels, or a sale and transfer of the note by Carter to Terry. As to some of the facts connected with this transaction there is a great conflict of testimony, but in respect to those which are to our minds controlling, there is but little, if any, dispute.

As between Terry and Daniels, it is clear the note was not paid. By the express terms of their agreement Terry was to "take up" the note from Carter and hold it until he was paid either by the "Eight-hour Law" and "Twenty per cent." cases, or otherwise. If not paid in three years the security could be enforced. The real point of difference is as to the

understanding which Carter had of the transaction. Did he take the money supposing the note was thereby paid and cancelled, or did he transfer the note to Terry to be held by him until paid by Daniels? Upon full consideration of the evidence we think it was the intention of Carter to transfer the note. He got his money from or through Terry, and not from Daniels, the maker of the note. He had been pressing Daniels for payment, but without success. The note remained at the bank, where it had been deposited for collection, until within two days of the time when, under the arrangement between Terry and Daniels, it was to be taken up by Terry. Carter then went and got it into his own possession. When Terry came to take it up he had not money enough to pay for it in full. He paid what he had, which reduced the amount required to just the sum Burr had agreed to loan him. When this payment was made Carter gave him the note indorsed in blank, without cancellation in whole or in part, on the understanding that if Carter called in a short time at the bank he would get the remaining $3,000. He did so call and got his money. Under these circumstances we do not doubt that Carter at the time fully understood the arrangement which had been made between Terry and Daniels, and took the money from Terry with the knowledge that Terry was to hold it until paid to him by Daniels. From the fact, too, that he gave the note to Terry, indorsed in blank and uncancelled, before the $3,000 was paid, we are satisfied he must have known that Terry was expecting to raise the money upon the note itself in order to meet the balance which was due to him. The established facts on this branch of the case are entirely inconsistent with the idea that the note was understood by any of the parties to have been cancelled by the payment which Terry made, or caused to be made, to Carter, and it nowhere appears from anything in the case that Carter either demanded or received any release or postponement of the lien which pertained to this note.

We do not understand that any question of distribution as between the appellant and appellee arises upon the record. The special term gave Carusi, the holder of the third note, a

priority over Dorsey E. W. Carter on account of the peculiar circumstances under which Carusi bought his note from John E. Carter. That question is not brought up by this appeal, as neither Carusi nor his representatives have been made parties. As to the distribution between Dorsey E. W. Carter and Mrs. Burr, the counsel for the appellant admits in his brief that the *pro rata* rule was followed by the general term, and no preference given to Mrs. Burr as the holder of the note first falling due. This certainly is all that Carter can ask.

The decree at the general term is

Affirmed.

GREGORY & Others *v.* HARTLEY & Another.

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

Submitted December 9, 1884.—Decided March 16, 1885.

It is again decided that the words "term at which said cause could be first tried and before the trial thereof," act of March 3, 1875, ch. 137, § 3, 18 Stat. 471, mean the first term at which the cause is in law triable : *i. e.* in which it would stand for trial, if the parties had taken the usual steps as to pleadings and other preparations. *Babbitt* v. *Clark*, 103 U. S. 606, and *Pullman Palace Car Co.* v. *Speck*, *ante*, 87, re-affirmed.

It is again decided that there cannot be a removal of a cause under that act after hearing on demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action. *Alley* v. *Nott*, 111 U. S. 472, and *Scharf* v. *Levy*, 112 U. S. 711, affirmed.

This was a motion to dismiss. The facts which make the case are stated in the opinion of the court.

Mr. W. J. Lamb and *Mr. E. E. Brown* for the motion.

Mr. Charles O. Wheadon, opposing.

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

This is a writ of error to reverse a judgment of the Supreme Court of Nebraska on the single ground that the Supreme Court decided that the District Court of Lancaster County had jurisdiction to proceed with the suit after a petition for the re-

moval thereof to the Circuit Court of the United States had been made and filed in the District Court. The transcript, which has been returned with the writ, is evidently very imperfect, and it purports to contain only a part of the record below. It is not authenticated by the clerk as a full transcript, and it shows on its face that much which is important to a correct understanding of the case has been omitted. From what has been returned, however, it sufficiently appears that the suit was originally brought in the District Court of Lancaster County by Milo F. Kellogg against Luke Lavender, James E. Phillpot, John S. Gregory, E. Mary Gregory, Thomas J. Cantlon, R. F. Parshall, and perhaps some others, to enforce the specific performance of a contract in writing entered into on the 30th of July, 1872, between the plaintiff Kellogg and the defendant Lavender for the sale by Lavender to Kellogg of certain lots in Lincoln, Nebraska. The price to be paid was $2,500. Of this amount $500 was paid in hand, and for the remaining $2,000 Kellogg executed two notes of $1,000 each, payable to the order of Lavender, one on the first day of May, 1873, and the other on the first day of May, 1874, with interest at the rate of twelve per cent. per annum. At what time the suit was begun nowhere appears, but an amended petition was filed on the 22d of November, 1879, making Joseph W. Hartley, Reuben R. Tingley, and many others parties. To this petition Hartley filed an answer and cross-petition on the 2d of December, 1879, Tingley an answer on the 1st of December, 1879, and Parshall an answer and cross-petition at some time before May 17, 1880. The answer and cross-petition of Hartley are found in the record, and from them it appears that he claimed and sought to enforce a lien on the property as security for the payment of money he advanced Kellogg to aid in paying the note due to Lavender in May, 1873. The answer of Tingley and the answer and cross-petition of Parshall are not copied into the transcript. On the 17th of May, 1880, the two Gregorys, Lavender, Cantlon and Phillpot filed demurrers to the answers and cross-petitions of Hartley and Parshall, and to the answer of Tingley, on the ground that they did not state facts sufficient to constitute a cause of action or a defence.

These demurrers were heard and overruled by the court on the 17th of August, 1880, and thirty days given the demurring defendants to answer.

At the time of the filing of the amended petition the legal title to the property was in E. Mary Gregory, the wife of J. S. Gregory, Lavender having conveyed it to Phillpot and Cantlon after he made his contract with Kellogg, and they having afterwards sold and conveyed it to Mrs. Gregory. On the 28th of November, 1879, Mrs. Gregory settled all matters in dispute with Kellogg, and he assigned to her his contract with Lavender. After this settlement, on the 22d of September, 1880, Mrs. Gregory filed her answer to the amended petition, in which she set up her title to the property and her adjustment of the controversy with Kellogg. On the 27th of September, 1880, Lavender, Phillpot and Cantlon filed their answer to the cross-petition of Hartley. On the 5th of November, 1880, leave was given Parshall and Tingley to file amended answers in forty days, and, on the 13th of December, 1880, Parshall did file his answer and cross-petition, claiming to be the owner of Kellogg's note to Lavender falling due in 1874, and asking to enforce a lien on the property for its payment. At the same time Tingley filed his answer and cross-petition, in which he claimed an interest in the note due in 1874, and prayed affirmative relief in his own behalf. On the 3d of March, 1881, Lavender, Phillpot, Cantlon and Mrs. Gregory, with leave of the court, filed a reply to the answer and cross-petition of Parshall. On the 23d of March, 1882, leave was granted Tingley to amend his pleadings, and to Mrs. Gregory to file an amended answer in thirty days. Mrs. Gregory did file her amended answer to the cross-petition of Hartley on the 17th of April, 1882, and, on the 15th of June thereafter, the Gregorys, Lavender, Cantlon, Phillpot and Kellogg presented their petition for the removal of the cause to the Circuit Court of the United States. That petition, so far as it is material to the question now under consideration, is as follows:

"Your petitioners now show to this court that the plaintiff herein, Milo F. Kellogg, is a citizen of the State of Missouri; defendant Thos. J. Cantlon is a citizen of the State of Colorado;

defendant Reville F. Parshall is a citizen of the State of Wisconsin; defendant J. W. Hartley is a citizen of the State of Ohio; and that defendants E. Mary Gregory, James E. Phillpot, J. S. Gregory, and Luke Lavender are citizens of the State of Nebraska; and that said Thos. J. Cantlon and Reville E. Parshall were non-residents of the State of Nebraska at the commencement of this action.

"That none of the other defendants in said cause have made any appearance or set up any claims of interest in the cause or controversy, and that the defendants named herein are the only ones appearing to have any interest therein. Your petitioners further represent that no final hearing or trial of said cause has been had, but said cause is now pending for trial in this court."

Upon the presentation of this petition the District Court refused to surrender its jurisdiction, and the petitioners excepted. On the 11th of November, 1882, a decree was entered sustaining the several claims of Hartley and Tingley, and establishing liens in their favor on the property in dispute. From this decree the Gregorys, Phillpot, Cantlon and Lavender appealed to the Supreme Court of the State, and assigned for error the refusal of the District Court to surrender its jurisdiction on the presentation of the petition for removal. The Supreme Court sustained the action of the District Court, and to review that decision this writ of error was brought.

To our minds it is very clear that there was no error in the rulings of the courts below upon the federal question involved, which alone can be considered by us. The District Court was not bound to surrender its jurisdiction until a case was made which on the face of the record showed that the petitioners were in law entitled to a removal. The mere filing of a petition is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statute, the right to take the suit to another tribunal. *Railroad Co.* v. *Koontz*, 104 U. S. 5, 14.

The act of March 3, 1875, ch. 137, § 3, 18 Stat. 471, which governs this case, provides that the petition for removal must be filed at or before the term at which the cause could be first

tried, and before the trial. This has been construed to mean the first term at which the cause is in law triable—the first term in which the cause would stand for trial if the parties had taked the usual steps as to pleadings and other preparations. *Babbitt* v. *Clark*, 103 U. S. 606; *Pullman Palace Car Co.* v. *Speck*, *ante*, 87. It has also been decided that there cannot be a removal after a hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action. *Alley* v. *Nott*, 111 U. S. 472; *Scharff* v. *Levy*, 112 U. S. 711. Either one of these rules is fatal to the present case. If we treat the suit as originally one to enforce the liens of Hartley and Tingley upon the property as security for the payment of the amounts due them respectively, it was begun when their respective answers and cross-petitions claiming affirmative relief were filed, and this was certainly not later than December 13, 1880, or a year and a half before the petition for removal was presented. Five terms of the court had passed, at either one of which the case would have been triable if the parties had taken the usual steps as to pleadings and preparations. In fact more than a year had elapsed from the time the issues had actually been made up on the pleadings of some of the parties.

Then again, the answers and cross-petitions of the claimants of these several liens are to be treated as their petitions for relief upon their respective causes of action. The answer and cross-petition of Hartley, the original answer of Tingley, and the original answer and cross-petition of Parshall, were all demurred to on the 17th of May, 1880, and the demurrers overruled, nearly two years before the petition for removal was filed. After the hearing on the demurrers it was too late, under our decisions, to ask for a removal.

Without considering any of the other objections to the removal which might be urged, the judgment is

Affirmed.

UNITED STATES *v.* STEEVER.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 9, 1885.—Decided March 16, 1885.

A torpedo steam launch, attached to a division of a naval squadron, though not proved to have had any books, is a ship, within the meaning of the prize act of June 30, 1864, ch. 174, § 10, rules 4 and 5; and her commander is entitled to one-tenth of prize money awarded to her, and cannot elect to take instead a share proportioned to his rate of pay; but her other officers and men are entitled to share in proportion to their rates of pay.

The distribution of prize money among the subordinate officers and crew of a ship "in proportion to their respective rates of pay in the service," under the prize act of June 30, 1864, ch. 174, § 10, rule 5, is to be made according to their pay at the time of the capture, and not according to the pay of grades to which they have since been promoted as of that time.

Under the act of August 8, 1882, ch. 480, referring the claims of the captors of the ram Albemarle to the Court of Claims, each captor is entitled to recover such a sum as, together with the sum formerly paid him by the Secretary of the Navy under the prize decrees in the case of the Albemarle, will equal his lawful share of the prize money in that case.

This was an appeal from a judgment of the Court of Claims. The facts are stated in the opinion of the court.

Mr. Solicitor-General for appellant.

Mr. James Fullerton for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal from a decree of the Court of Claims in favor of the appellee in a suit brought by him under the act of August 8, 1882, ch. 480, to recover the amount necessary to make up his lawful share of the prize money awarded for the capture of the rebel ram Albemarle. The facts of the case, as appearing in the findings and judgment of the Court of Claims, are as follows:

The rebel iron-clad ram Albemarle was captured and sunk at Plymouth in the Roanoke River, in the State of North Carolina, on the night of October 27, 1864, by the United States Picket Launch No. 1, an armed torpedo launch propelled by

steam, attached to a division of the North Atlantic blockading squadron, and commanded by Lieutenant William B. Cushing, of the United States Navy, and having on board six inferior officers (of whom the petitioner, a third assistant engineer, was one) and eight men. Lieutenant Cushing had been, by order of the Secretary of the Navy, detached from the command of the United States ship Monticello, and directed to report for duty to Rear Admiral Porter, commanding that squadron; and had been assigned by the admiral to the command of this launch. It does not appear that the launch had any books.

The Albemarle was afterwards raised by the United States forces, and appropriated to the use of the United States, and was twice appraised by duly appointed boards of naval officers; the first time, before she was so appropriated, at the sum of $79,944, which was forthwith deposited by the Secretary of the Navy with the Assistant Treasurer of the United States at Washington; and the second time, under the act of April 1, 1872, ch. 76, 17 Stat. 649, at the sum of $282,856.90, which, less the sum already deposited, was likewise so deposited, pursuant to the act of January 8, 1873, ch. 18, 17 Stat. 405.

Upon successive prize proceedings in 1865 and 1873, in the District Court of the United States for the District of Columbia, the Albemarle was condemned as prize of war, and it was adjudged and decreed that she was of superior force to the launch, and that her appraised value, deducting costs, and amounting to $273,135.09, be paid to the captors as follows: One twentieth part to the admiral commanding the squadron at the time of the capture, one hundredth part to the fleet captain, and one fiftieth part to the officer commanding the division to which the launch was attached, and the remainder distributed to the other persons doing duty on board the launch, in proportion to their respective rates of pay in the service. In all the prize proceedings, there was no appearance by or in behalf of any of the captors except Cushing.

Before either of those decrees was made, three of the officers of the launch were promoted: Lieutenant Cushing, in February, 1865, to the rank of lieutenant commander; and Acting Master's Mates William L. Howarth and Thomas S. Gay, in

March, 1865, the one to the grade of acting master, and the other to the grade of acting ensign; and each promotion to date from October 27, 1864.

The money so ordered to be distributed amounted, after deducting the shares paid to the commander of the squadron, the fleet captain and the division commander, to the sum of $251,284.29, which was distributed by the officers of the Treasury Department among all the officers and crew of the launch, or their legal representatives, in proportion to the respective rates of pay to which they were by law entitled on the day of the capture, except that Cushing, Howarth and Gay were, by order of the Secretary of the Navy, paid in proportion to the rates of pay of the grades to which, after the capture, they had been promoted as aforesaid.

By the act of August 8, 1882, ch. 480, Congress referred the claims of the captors of the Albemarle to the Court of Claims, "with jurisdiction and authority to hear and determine the same, and all defences thereto which are or may be open to the United States, and to render judgment thereon, with the right of appeal as in other cases;" and if the court should find that any of the captors had not received their full and just share of the prize money awarded for the capture of the Albemarle, according to the proportions provided in the prize laws in force at the time of the capture, and that they were entitled to claim and recover the same, then to render judgment in favor of them, or their legal representatives, for such sums as, added to the amount already paid, should make up their lawful shares; and provided that no suit should be brought under the provisions of this act after one year from the date of its passage; and that any judgment rendered by the Court of Claims should be paid by the Secretary of the Treasury out of any money in the treasury applicable to the payment of prize to captors, and, failing such money, out of any money in the treasury not otherwise appropriated. 22 Stat. 738.

Within the time limited by this act, all the officers and men of the launch, or their legal representatives, except Cushing, Howarth and Gay, brought suits under it in the Court of Claims, which held that, according to the prize laws in force at the time

of the capture, Lieutenant Cushing was not entitled to prize money in proportion to his rate of pay, but only as commander of a single ship to one tenth of the prize money, and had therefore received $30,927.84 more than he was by law entitled to; and that Howarth and Gay were entitled to prize money only in proportion to their rate of pay as acting master's mates on the day of the capture, and not according to the pay of the grades to which they had since been promoted, and had therefore received, Howarth $18,979.02 and Gay $11,801.52, more than they were respectively entitled to; and that by the amount of these three sums, or $61,708.38, the other twelve captors had received less than they were entitled to; and gave judgment for each of them, or their representatives, accordingly. 19 C. Cl. 51.

The name, rank and pay of the officers and crew on board the launch at the time of the capture, the amount which each one, or his representatives, had received under the prize proceedings, the amount which each should have received in the opinion of the Court of Claims, and the amount now due to each, according to the judgment of that court, were as shown in the following table:

Name and rank.	Pay.	Prize Proceedings.	Court of Claims.	Due.
William B. Cushing, lieutenant	$1,875	$56.056 27	$25,128 43	.....
Francis H. Swan, acting ass't paymaster	1,300	31,102 50	45,793 80	$14.691 30
William Stotesbury, third ass't engineer	1,000	23,925 00	35,226 00	11,301 00
Charles L. Steever, third ass't engineer	1,000	23,925 00	35,226 00	11,301 00
William L. Howarth, acting master's mate	480	35,887 50	16,908 48	.....
Thomas S. Gay, acting master's mate	480	28,710 00	16,908 48	.....
John Woodman, acting master's mate	480	11,484 00	16,908 48	5,424 48
Samuel Higgins, first-class fireman	360	8,613 01	12,681 36	4,068 35
Richard Hamilton, coal-heaver	240	5,742 01	8,454 24	2,712 23
Edward J. Houghton, ordinary seaman	192	4,593 60	6,763 39	2,169 79
Bernard Harley, ordinary seaman	192	4,593 60	6,763 39	2,169 79
William Smith, ordinary seaman	192	4,593 60	6,763 39	2,169 79
Robert H. King, landsman	168	4,019 40	5,919 62	1,900 22
Henry Wilkes, landsman	168	4,019 40	5,919 62	1,900 22
Lorenzo Deming, landsman	168	4,019 40	5,919 61	1,900 21
		251,284 29	251,284 29	61,708 38

The present suit is brought under the act of August 8, 1882, ch. 480, by one of the subordinate officers of the launch who had not been promoted since the capture of the Albemarle. The question whether he has heretofore received less than his

lawful share of prize money depends upon the question whether larger shares than the prize act allowed have been awarded and paid to Lieutenant Commander Cushing, and to Howarth and Gay, who, at the time of the capture, were two of his acting master's mates.

The prize court held that Cushing was entitled to share according to rate of pay with the other officers and men on board the launch. The Court of Claims held that he was entitled to one tenth of the prize money as commander of a single ship. The question which of these views was correct depends upon the rules laid down in section 10 of the prize act of June 30, 1864, ch. 174; 13 Stat. 306.

By those rules, all commanding officers have certain fractional parts of the prize money; and none of them have, or can elect to take, a share proportioned to their pay. By rule 4, there is to be paid "to the commander of a single ship one tenth part of all the prize money awarded to the ship under his command, if such ship at the time of the capture was under the command of the commanding officer of a fleet or squadron, or a division, and three twentieths if his ship was acting independently of such superior officer." By rule 2, to the commanding officer of a division is to be paid one fiftieth part of any prize money awarded to a vessel of his division, unless he elects to receive instead the share due to him as commander of a single ship making or assisting in a capture, that is to say, one tenth. And by rule 1, the commanding officer of a fleet or squadron receives in all cases one twentieth of all prize money awarded to vessels under his immediate command. So, by rule 3, the fleet captain receives one hundredth part of prize money awarded to vessels of the fleet or squadron in which he is serving, with the single exception that when the capture is made by the vessel on board of which he is serving, he shares, in proportion to his pay, with the other officers and men on board. It is only "after the foregoing deductions," that rule 5 directs that "the residue shall be distributed and proportioned among all others doing duty on board (including the fleet captain), and borne upon the books of the ship, in proportion to their respective rates of pay in the service." 13 Stat. 309, 310.

Those rules would seem to have been framed upon the theory that in making general regulations for the distribution of prize money it is more just and equitable, and more suitable to the rank of commanding officers, to grant them a certain fractional part, than to determine their shares by their rates of pay, like subordinate officers and men; and upon the supposition that the fractional part awarded to the commander of a single ship will usually be more than equivalent to a share proportioned to his rate of pay.

But whatever may have been the reasons on which the general rules of distribution laid down in the prize act were founded, it is enough to say that those rules are fixed and definite, governing all cases coming within their terms, and are the only guides of all courts and officers charged with the duty of administering the prize act. The share of the commander of a ship is the same, whether he is leading in action or lying disabled in his berth; and the share of the admiral commanding the squadron is not increased if the capture is made by his flagship, nor diminished if is made without his participation or knowledge by another ship belonging to his command. *Lumley* v. *Sutton*, 8 T. R. 224, 229; *Pigot* v. *White*, 4 Doug. 302; *S. C.* 1 H. Bl. 265 note; Dr. Lushington, in *The Banda & Kirwee Booty*, L. R. 1 Adm. & Eccl. 109, 250; *Decatur* v. *Chew*, 1 Gallison, 506; 11 Opinions of Attorneys General, 9, 94. The courts cannot depart from the express law, because of the peculiar bravery or merit of the captors, or any of them, in a particular case. *The Atlanta*, 3 Wall. 425, 433; *Porter* v. *United States*, 106 U. S. 607, 611; *The Joseph*, 1 Gallison, 545, 561; *The Anglia*, Blatchf. Prize Cas. 566.

We can have no doubt that the launch which took the Albemarle was "a single ship," within the meaning of the rules of distribution in the prize act of 1864.

In those rules, the words "single ship" are used in contradistinction to the words "vessel or vessels," which include more than one; and upon a view of the whole act, it is manifest that the word "ship," in the few instances in which it occurs, has no restricted sense, implying three square-rigged masts, or any masts at all, but is synonymous with the general

words "vessel of the Navy," or simply "vessel," as used throughout the act, and comes within the definition of § 32, by which in the term "vessels of the Navy" are to be included for the purposes of this act, all armed vessels officered and manned by the United States, and under the control of the Department of the Navy. 13 Stat. 315. In the re-enactment of the fourth rule in Rev. Stat. § 4631, the words "commander of a single vessel" are substituted for "commander of a single ship."

Nor is it material that there was no affirmative proof that the launch had any books. The keeping of books is not made a condition of the right of any vessel to share in prize money. The books of a ship are but the usual evidence of service on board; and neither the omission to keep books, nor the neglect of the proper officers to enter names upon them, can be held to cut off those lawfully assigned to duty on board, and actually doing such duty, from participation in prize money awarded to the ship. It is found as a fact that Lieutenant Cushing had been detailed by the proper authorities from the ship which he had previously commanded; and as to the other officers and men, the doing duty on board is sufficient *prima facie* evidence, at least, that they belonged to the launch, and were entitled to share in the prize money. In *Wemys* v. *Linzee*, 1 Doug. 324, cited for the United States, the captain of marines, who was denied an officer's share, was no part of the complement of the ship. See *Mackenzie* v. *Maylor*, 4 Doug. 3.

The launch being a single ship, within the meaning of the prize act, her commander, as well as her other officers and her crew, was entitled to prize money according to the fourth and fifth rules of distribution therein prescribed.

The prize court therefore erred in awarding to her commander, instead of his one-tenth of the prize money, a share proportioned to his rate of pay.

Another error occurred in the distribution of the prize money, by order of the Secretary of the Navy, to Cushing, Howarth and Gay, according to the rates of pay of the grades to which they had been promoted since the capture. Although prize money is, strictly speaking, a matter of bounty and not of

right, and no one has any absolute title to it before adjudication, yet unless the government, acting through the proper department, has clearly manifested an intention to revoke the grant, or to alter the mode of distribution, it is to be awarded and distributed according to the laws in force and the facts existing at the time of the capture. *The Siren*, 13 Wall. 389; *The Elsebe*, 5 C. Rob. 173; *Stevens* v. *Bagwell*, 15 Ves. 139, 152; *Pill* v. *Taylor*, 11 East, 414, and 8 Taunt. 805; 11 Opinions of Attorneys General, 102. The direction in the prize act to make distribution among inferior officers and men "according to their respective rates of pay in the service" naturally implies the rates of their pay at the time of the capture, by relation to which the subsequent distribution is made; and not those rates as affected by promotions after the capture and before decree or distribution, although such promotions, so far as affects rank, and possibly ordinary pay, date from the day of the capture. To hold otherwise would be to leave the shares of prize money, not only of the persons promoted, but also of all others on board and entitled to share according to rate of pay, subject to be varied in consequence of delay in obtaining distribution.

For these reasons, this court concurs in the conclusions of the Court of Claims as to the shares of prize money which the officers and crew of the launch were entitled to receive under the prize laws in force at the time of the capture. The inequitable operation of those laws, as applied to a capture by a vessel having so small a number of officers and men as this launch, by which the leader of the enterprise obtains less prize money than a paymaster or an engineer under his command, is a matter for the consideration of Congress, and not of the courts.

The report of the Committee on Naval Affairs of the House of Representatives, accompanying the bill which was afterwards passed as the act of August 8, 1882, ch. 480, referred, among other things, to the following documents: The decrees of the prize court in the case of the Albemarle. The orders of the Secretary of the Navy for the distribution of the prize money. The opinion of Attorney General Reverdy Johnson,

dated November 19, 1849, that if accounting officers err, designedly or by mistake, the loss must fall on the United States. 5 Opinions of Attorneys General, 183. The opinion of Attorney General Pierrepont, dated December 10, 1875, that this launch was "a single ship," within the meaning of the prize act; that her commander was entitled to his fractional part, and could not share according to his pay, in the prize money of the Albemarle; and that the rates of pay, according to which others on board the launch were entitled to share in the prize money, were the rates of pay at the time of the capture. 15 Opinions of Attorneys General, 63. A letter of the Secretary of the Navy to the counsel of the captors, dated April 24, 1877, stating that, as the prize money of the Albemarle had been fully distributed, and as there was no other fund which he could lawfully order to be paid to her captors, they must look to Congress for the relief to which they seemed to be entitled. Report No. 90, H. R. 1st Sess. 47th Congress.

It is evident, therefore, that the act of 1882 was passed with a knowledge of the manner in which the prize money for the capture of the Albemarle has been distributed by the Secretary of the Navy under the decrees of the prize court; and the reasonable inference is that Congress intended, without impeaching the validity of the distribution so made, or affecting the right of any captor to hold the money already paid him, but treating each as having received no more than a suitable reward for his gallantry, to allow out of the Treasury, to those of the captors who had received less than their lawful share according to the rules of the prize act, enough to make up the deficiency. The joint effect of the act of 1882 and the previous distribution is the same as if the prize money had been distributed in conformity with those rules, and Congress had afterwards granted to Cushing, Howarth and Gay, out of money in the Treasury, sums in addition to their lawful shares of prize money, as was done in the case of Captain Perry for captures on Lake Erie in the War of 1812. Act of April 18, 1814, ch. 70; 3 Stat. 130.

It is therefore unnecessary to express an opinion upon the question argued by counsel, whether, under the act of 1864,

the jurisdiction of the prize court, upon the condemnation of a prize taken by an armed vessel of the Navy, extended to determining the separate shares of the officers and crew; or was limited to adjudging what vessels were entitled to share, and whether, by reason of their force as compared with that of their prize, the whole or the half of the proceeds should go to them—leaving the distribution among the officers and men to be made by the Secretary of the Navy, according to the records of the department.*

Judgment affirmed.

HARDIN, Administratrix, & Others *v.* BOYD, Administrator, & Others.

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

Submitted December 22, 1884.—Decided March 15, 1885.

No rule can be laid down in reference to amendments of equity pleadings that will govern all cases. They must depend upon the special circumstances of each case, and in passing upon applications to amend, the ends of justice must not be sacrificed to mere form or by too rigid an adherence to technical rules of practice.

In a suit brought by the heirs and administrator of a vendor of land by title bond, the bill alleged that the bond had been obtained by fraud, and, also, that the land had not been fully paid for according to the contract of sale. Its prayer was, among other things, that the bond be cancelled; that an account be taken of the rents and profits which the purchaser had enjoyed, and of the amount paid on his purchase; that the title of the complainants be quieted; and that they have such other relief as equity might require. At the final hearing the complainants were permitted to amend the prayer of the bill so as to ask, in the alternative, for a decree for the balance of the purchase money and a lien on the land to secure the payment thereof: *Held*, That no error was committed in allowing the amendment. It did not make a new case, but only enabled the court to adapt its relief to that

* See act of July 17, 1862, ch. 204, § 5; 12 Stat. 607; act of June 30, 1864, ch. 174, §§ 1, 7, 9, 10, 16, 27, 28; 13 Stat. 307–314; *The St. Lawrence*, 2 Gallison, 19; *Proceeds of Prize*, Abbott Adm. 495; *The Glamorgan*, 1 Sprague, 273; *The Cherokee*, 2 Sprague, 235; 5 Opinions of Attorneys General, 142.

Statement of Facts.

made by the bill and sustained by the proof. The bill, with the prayer thus amended, was in the form in which it might have been originally prepared consistently with the rules of equity practice.

The case distinguished from *Shields* v. *Barrow*, 17 How., 130.

Although the debt for unpaid purchase money was barred by limitation under the local law, the lien therefor on the land was not barred ; for there was no such open adverse possession, for the period within which actions for the recovery of real estate must be brought, as would cut off the right to enforce the equitable lien for the purchase money.

This was a bill in equity to set aside a conveyance of lands, or (as amended below) in the alternative for payment of the purchase money and to make it a lien on the lands.

The main question on this appeal relates to the alleged error of the Circuit Court in permitting the complainants, at the hearing, to amend the prayer of their bill, so as to obtain relief not before specifically asked, and, which appellants contend, is inconsistent with the case made by the bill. To make intelligible this and other questions in the cause, it is necessary to state the issues and the general effect of the evidence.

On the 28th day of March, 1871, John D. Ware executed his title bond to William D. Hardin, reciting the sale to the latter of certain lands in Crittenden County, Arkansas, for the sum of $20,000, one-half of which was to be paid at the delivery of the bond, and the remainder, on the 1st day of January thereafter, in county scrip or warrants; and providing for a conveyance to the purchaser, when the purchase money should be fully paid. Ware died, at his home in Tennessee, on the 6th day of December, 1871. In the same month, the Probate Court of Crittenden County appointed L. B. Hardin (a brother of the purchaser) to be administrator of Ware ; and, on the 15th of January, 1872, his bond having been on that day filed and approved, letters of administration were directed to be issued. Under date of the 23d day of January of the same year, L. B. Hardin, in his capacity as administrator, executed to the purchaser an absolute conveyance of all the right, title and interest of Ware in the lands. The deed recited the payment by the grantee to the said administrator of $10,000 in Crittenden County scrip and warrants, and that the deed was made in conformity with an order of the Probate Court.

Statement of Facts.

The general statutes of Arkansas declare that "when any testator or intestate shall have entered into any contract for the conveyance of lands and tenements in his lifetime, which was not executed and performed during his life, and shall not have given power by will to carry the same into execution, it shall be lawful for the executor or administrator of such testator or intestate, with the approval of the court in term time, to execute a deed of conveyance of and for such lands, pursuant to the terms of the original contract; such executor or administrator being satisfied that payment has been made therefor, according to the contract, and reciting the fact of such payment to the testator or intestate, or to such executor or administrator, as the case may be, which deed may be acknowledged as other deeds, and shall have the same force and effect to pass the title of such testator or intestate to any such lands as if made pursuant to a decree of court." Act Feb. 21, 1859; Gantt's Dig. 180.

By deed of July 10, 1877, W. D. Hardin conveyed these lands to his wife, and they were in possession, by tenants, when the present suit was instituted on the 28th of October, 1881. The complainants are the heirs at law of the vendor and one Boyd, his administrator, the latter having been appointed at the last domicil of the decedent in Tennessee. The defendants were W. D. Hardin and his wife and their tenants. The bill proceeds upon these grounds: That Ware's obligation of March 28, 1871, was obtained through fraud and imposition practised by the purchaser; that the latter was at liberty, according to the real agreement between him and Ware, to pay the entire purchase money in county scrip or warrants; that he and his wife were in possession, claiming the lands to be the absolute property of the latter, although no part of the purchase money had been paid, except $5,400 paid to the intestate in county scrip or warrants at their face value; that no such proceedings as are recited in the deed to W. D. Hardin, were ever had in the Probate Court of Crittenden County; that the $10,000 in scrip or warrants, which the deed states was paid by W. D. Hardin, were disposed of at private sale for fifteen cents on the dollar of their face value, and the proceeds applied, by

collusion between the purchaser and his brother, to a claim which they, acting together, fraudulently procured to be allowed in favor of W. D. Hardin against Ware's estate, when, in fact no such indebtedness existed; that all the papers relating to the estate of Ware were destroyed by Hardin, while in his custody as clerk of the Probate Court, for the purpose of concealing his fraudulent scheme to obtain the lands without paying for them; that the deed from Hardin to his wife was without consideration; and that Hardin, after he took possession of the lands, appropriated to his own use all the rents annually accruing therefrom.

The prayer of the bill was that "the said bond for title, and the said deeds made by Lucian B. Hardin to said Wm. D. Hardin, and by the latter to said Lida Hardin, his wife, may be set aside for fraud; that an account may be taken of the said rents and profits, and of the value of the county warrants delivered by said William D. Hardin, and that your orators may have a personal decree against said defendants for any balance that may be found to be justly due to them; that a decree may be rendered quieting the title of the plaintiff herein to said lands against said claims of the said defendants, and for such other relief as equity may require."

Hardin and wife filed separate answers, and also pleas relying upon the statute of limitation in bar of the suit. They also demurred to the bill upon numerous grounds.

A good deal of evidence was taken touching the physical and mental condition of Ware at and before the execution of his title bond, as well as upon the issue, as to whether Hardin had paid for the lands according to contract. Without detailing all the facts, it is sufficient to say that, according to the weight of the evidence, the payment to Ware of $5,400 in county scrip or warrants was the only one ever really made on Hardin's purchase of these lands, and that the alleged payment subsequently of $10,000 in like scrip or warrants to L. B. Hardin, administrator, was not intended to be a payment on the land, because the proceeds of their sale were, by collusion between him and W. D. Hardin, appropriated by the latter on a fictitious claim asserted by him against Ware's estate.

Argument for Appellants.

Such was the state of the record when the cause came on for hearing. After the evidence was read the complainants asked leave to amend the prayer of the bill by inserting therein the following words: "Or, if thought proper, that the court give a decree for the purchase-money due on said lands, and that the plaintiffs be decreed to have a lien on said lands for the payment thereof, and that said lien be foreclosed." This amendment was allowed, and the defendants excepted. And thereupon the court, having heard the evidence and the argument of counsel, rendered a final decree, and adjudging that W. D. Hardin was indebted to B. P. Boyd, administrator of Ware, in the sum of $17,150 on the purchase-money for the lands and that complainants have a lien thereon for its payment, relating back to the date of the title bond. The deeds from L. B. Hardin, administrator to W. D. Hardin, and from the latter to his wife, were cancelled for fraud, and the land ordered to be sold in satisfaction of the lien; no sale, however, to take place until the heirs of Ware should file in court a warranty deed for the lands. The court refused to give a personal decree for the balance of the purchase-money, "the same being barred by the statute of limitations." Subsequently, the heirs of Ware filed the required deed in court, and the decree was made absolute.

Hardin appealed to this court. After the appeal was perfected he departed this life, and, by consent, it was revived in the name of Mrs. Hardin, as his administratrix. After the submission of the cause here the heirs-at-law of Hardin appeared, and by consent they were made co-appellants without opening the submission.

Mr. B. C. Brown, *Mr. Thomas M. Peters* and *Mr. O. P. Lyles* for appellants argued the case on its merits, including several questions not noticed in the opinion of the court. On the effect of the statute of limitations on the claim, they cited *Birnie* v. *Main*, 29 Ark. 591; Gantt's Digest, § 4113; *Lupten* v. *Janney*, 13 Pet. 381; *Underhill* v. *Mobile Fire Department Insurance Co.*, 67 Ala. 45. As to the amendment, they said: The amendment allowed by the chancellor in the prayer of the

original bill, after the trial had commenced, was improper. The amendment made a new case, and was repugnant to the prayer of the original bill. The original bill was for a cancellation of the sale, and the amendment was to enforce it. It deprived the defendant Hardin of the opportunity of showing upon the new issue thus presented that the whole purchase-money was fully paid. The question of payment vel non had been presented in the original bill as an evidence of fraud. This he had fully met. The relief in the two cases is not precisely the same, *Shields* v. *Barrow*, 17 How. 130; *Waldren* v. *Bodley*, 14 Pet. 156; *Sneed* v. *McCool*, 12 How. 407; Story Eq. Pl. § 256; *Lehman* v. *Meyer*, 67 Ala. 396; *Micou* v. *Ashurst*, 55 Ala. 607; 1 Daniel Ch. Pr. 328–385; *Rives* v. *Walthall*, 38 Ala. 329.

Mr. U. M. Rose for appellees.

Mr. Justice Harlan, after stating the foregoing facts, delivered the opinion of the court:

In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly, great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs. The rule is thus stated in *Lyon* v. *Talmadge*, 1 Johns. Ch. 184, 188: "If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or statement of fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. But the substance of the bill must contain ground for relief. There must be equity in

the case, when fully stated and correctly applied to the proper parties, sufficient to warrant a decree." And, in 1 Daniells Ch. Pr. 384, 5th ed., the author, after alluding to the rule in reference to amendments, observes: "The instances, however, in which this will be done are confined to those where it appears, from the case made by the bill, that the plaintiff is entitled to relief, although different from that sought by the specific prayer; when the object of the proposed amendment is to make a new case, it will not be permitted." Whether the amendment in question changed the substance of the case, or made a new one, we proceed to inquire.

The original bill in this suit, certainly states facts entitling complainants to some relief. He and his wife were in possession, asserting title, freed from all claim, of whatever kind, upon the part either of the heirs or of the estate of Ware. The complainants evidently supposed that the relief to which they were entitled was a cancellation, upon the ground of fraud, of Hardin's contract of purchase, as well as of the deeds to him and his wife, with an accounting that would embrace, on one side, the rents and profits derived from the lands, and, on the other, the value of the scrip or warrants that he had delivered in part payment of the purchase-money. But if it were doubtful whether the evidence was sufficient to justify a decree setting aside the contract upon the ground of fraud or imposition practised upon the vendor, and if the evidence clearly showed that the purchaser had not fully paid for the lands, according to the terms of his purchase, should the complainants have been driven to a new suit in order to enforce a lien for the unpaid purchase-money? And this, too, after the parties had taken their proofs upon the issue, distinctly made by the pleadings, as to the amount of the purchase-money really due from Hardin? Such practice would have done no good to either party, and must have resulted in delay and additional expense to both. A new suit to enforce a lien on the land would have brought before the court the same evidence that was taken in this cause as to the amount Hardin had paid. When leave was asked to amend the prayer for relief, no objection was made by the defendant; but the amendment having been allowed, he excepted,

but without any suggestion of surprise or any intimation that he was able or desired to produce additional proof upon that issue. Apart from the allegations in reference to fraud in obtaining the title bond, the bill made a case of non-payment of the greater part of the purchase-money. To amend the prayer of the bill so as to justify a decree consistent with that fact, did not make a new case, nor materially change the substance of the one actually presented by the bill and the proofs. It served only to enable the court to adapt its measure of relief to a case distinctly alleged and satisfactorily proved. The complainants could thereby meet the objection, which otherwise might have been urged, that the nature of the specific relief originally asked precluded the court from giving, under the general prayer, the particular relief which the amendment and the proof authorized.

It is a well-settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied another may be granted; the relief, of each kind, being consistent with the case made by the bill. *Terry* v. *Rosell*, 32 Ark. 478; *Colton* v. *Ross*, 2 Paige, 396; *Lloyd* v. *Brewster*, 4 Paige, 537, 540; *Lingan* v. *Henderson*, 1 Bland, 236, 252; *Memphis* v. *Clark*, 1 Sm. & Marsh, 221, 236. Under the liberal rules of chancery practice which now obtain, there is no sound reason why the original bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the lands for unpaid purchase-money. The matters in question arose out of one transaction, and were so directly connected with each other, that they could well have been incorporated in one suit involving the determination of the rights of the parties with respect to the lands. The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with the established rules of equity practice. It suggested no change or modification of its allegations, and, in no just sense, made a new case.

The decision in *Shields* v. *Barrow*, 17 How. 130, is invoked, with some confidence, as authority against the action of the court in allowing the prayer of the bill to be amended. That was a suit to set aside an agreement of compromise on the ground of fraud and imposition, and to restore the complainant to his original rights under a contract for the sale of certain lands and other property. The bill was fatally defective as to parties. No decree could have been based upon it, for indispensable parties were not before the court, and could not be subjected to its jurisdiction. The amendment of the bill, there tendered and allowed by the court of original jurisdiction, not only asked that the compromise, if held binding, be specifically enforced, but it brought into the case entirely new issues of fact and law, and made an additional defendant, in his individual capacity and as tutor of his minor children The relief sought by that amendment was, therefore, not within the case set out in the original bill. Nor was the application there, as here, simply to amend the prayer of the bill, so as to ask, in the alternative, for specific relief within the case as originally presented. It was regarded by this court as an attempt, under the cover of amendment, to change the very substance of the case. That such was its view upon the point necessary to be decided is clear from the opinion, for the court said: "To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily encumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew. To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject." The circumstances of the present case are entirely different from those in *Shields* v. *Barrow*. The amendment here did not introduce new allegations, nor make additional parties, nor encumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact. It simply enabled the court, upon the case made by the original bill, to give the relief which that case justified. *Neale* v. *Neales*, 9 Wall. 1, 8; *Tremolo Patent*, 23 Wall. 518; *Burgess* v. *Graffam*, 10 Fed. Rep.

216, 219; *Battle* v. *Mutual Life Ins. Co.*, 10 Blatchford, 417; *Ogden* v. *Thornton*, 3 Stewart, (30 N. J. Eq.) 569, 573; *McConnell* v. *McConnell*, 11 Vt. 291.

We are of opinion, for the reasons stated, that the amendment of the prayer of the bill was properly allowed, and that there was no error in adjudging that Ware's estate had a lien on the land for the balance of the purchase-money. The deed to W. D. Hardin, and the deed of the latter to his wife, having been properly cancelled, the legal title remained in the heirs of the vendor. They are not bound to surrender that title except upon the performance of the conditions upon which their ancestor agreed to convey, viz., the payment of the purchase-money. According to the local law, they occupied the position of mortgagees; for, "the legal effect of a title bond is like a deed executed by the vendor and a mortgage back by the vendee." *Holman* v. *Patterson's Heirs*, 29 Ark. 363; *Martin* v. *O'Bannon*, 35 Ark. 68. The heirs of Ware held the title in trust for the purchaser, while Hardin was a trustee for the payment of the purchase-money. *Schall* v. *Biscoe*, 18 Ark. 142, 157; *Moore* v. *Anders*, 14 Ark. 628; *Holman* v. *Patterson*, 29 Ark. 363; *Bayley* v. *Greenleaf*, 7 Wheat. 46, 50; *Boone* v. *Chiles*, 10 Pet. 177, 225; *Lewis* v. *Hawkins*, 23 Wall. 119, 126; 1 Story Eq. Jur., § 1217 *et seq.*; 2 Sugden Vendors, 375, ch. 19, n. d.

But it is contended that the debt for unpaid purchase-money, as well as the lien claimed therefor, are equally barred by the statute of limitations of Arkansas. An action to recover the debt may be barred by limitation, yet the right to enforce the lien for the purchase-money may still exist. *Lewis* v. *Hawkins*, 23 Wall. 119, 127; *Birnie* v. *Main*, 29 Ark. 593; *Colcleugh* v. *Johnson*, 34 Ark. 312, 318. In the case last cited the Supreme Court of Arkansas said: "The debt itself would appear to be barred in 1872, and no action could be brought at law. But the bar of the debt does not necessarily preclude a mortgagee or vendor retaining the legal title from proceeding *in rem* in a court of equity to enforce his specific lien upon the land itself. . . . Unless the defendant can show that the lien has been in some way discharged and extinguished, or lost upon some

equitable principles, such as estoppel, he can only interpose the bar of adverse possession of the land for such time as would bar the action at law for its recovery." In the same case it was held that, as between mortgagor and mortgagee, the possession of the mortgagor is not inconsistent with the mortgagee's right so long as the latter does not treat the former as a trespasser; that where the mortgagor remained the actual occupant with the consent of the mortgagee he was strictly tenant at will; that if the tenancy be determined by the death of the mortgagor, and his heirs or devisees enter and hold without any recognition of the mortgagor's title by payment of interest or other act, an adverse possession may be considered to take place. "The principle," said the court, "is a wholesome one for both parties, as it enables the mortgagee (or vendor by title bond) to rest securely on his legal title, and indulge the mortgagor or purchaser, whilst the latter can easily, upon payment, procure the legal title, or have satisfaction of the mortgage entered of record under the statute; and even if he should neglect this, a Court of Chancery would not entertain a stale demand for foreclosure after many years without clear proof rebutting the presumption of payment; or if the mortgagor should die and the heirs should enter without recognition of the mortgagee's rights, the statute of limitations would commence to run as in case of adverse possession." When did adverse possession begin in the present case? Not when Hardin took possession of the land, for he went into possession in the lifetime of the vendor, and with his consent. The claim of adverse possession cannot be based either upon the alleged proceedings in the Probate Court purporting to authorize and direct the administrator of Ware to execute a deed to Hardin, or upon the deed which was made to him by such administrator; for, according to the weight of evidence, no such action was ever taken by the court and, by its order, made a matter of record, and that deed, although filed for record, was never recorded during the period when Hardin held the office of clerk of that court, nor until 1877. So that there was nothing upon the public record of conveyances, as shown at the hearing, nor in any of the circumstances attending Hardin's possession, prior

to the conveyance to his wife, that showed such open, notorious adverse possession of the land as was requisite to change the relations originally existing between the vendor and purchaser, or between the latter and the heirs of the former. Hardin's possession under the deed of the administrator was simply a continuation of the possession originally obtained with the consent of his vendor. If it be said that Mrs. Hardin's possession under the deed from her husband was, upon her part, an assertion of title adverse to any claim that Ware's estate had, it may be answered that such possession commenced less than seven years prior to the bringing of this suit, which is the period within which the statutes of Arkansas require action or suits to be brought for the recovery of real estate.

It is objected to the decree that the value of the county scrip or warrants, which the court found had not been delivered by Hardin in payment for the land, should have been ascertained upon the basis of value as alleged in the original bill, namely, ten cents on the dollar; and this, although the answer placed their value at seventy-five cents. According to the preponderance of evidence they were worth about seventy cents on the dollar of their face value. The court was not obliged to accept the allegations of value in the pleadings, and should have been controlled, on this point, by the evidence. We do not perceive any error in the aggregate amount ascertained to be due, taking the two instalments of purchase-money at the market value of the scrip or warrants, in which they were payable, at the time they were respectively due, and giving interest upon those amounts from the maturity of each instalment.

Some time after the decree Hardin filed a petition for rehearing, submitting therewith copies of numerous papers (alleged to have been lost at and before the final hearing) purporting to relate to a suit instituted by the heirs of Ware in the Crittenden Circuit Court against L. B. Hardin for the purpose of having him removed as administrator, or preventing his interfering with the assets of the estate. The record of that suit, it was alleged in the petition for rehearing, disproved the principal grounds upon which the decree in this case was rested. Without assenting to this view, and without comment-

ing upon the failure of the petition to disclose the circumstances under which the papers alleged to have been lost were found, it is sufficient to say that the granting of a rehearing was a matter within the discretion of the court below, and not to be reviewed here.

Other questions are discussed in the briefs of counsel, but we have noticed all that we deem of importance. There is no error in the decree, and it is

Affirmed.

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ALIEN.

APPEAL.

See PRACTICE, 4, 5, 7.

ARKANSAS.

See LIMITATIONS, STATUTES OF, 4.

ASSIGNMENT.

See ACTION, 1, 2;
TAX AND TAXATION, 1, 2.

ATTORNEY AND SOLICITOR.

BAIL.

CASES OVERRULED OR QUALIFIED.

1. The ruling in *Texas* v. *White*, 7 Wall. 700, that the legislature of Texas, while the State was owner of the bonds there in suit, could limit their negotiability by an act of legislation, with notice of which all subsequent purchasers were charged, although the bonds on their face were payable to bearer, overruled. *Morgan* v. *United States*, 476.
2. The ruling in that case, that negotiable government securities, redeemable at the pleasure of the government after a specified day, but in which no date is fixed for final payment, cease to be negotiable as overdue after the day when they first become redeemable, limited to cases where the purchaser acquires title with notice of the defect, or under circumstances discrediting the instrument, such as would affect the title of negotiable demand paper purchased after an unreasonable length of time from the date of the issue. *Ib.*

CHARTER PARTY.

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COLORADO.

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A person travelling on a railroad in charge of mails, under the provision of § 4000 Rev. Stat., does not thereby acquire the rights of a passenger, in case he is injured on the railroad through negligence of the company's servants. *Price* v. *Pennsylvania Railroad Co.*, 218.

CONDITION PRECEDENT.

CONFISCATION.

1. The well established rule in Louisiana that where a mortgage contains the *pact de non alienando*, the mortgagee may enforce his mortgage by

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See STATUTES, B.

CONTEMPT.

1. When there is reasonable ground to doubt as to the wrongfulness of the conduct of a defendant in a suit in equity to prevent the infringement of a patent, the process of contempt should not be resorted to to enforce the plaintiff's rights. *California Paving Co.* v. *Molitor*, 609.
2. Plaintiff obtained a decree in equity against defendant as an infringer of plaintiff's rights under a patent for an improvement in pavements. Defendant continued to lay pavements. Plaintiff proceeded against him for contempt, alleging that he was still using plaintiff's process. Defendant denied the allegation, and answered that he was using a process different from that which had been adjudged to be an infringement. On this question there was a division of opinion in the court below. *Held*, That the process of contempt is not an appropriate remedy. *Ib.*

See CONFLICT OF LAW, 4;
HABEAS CORPUS.

CONTRACT.

1. Under contracts to furnish stone to the United States for a building, and to saw it, and cut and dress it, all as "required," the contractor may recover damages for enforced suspension of, and delays in, the work, by the United States, arising from doubts as to the desirability of completing the building with the stone, and on the site, which involved the examination of the foundation and the stone by several commissions. *United States* v. *Mueller*, 153.
2. A contract to furnish "all of the dimension stone that may be required in the construction" of a building does not include dimension stone used in "the approaches or steps leading up into the building." *Ib.*
3. When a regulation, made by the head of an executive department in pursuance of law, empowers subordinates, of a class named, to contract on behalf of the United States as to a given subject matter; and further directs that "any contract made in pursuance of this regulation must be in writing," a verbal executory contract relating thereto is not binding upon the United States. *Camp* v. *United States*, 648.
4. When an executive regulation directs officers of one class to make a contract on behalf of the United States, it confers no authority to make it upon officers of a different class, although employed about the same government business. *Ib.*

See NAVAL CONTRACTS, 1, 2, 3;
PARTNERSHIP, 1;
SHIPS AND SHIPPING, 1, 2.

CORPORATION.

COSTS.

See ATTORNEY AND SOLICITOR.

COUNSEL FEES.

See ATTORNEY AND SOLICITOR.

COURT OF PROBATE.

See PROBATE COURT.

COURT AND JURY.

1. The declaration in an action to recover money contained the money counts. The defendant pleaded the general issue, and the statute of limitation. The plaintiff replied a new promise within the statutory time. At the trial before a jury, he offered in evidence a deposition, taken under a commission, to prove the new promise. The defendant objected to the deposition, but did not state any ground of objection. The bill of exceptions set forth, that the court "sustained the objection, and refused to permit the said deposition to be read to the jury, and ruled it out because of its informality." The deposition appearing to be regular in form ; and the evidence contained in it, as to the new promise, being material, and such as ought to have been before the jury ; and the court below having instructed the jury that the plaintiff had not offered sufficient evidence of a new promise to be submitted to the jury, and directed a verdict for the defendant ; and as, if there was such new promise, there was evidence on both sides, for the consideration of the jury, on the other issues, on proper instructions ; and as the bill of exceptions did not purport to set out all the evidence on such other issues, this court reversed the judgment for the defendant, and awarded a new trial. *Spaids* v. *Cooley*, 278.
2. When parties do not waive the right of trial by jury, the court may not substitute itself for a jury, by passing upon the effect of the evidence—finding the facts—and rendering judgment thereon. *Baylis* v. *Travellers' Insurance Company*, 316.
3. At the trial of this case, after close of the testimony, defendant moved to dismiss on the ground of the insufficiency of the evidence to sustain a verdict. This motion being denied, plaintiff asked that the case be submitted to the jury to determine the facts on the evidence. The court refused this and plaintiff excepted. The court then ordered a verdict for plaintiff, subject to its opinion, whether the facts proved were sufficient to render defendant liable to plaintiff on the cause of action stated. Plaintiff moved for judgment on the verdict, and defendant moved for judgment on the pleadings and minutes of the trial. Judgment was rendered for defendant upon an opinion of the court as to the effect of the evidence and as to the law on the facts as deduced from it by the court : *Held*, That the plaintiff was thereby deprived of his constitutional right to a trial by jury, which he had not waived, and to which he was entitled. *Ib.*
4. A grant of land in Texas was made to the grantor of the plaintiff in

error, with the following description : "Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a land-mark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia. ; a line was run to the north 22° east 22,960 varas and planted a stake in the prairie for the second corner. Thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow Creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as land-marks for the third corner. Thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow Creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English 'box elder,' from which 7 varas to the south 28° west there is a cottonwood with two trunks and 16 varas to the south 11° east there is an elm 15 in. dia. Thence following up the river by its meanders to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas." The evidence showed that the lines when run on these courses and distances, did not coincide with ascertained monuments, either called for in the grant, or conceded to mark the track of the survey of the tract made in 1833. Two marked hackberry trees were found in 1854 in the eastern line, but not at the point called for by the description. If the courses and distances were followed, this grant covered most of the claim of defendant in error. If the two hackberry trees found in 1854 were the ones described in the grant, it would not include any of that claim. *Held :*

(1) That a request by defendant below (plaintiff in error), for an instruction "that a call for two small hackberries at the end of the distance on the course called for, having no marks on them to designate them from other trees of the same kind and having no bearing trees to designate or locate them, is not a call for such a natural object as will control the call for course and distance. And the jury are not authorized to consider any evidence in this case about two small hackberries found by S. A. Bigham, and by him pointed out to various other persons, which are found more than a mile from the point where course and distance would place the S. E. corner of the 11-league grant."

(2) That the jury should have been told "that if the testimony was not sufficient to identify the two hackberries with those called for in the grant, and could not fix the northeast corner nor the back line by any other marks or monuments, then they should fix it by the courses and distances of the first and second lines of the survey, except that the second line should be extended so as to meet the recognized east line as marked and extended beyond the hackberries." *Ayers* v. *Watson*, 594.

See MUNICIPAL BONDS, 3 (6).

CUSTOMS DUTIES.

1. The act of July 14, 1862, § 9, 12 Stat. 553, imposes, as a duty, "On all delaines . . . and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard:" *Held*, That the similarity required is a similarity in product, in adaptation to uses, and in uses, even though in commerce they may be classed as different articles; affirming *Greenleaf* v. *Goodrich*, 101 U. S. 278. *Schmieder* v. *Barney*, 645.
2. The language of tariff acts is construed as having the same meaning in commerce that it has in the community at large, unless the contrary is shown. *Swan* v. *Arthur*, 103 U. S. 598, to this point affirmed. *Ib.*

See EVIDENCE, 4.

DEED.

1. A deed from an Indian chief to A, in 1856, of a tract described by metes and bounds, and further as "*being the land set off to the Indian Chief 'Buffalo' at the Indian Treaty of September* 30, 1854, *and was afterwards disposed of by said Buffalo to said A, and is now recorded with the government documents*," does not convey the equitable interest of the chief in another tract described by different metes and bounds, granted to the said chief by a subsequent patent in 1858, in conformity with the said treaty, in such manner that an action at law may be maintained by A, or his grantee for recovering possession of the same. *Prentice* v. *Stearns*, 435.
2. The general rule in Texas for construing descriptions in grants of land is: that natural objects control artificial objects; that artificial objects control courses and distances; that course controls distance; and that course and distance control quantity. *Ayres* v. *Watson*, 594.

See COURT AND JURY, 4.

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See COURT AND JURY, 1.

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1. A certificate of division of opinion under § 652 Rev. Stat., can be

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1. A probate settlement of an adminstrator's account does not conclude as to property fraudulently withheld from it. *Griffith* v. *Godey*, 89.

See JURISDICTION, B, 1.
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EXECUTORY DEVISE.

See WILL, 2, 3.

FIVE-TWENTY BONDS.

1. The distinction between redeemability and payability commented on in *Texas* v. *White*, 7 Wall. 700, defines the five-twenty bonds in suit in this case. *Morgan* v. *United States*, 476.
2. The obligations of the United States under the five-twenty bonds, consols of 1865, are governed by the law merchant regulating negotiable securities, modified only, if at all, by the laws authorizing their issue. *Ib.*
3. The five-twenty consols of 1865 on their face were "Redeemable at the pleasure of the United States after the 1st day of July, 1870, and payable on the 1st day of July, 1885." In conformity with provisions of law, notice was duly given as to the bonds of this class, in suit in these actions, that in three months after the date of such notice the interest on the bonds would cease: *Held*, That the exercise of the right of redemption made the bonds payable on demand, without interest, after the maturity of the call, until the date for absolute payment. *Ib.*
4. A holder of a called five-twenty consol could without prejudice, except loss of interest, wait without demand, for the whole period, at the expiration of which the bond was unconditionally payable. *Ib.*
5. In stamping upon these bonds the faculty of passing from hand to hand as money, and in conferring upon the Secretary of the Treasury the power to receive them in payment, in the great exchange of bonds by which the annual interest on the public debt was reduced, it was intended to leave with the called bonds the character of unquestioned negotiability, and to protect *bona fide* purchasers for value, in the due course of trade, without actual notice of a defect in the obligation or title. *Ib.*

See EVIDENCE, 3.

FORECLOSURE.

See ATTORNEY AND SOLICITO

HABEAS CORPUS.

Where a person is in custody, under an order of the Circuit Court, for

B. Jurisdiction of Circuit Courts.

See Conflict of Law, 4, 5;
Removal of Causes;
Virginia Military District in Ohio, 1.

LEASE.

See CORPORATION, 3;
PARTIES, 3.

LEVY OF EXECUTION.

See ACTION ON THE CASE.

LIEN.

See EQUITY PLEADING, 2;
WATER RATE.

LIMITATIONS, (STATUTES OF).

1. The Statute of Limitations for writs of error, § 1008 Rev. Stat., begins to run from the date of the entry and filing of the judgment in the court's proceedings, which constitutes the evidence of the judgment. *Polleys* v. *Black River Improvement Co.*, 81.
2. A State statute of limitations as to real actions begins to run in favor of a claimant under a patent from the United States, on the issue of the patent and its transmission to the grantee. *Bicknell* v. *Comstock*, 149.
3. The lapse of time provided by a statute of limitations as to real actions vests a perfect title in the holder. *Ib.*
4. The statute of Arkansas that "All demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred"—begins, on the granting of letters of administration, to run against persons under age, out of the State with no guardian appointed within the State, and whose claims are alleged to be founded in frauds which were not discovered until after the expiration of the two years fixed by the act. *Morgan* v. *Hamlet*, 449.
5. Although the debt for unpaid purchase money in this case was barred by limitation under the local law, the lien therefor on the land was not barred; for there was no such open adverse possession, for the period within which actions for the recovery of real estate must be brought as would cut off the right to enforce the equitable lien for purchase money. *Hardin* v. *Boyd*, 756.

LOCAL LAW.

A suit in equity is the proper remedy, in the courts of the United States, to enforce the statutory liability of directors to a creditor of a corporation, (organized under the act of the legislature of South Carolina of December 10, 1869), by reason of the corporation debts being in excess of the capital stock. An action at law will not lie. *Stone* v. *Chisolm*, 302.

See LIMITATIONS (STATUTES OF), 2, 3, 4;
RIPARIAN RIGHTS.

MUNICIPAL CORPORATION.

NULLUM TEMPUS OCCURRIT REGI.

Delay in forcing a claim arising out of an illegal sale of property of the United States, at a value far below its real worth, cannot be set up as a bar to the recovery of its value. *Steele* v. *United States*, 128.

OFFICERS OF THE NAVY.

See LONGEVITY PAY.
RETIRED OFFICERS.

OHIO.

See WILL, 3, 4.

PACT DE NON ALIENANDO.

See CONFISCATION, 1.

PARTIES.

1. All persons interested in a suit in equity, and whose rights will be directly affected by the decree, must be made parties to the suit, unless they are too numerous, or some of them are out of the jurisdiction, or not in being; and in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all. *McArthur* v. *Scott*, 340.
2. A trustee having large powers over the trust estate, and important duties to perform with respect to it, is a necessary party to a suit by a stranger to defeat the trust. *Ib.*
3. The D. & M. Railroad Company, an Iowa Corporation, received from a township in Iowa, in consideration of its agreement to construct and maintain a railroad to a city in the township, the proceeds of a special tax and a conveyance of a large amount of swamp lands. It constructed the railroad, and, after operating it for a time, leased it to the C. & N. Railway Company, an Illinois corporation. The latter company changed the line and made it avoid the city, constructing a branch to the latter. A tax-payer and resident in the township, on behalf of himself and all other resident voters, tax-payers and property holders, commenced suit in a State court of Iowa against both companies, praying for a peremptory writ of mandamus to compel the reconstruction and operation of the old line. To this the defendants filed a joint demurrer, and a joint answer, setting out further matter in defence. On motion of the Illinois company the suit was removed to the Circuit Court of the United States, as a controversy wholly between it and citizens of Iowa, in which the Iowa company had no interest. Act of March 3, 1875, § 2, 18 Stat. 471. *Held*, That the Iowa corporation was a necessary party for the determination of the controversy,

PARTNERSHIP.

PATENT FOR INVENTIONS.

RETIRED OFFICERS.

SUPERSEDEAS.

See PRACTICE, 6, 7.

TAX AND TAXATION.

VESTED REMAINDER.

See WILL, 2, 3.

VIRGINIA MILITARY DISTRICT IN OHIO.

WARRANTY.

See SHIPS AND SHIPPING, 2 (1).

WASTE.

WATER RATE.

WILL.